



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

[2023] NZDT 740

**APPLICANT**      **BR**

**APPLICANT**      **SR**

**RESPONDENT**    **LD**

**SECOND**          **BD**  
**RESPONDENT**

**The Tribunal orders:**

The claim and counterclaim are both dismissed.

**Reasons**

1. The Applicants and the Respondents had discussed building a boundary fence. The Respondents thought agreement had been reached, but when building was about to start the Applicants indicated they did not agree. Discussions did not really progress and LD went ahead and built a fence on her own land inside her boundary. The Applicants claimed the fence between their property and the Respondents' property interfered with their right to enjoy their property. The Applicants object to the height of the fence and they consider it unsightly. They allege that the fence is built to the footpath, obscuring safe exit for vehicles from their property onto the busy [Road]. The Applicants filed a claim seeking to have the fence removed and a new fence being built to which both parties could agree. The Respondent counterclaimed for other things including half of the cost of the boundary survey and other compensation.
2. This is a claim by the applicants for an order that the fence be removed and that a new fence be built to be jointly agreed by the parties. They claim \$700.00. The counterclaim is a claim for half the cost of the boundary survey, for trespass on the Respondent's property prior to the fence being built and for harassment of her contractors, in the total sum of \$4,467.25.
3. The issues to be determined were as follows:
  - a. Does the Fencing Act 1978 have any application to these circumstances?
  - b. If it is not a boundary fence, has LD created a nuisance which would allow the Applicants to claim damages?

- c. Have the Applicants trespassed on the Respondents' property and if so, can the Tribunal make any order for damages?
- d. Can the Tribunal make the other orders sought in the counterclaim, and if so, is it appropriate to do so?

**Does the Fencing Act 1978 have any application to these circumstances?**

4. The Fencing Act 1978 applies to agreements to build boundary fences, and where agreement cannot be reached, provides a process by which disputes for boundary fences can be resolved.
5. LD said in the hearing that she initially believed that there was an agreement about the fence being built, and if this had been so BR and SR would have been required to comply with it. However it was clear from the evidence before me that though there had been agreement in principle, there was no agreement in any detail, and thus no agreement for the purposes of the Fencing Act.
6. The process of dispute resolution when agreement is not reached that the Act provides requires the service of Fencing Act notices and counter-notices within required timeframes (sections 10 and 11 of the Act). Some attempts to comply with the process were made but these were not sufficient to give the Tribunal any opportunity to make any orders.
7. Ultimately LD built the fence on her own land. She was entitled to do that. She paid for it all herself including for the survey. There is a theoretical argument that suggests that because the fence was not on the boundary, that an order could be made for a fence on the boundary. However in this case that would not be appropriate, and in fact pointless. I am not prepared to consider such a possibility in this case.
8. LD claims BR and SR should pay half the costs of the survey but there is nothing under the Fencing Act that would allow me to make such an order in this case. This part of the counterclaim is dismissed.
9. BR and SR's claim is also dismissed, because the Fencing Act does not apply, to the extent that the claim relies upon the Fencing Act.
10. In summary, then, the parties both had plenty of opportunity to utilise the Fencing Act dispute resolution process, but both chose not to do so, or did not do it properly. As a result, I am unable to apply the Fencing Act to resolve this dispute or to change anything that has occurred.

**If it is not a boundary fence, has LD created a nuisance which would allow the Applicants to claim damages?**

11. When one neighbour acts in a manner that affects the other neighbour's enjoyment of their property, that may create an actionable nuisance for which damages can be claimed.
12. BR and SR alleged that their access to sunlight was affected by the fence, but the photos disproved that, for at least some, if not all, of the day. I was not able to see any nuisance created by the fence. However even if I were able to find that there was a nuisance, the loss BR and SR may have suffered (if anything) is economic and not physical. Under the Disputes Tribunal Act 1988 I am unable to decide claims in tort (nuisance is a tort, or civil wrong,) unless physical damage has occurred or property may need to be ordered to be returned, which is not the case here. The Applicants' claim is dismissed.

**Have the Applicants trespassed on the Respondents' property and if so, can the Tribunal make any order for damages?**

13. Trespass to property is a tort or civil wrong committed when someone goes onto another's property without permission or entitlement.

14. It appears that there may have been some evidence of trespass, though BR and SR appeared to deny it. However again, I am unable to decide the claim because there is no evidence of physical damage, and so this part of the counterclaim is outside my jurisdiction too.

**Can the Tribunal make the other orders sought in the counterclaim, and if so, is it appropriate to do so?**

15. I have dismissed the Applicant's claim and two of the three parts of the counterclaim. The final part of the counterclaim is a claim for damages to be paid by BR and SR for harassing her contractors. I have no evidence of this in front of me, nor how it caused any loss to the Respondents. This kind of claim is also very rarely successful in the Disputes Tribunal because, for example, neighbour disputes often involve some tension and so damages for naturally occurring stresses are not really able to be compensated.

16. As a result of my findings both the claim and the counterclaim are dismissed.

**Referee: M Wilson**  
**Date: 4 December 2023**



## Information for Parties

### Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

### Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.

Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

### Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

### Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.