



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 744

APPLICANT **CQ**

SECOND **LM**
APPLICANT

THIRD **OL**
APPLICANT

RESPONDENT **JT**

The Tribunal orders:

1. From 22 January 2024, CQ may undertake work to build a boundary fence which shall be constructed along the driveway on the boundary between [Address 1] and [Address 2]. This work will include the removal of the current fence.
2. The fence to be constructed will be in accordance with the Fencing Notice served by CQ dated 14 June 2023.
3. If access to JT's property is required to remove and current fence and to complete the construction of the new fence, the contractor engaged by CQ to construct the fence is authorised to enter onto that part of JT's land at reasonable times to do such things as is reasonably necessary to carry out the work to construct the fence. Any such entry onto JT's land will be exercised so as to cause as little disturbance as possible to the persons lawfully on JT's land.
4. JT shall pay CQ \$2,750.00 within ten business days of CQ providing an invoice to JT for this amount once the construction of the fence is completed.

Reasons:

1. The parties own neighbouring properties on [road]. The three applicants have the legal right by way of easement to use a driveway which is owned by CQ as the owner of [Address 1]. The fence which runs between the driveway and the property owned by the respondent was damaged in the [flood]. Subsequently the fence has become the subject of a dispute with the applicants wanting it replaced. The applicants claim \$2,750.00 from the respondent as his half share of the cost of the replacement fence. The applicants also request that the respondent agree to the removal of a tree on the boundary between the properties, additional costs (which were not calculated prior to the first hearing) and the Tribunal's filing fee.
2. After the first hearing the applicants told the Tribunal that they wanted to increase their claim by another \$1,4015.00 due to costs they incurred when the contractors they engaged to build the fence on 13 July 2023 were not able to go ahead with the building of the fence due to the respondent stopping their work.

3. At the first hearing, the respondent told the Tribunal that he had recently repaired the fence with several new posts and framing which would allow the applicants to attach palings to their side of the fence if they wanted to. The applicants had not seen the work done by the respondent prior to the hearing.
4. The first hearing was adjourned and a time agreed to by the parties to inspect the fence that the respondent had repaired. The applicants inspected the fence without the respondent and decided they did not want to meet with the respondent at the arranged time.
5. The second and third applicants did not attend the second hearing and had advised the first applicant that they could not attend. The respondent also did not attend the second hearing. As this hearing was in person the start of the hearing was delayed to allow the respondent time to arrive and a call was made to the respondent, but there was no answer. The nonattendance of a party does not prevent a hearing going ahead.
6. The issues to be determined by the Tribunal are:
 - a. Does the Tribunal have jurisdiction to hear this matter?
 - b. If so, is there an adequate fence between the parties?
 - c. If not, is the fence proposed by the applicants adequate?
 - d. If so, has a fencing notice been served in accordance with the Fencing Act 1978?
 - e. If so, has a counter notice been served?
 - f. Is the respondent liable for the applicants' costs after the initial work on the fence was stopped?
 - g. If not, what remedy is available to the applicants?
7. The relevant law is the Fencing Act 1978 which provides a regime where occupiers of neighbouring land not separated by an adequate boundary fence are responsible for sharing the costs of an adequate fence.

Does the Tribunal have jurisdiction to hear this matter?

8. The Disputes Tribunal does not have jurisdiction to hear every claim that is filed. Its jurisdiction is limited by the Disputes Tribunal Act 1988 and statutes which specifically grant the Tribunal jurisdiction such as the Consumer Guarantees Act 1993 and the Fencing Act 1978. Therefore, the Tribunal does have jurisdiction to hear disputes regarding fencing.
9. As advised at the first hearing, the Tribunal does not have the jurisdiction to order the removal of trees. This is because an order for the removal of trees arises under section 333 of the Property Law Act 2007 (PLA). Under section 362(1)(e) of the PLA the District Court has jurisdiction to hear and make the orders in relation to the removal or trimming of a tree. Accordingly, this Tribunal has no jurisdiction to hear and determine this claim as much as it relates to the removal of trees. However, the Tribunal can hear the dispute between the parties with respect to the fence.

If so, is there an adequate fence between the parties?

10. Section 9 of the Fencing Act 1978 states that owners of adjoining land not currently divided by an adequate fence are liable to contribute in equal proportions to work on a fence.
11. On the basis of the evidence provided to the Tribunal, and in spite of the work done by the respondent to repair the fence, I find that there is not an adequate fence between the parties. I say this because:
 - a. The fence does not run along the entire length of the boundary.
 - b. The fence is not uniform in appearance or build.
 - c. The posts are not firmly placed in the ground and the applicants' evidence was that this would mean that the fence would become more unstable and fail over time.

- d. I accept the applicants' evidence that the applicants' would not be able to attach fence rails to the other side of the wooden framing as the posts which form part of the wooden framing are not uniformly spaced or aligned. The applicants' evidence also set out that the posts and framing may not be able to take the weight of additional rails due to the posts not being firmly placed in the ground.

If not, is the fence proposed by the applicants adequate?

12. Schedule 2 to the Fencing Act sets out specimen types of fence for urban areas. On the evidence provided to the Tribunal I find that the fence proposed by the applicant is adequate, being 1.8 metre high timber fence with evenly spaced posts concreted into the ground.

If so, has a fencing notice been served in accordance with the Fencing Act 1978?

13. Section 10 of the Fencing Act states that any occupier who desires to compel any other occupier to contribute to the cost of work on a fence shall serve notice on them in the form of Schedule 1 to the Fencing Act, or similar.
14. The evidence shows that the applicants served a fencing notice on the respondent on 14 June 2023.
15. The respondent had argued that notice was not served in accordance with the Fencing Act. However, as the respondent replied to the first applicant referring to the matters set out in the notice, it is reasonable to conclude that he received and had notice of the fencing notice.

If so, has a counter notice been served?

16. Section 11 of the Fencing Act states that if the occupier receiving a notice objects to any of the proposals set out therein, they may, within 21 days after the date of the service of the notice, serve on the occupier who gave the notice a cross-notice signifying their objection, and they may make counter-proposals in that cross-notice.
17. On the evidence provided to the Tribunal, I find that the respondent did serve a cross notice as he responded to the first applicant on 25 June 2023 stating that he was of the view that no new fence was needed, and he could repair the damage to the fence. The first applicant objected to the fence being repaired and responded in writing to the respondent, asking the respondent to provide an alternative quotation.
18. At this point the parties were in dispute.

Is the respondent liable for the applicants' costs after the initial work on the fence was stopped?

19. On the evidence provided, I do not find that the respondent is liable for the applicants' costs they incurred after initial work on the fence was stopped. I say this because, at this point the respondent had technically served a cross notice, rather than remaining silent. Although the first applicant had stated they would go ahead with the fence if the respondent did not provide an alternative quotation, as the respondent was of the view that he could repair the fence, it is reasonable to assume he did not think he should have to.
20. As stated in paragraph 17 above, at this point the parties were in dispute and no work should have started on the fence. For this reason, the respondent should not be liable for the costs incurred by the applicants when the parties were still in dispute about the rebuild of the fence.

If not, what remedy is available to the applicants?

21. As I have found that the current fence is not adequate, it follows that pursuant to section 9 of the Fencing Act, the fence should be removed and replaced with an adequate fence in accordance

with the quotation obtained by the first applicant, with the parties sharing the boundary, equally sharing the costs.

22. The cost of this fence is \$5,500.00 for which the respondent is responsible for half, or \$2,750.00. The respondent will also need to allow the fencing contractor access to his land to allow for the old fence to be removed and the new fence to be constructed.

23. The applicants also claimed the Tribunal's filing fee. Section 43 of the Disputes Tribunal Act 1988 only allows for a party to claim a refund of these costs in certain limited circumstances, none of which apply in this case.

Referee: K. Armstrong
Date: 14 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>.