



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

**District Court**

**[2023] NZDT 475**

**APPLICANT**                      **CC**  
(claim and counterclaim  
respondent)

**RESPONDENT**                      **SN**  
(claim and counterclaim  
applicant)

**RESPONDENT**                      **KM**  
(counterclaim)

**The Tribunal orders:**

1. A full replacement fence is to be constructed on the boundary between the parties' properties at [Address].
2. The fence is to be 45m. timber material as quoted for SN, with palings 1800 x 125 x 12, posts 100 x 100 and rails 70 x 50.
3. The total cost of the fence removal and full fence replacement is to be \$7,331.25 in accordance with the S Ltd estimate dated 20 February 2023.
4. The cost is to be shared in equal proportions between the two parties (\$3,665.63 each).
5. S Ltd will require a 15% deposit before commencement of work for materials and supplies which is to be shared in equal proportions between the two parties.
6. The start date for work shall commence at the end of October 2023 on a date agreed upon by both parties.

**Reasons**

1. This matter relates to a dispute in relation to work on the boundary fence between the properties at [Address]. On 11 January 2023 SN sent a message to her neighbours at [property 1] proposing they remove a tree stump that bordered on the fence line and for her part, if the stump was removed and there were no plants, weeds, trees pushing up against the fence, she would pay for the fence to be repaired which was estimated to cost \$1,495.00. CC, who co-owns [property 1] with KM, says they carried out that work then SN refused to pay to repair the fence.
2. SN says that on 11 January 2023 KM dismissed her proposal, stating they needed a whole new fence, that it was not worth replacing sections. She says she told him she needed to consult a builder for a second opinion before she committed to a new fence being built. She says she met CC and her son while work on the tree stump was being done over the next 2 days, and they both made it very clear that full fence replacement was required. She says on the morning of 14 January 2023 she and

KM agreed to replace the fence with a 50/50 division of the cost. Later that evening she was asked by KM and CC to pay half the cost of the tree stump removal since she was not paying for the repair of the fence as she had initially said she would. SN refused. She says she subsequently received a letter dated 14 January 2023 from CC where CC stated they had no intention of fixing the fence and referred back to the initial offer of SN to pay for the repairs to the fence, which SN says CC and KM never agreed to.

3. Subsequently SN's lawyer wrote to CC and KM on 26 January 2023 proposing they repair the fence at their cost, or the entire fence be replaced with the cost sharing to be agreed, with SN offering to cover 40% of the costs provided the palings face her property. CC responded that they had an agreement / written contract from SN stating she was repairing the fence at her cost, which was why they had carried out the work on the stump.
4. On 27 January 2023 CC filed a claim in the Tribunal claiming payment of \$1,495.00 by SN in terms of the original agreement of 11 January 2023. On that same date, a Fencing Act Notice was served on CC and KM by SN relating to repair work to be carried out on the fence and the estimated costs of \$1,500.00 to be paid for by CC and KM. A Cross Notice was served on SN by CC claiming the Fencing Act 1978 does not apply due to the pre-existing agreement of 11 January 2023.
5. On 10 February 2023 SN filed a counterclaim for \$4,999.00 for full replacement of the fence, with the Tribunal to determine the allocation of cost, or \$1,500.00 for repair. The amount claimed was increased on 27 February 2023 to \$6,810.10 based on quotes received for full replacement, and for the Tribunal to determine the allocation of cost. At the first hearing held on 28 March 2023 SN claimed that for a full fence replacement, based on advice she has received from builders, the allocation of costs should be 65% to be borne by CC and KM and 35% to be borne by her.
6. The counterclaim differs from SN's original Fencing Notice of 27 January which related to repair only. To ensure clarity for both parties, the matter was adjourned to allow SN to complete and serve a further Fencing Notice on CC and KM and to allow CC and KM to serve a Cross-notice on SN if they chose to do so.
7. A second Fencing Notice was completed by SN and served on CC and KM on 3 April 2023 seeking a full fence replacement at a total cost of \$7,331.25 with 65% of the costs (\$4,765.31) to be borne by CC and KM and 35% (\$2,565.94) to be borne by SN due to encroachment damage from [property 1]. CC responded with a Cross Notice on 4 April 2023 that the Fencing Act 1978 does not apply due to the existence of the pre-existing contract of 11 January 2023 with SN.

### **Relevant law**

8. The matter involves the law of contract and the Fencing Act 1978. A claim about a fence is considered as either a claim in contract or a claim under the Fencing Act. The Fencing Act does not interfere with existing agreements.
9. Parties to a contract must perform their respective obligations. If they do not, they will be in breach and need to account for any loss caused to the other party to the contract. An agreement does not need to be in writing. For an agreement to be a legally binding contract certain elements are required. These include:
  - the parties intended to create a legally binding agreement when they entered into the agreement;
  - one party to the contract made an offer and the other party accepted that offer;
  - the terms of the contract must be certain – it needs to be clear what the parties' respective obligations are.
10. If there is not an enforceable agreement, a party may use the Fencing Act to resolve a disagreement with a neighbour about a fence between their properties.

## The issues

11. The issues I need to decide are:

### Claim

- a) Was there an enforceable contract between the parties for the repair of the fence at SN's expense if CC and KM removed the tree stump on their side of the boundary?
- b) If so, what is CC's remedy?

### Counterclaim

- c) Does SN's counterclaim of 10 February rely on and add to her Fencing Notice of 27 January?
- d) If so, what is her remedy?

### Fencing Act

- e) Does the Fencing Act apply in the circumstances of this case?
- f) What are the matters to be resolved?

### Claim

**Was there an enforceable contract agreed between the parties on 11 January 2023 for the repair of the fence at SN's expense if CC and KM removed the tree stump on their side of the boundary?**

12. CC says there was an existing agreement in relation to repairing the fence. She refers in page 1 of her Cross Notice dated 4 April 2023 in response to the Fencing Notice dated 3 April 2023, to an agreement being reached on 11 January 2023 from a contract written by and given from SN, and was accepted by CC and KM by their performance of the remedial work requested.

13. I do not accept that SN's letter of 11 January was a written contract. I consider it was a proposal for dealing with repairs to their mutual fence and inviting discussion. I am satisfied on the evidence that the response to the letter that day by KM was firmly that the fence was rotten and needed to be replaced. I have regard to him taking SN to view another fence on his nearby property, and advising her on costs and the type of products that could be used, and then him viewing parts of the mutual fence with SN and stating the fence was "old and rotten", and SN advising him she would take further advice from her builder on the issue of repair vs replacement. I find it more likely than not that the proposal put forward by SN was not taken further while she sought further advice from her builder, which she did 3 days later.

14. CC refers to comments made by SN about wanting to thank KM for his work, that there wasn't any rush but thanked him "for getting on to it so quickly" and says this shows SN acknowledged that there was a mutually agreed contract and it was being fulfilled by KM. In light of the discussions SN had had with KM on 11 January I consider it more likely than not that those comments are not evidence of her affirming a contract in terms of her original proposal, but more an acknowledgement that work on the fence of some nature would be needed at some stage, whether it be a repair or rebuild.

15. I find there was not an enforceable contract between the parties formed on 11 January 2023. CC's claim is dismissed.

16. Consequently it is not necessary to consider any remedy CC and KM had.

## Counterclaim

### **Does SN's counterclaim of 10 February rely on and add to her Fencing Notice of 27 January?**

17. The counterclaim of 10 February differs from SN's original Fencing Notice of 27 January which related to repair only. In the counterclaim SN seeks a full replacement fence with the Tribunal to determine the allocation of cost, or \$1,500.00 for repair at CC's and KM's cost, with SN being prepared to replace a few cracked or rotten palings around her garage area.
18. CC disagrees with the counterclaim and relies on the 11 January purported agreement, which I have found was not enforceable.
19. SN refers to an agreement subsequent to 11 January, entered into on 14 January 2023 when she and Mr P, an architect, and Mr U, a carpenter, met with KM to view the fence, and says she and KM agreed that they would replace the fence with a new one and share the cost 50/50. The parties were to seek several quotes for builders and different types of material for the fence. KM and CC later that day advised SN she should pay half the tree stump removal costs now that she was not going to pay for the repairs, which SN refused to do. CC then advised in a letter later that day their view that SN was responsible for the repairs / replacement of the fence. I have regard to the 14 January agreement being subject to further information and advice being sought, and decisions to be made. I find the agreement reached earlier that day was not sufficiently certain to be an enforceable contract.
20. To ensure clarity and a path to resolution SN completed and served a further Fencing Notice on 3 April 2023.
21. I dismiss the counterclaim. Accordingly, it is not necessary to decide what SN is entitled to be paid in terms of the counterclaim.

## Fencing Act

### **Does the Fencing Act apply in the circumstances of this case?**

22. I am satisfied that there is no enforceable contract for either repair or replacement of the fence. In the circumstances the Fencing Act can apply. I am satisfied SN has validly served a Fencing Notice dated 3 April 2023 on CC who in turn has served a Cross Notice dated 4 April 2023 on SN which maintains there is an enforceable contract so the Fencing Act does not apply, and that repair rather than replacement is sufficient.

### **What are the matters to be resolved?**

#### Is the existing fence an adequate fence?

23. Section 2 of the Fencing Act defines an "adequate fence" as a fence that, as to its nature, condition, and state of repair, is reasonably satisfactory for the purpose that it serves or is intended to serve. CC says that the fence is adequate and does not need replacing, only some repairs. However I have regard to the conversations KM had with SN on 11 January about how the fence needs replacing and showing her the extent of the rotten and cracked boards, and the conversations of a similar nature on 14 January with SN when Mr P and Mr U were present. Further, at the first hearing Mr P in his evidence said that the fence was nearing the end of its life. I find that given the age and state of repair of the fence it is no longer an adequate fence, and that it requires replacement rather than repair.

#### Details of replacement fence

24. The Fencing Notice sets out the proposed details of the fence. SN says it proposes a like-for-like fence in terms of type of fence, materials, position and length, with the palings facing her property as they do at present. I find the style of fence reasonable.

25. The price provided by S Ltd at \$7,331.25 was the lowest of three quotes and includes removal of the existing fence. I find the price and the builder's terms of payment and proposed start date reasonable.

26. A controversial issue is the proportions of the cost sharing. The Notice proposes the cost be split as 65% to be paid by [property 1] (\$4,765.31) and 35% to be paid by [property 2] (\$2,565.94). SN relies on s17 of the Fencing Act for this proposition, which provides:

**Liability for damage caused by occupier**

If any fence is damaged or destroyed in circumstances in which, apart from this Act, an occupier would be liable therefor, he shall be liable for the whole cost of making good the fence.

27. SN says the fence has been damaged by the encroachment of plants and trees and foliage from the [property 1] side of the fence, and accordingly CC and KM should bear a higher proportion of the cost. However, I have regard to the age of the fence and that it is coming near to the end of its life, and to the fact that a new fence will likely last for several decades. I consider in the circumstances it would be inequitable for [property 1] to bear a higher proportion of the cost. I find the costs are to be shared 50 / 50.

28. I find:

- a) A full replacement fence is to be constructed on the boundary between the parties' properties at [Address].
- b) The fence is to be 45m. timber material as quoted for SN, with palings 1800 x 125 x 12, posts 100 x 100 and rails 70 x 50.
- c) The total cost of the fence removal and full fence replacement is to be \$7,331.25 in accordance with the S Ltd estimate dated 20 February 2023.
- d) The cost is to be shared in equal proportions between the two parties (\$3,665.63 each).
- e) S Ltd will require a 15% deposit before commencement of work for materials and supplies which is to be shared in equal proportions between the two parties.
- f) The start date for work shall commence at the end of October 2023 on a date agreed upon by both parties.

**Referee: B Curtis**  
**Date: 25 August 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>.