



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

**[2023] NZDT 532**

**APPLICANT      DL**

**RESPONDENT    ET**

**The Tribunal orders:**

1. Both the claim and counterclaim are dismissed.

**Reasons:**

2. DL owns the property on [Address 1] and ET owns [Address 2] which sits below DL's property.
3. Due to a weather event on 17 July 2021, a retaining wall on the boundary of the two properties partially collapsed.
4. As a result of this collapse, debris accumulated on ET's property. DL's property above also ended up with a damaged fence and a hole on the walkway both of which are near the top of the partially collapsed retaining wall.
5. Both parties reached out to their insurance companies and also discussed remediation work with each other. ET received \$57,710 from his insurance company and DL received \$11,187 from his insurer.
6. In July 2022, ET and DL agreed that:
  - a. ET will repair the retaining wall at his cost as it was solely on his property; and
  - b. DL would then repair the fence and the walkway above the retaining wall which were both solely on his property.
7. After getting the necessary approvals and signing up a contractor for the work, the repair work was to commence in the second week of January 2023 and completed within 2-4 weeks.
8. On 30 January 2023, ET advised DL that he will be calling a halt to the wall repair due to lack of funds.
9. DL files this claim where he seeks \$12,471.85 for reduced rent and other costs associated with repairs on his property which can no longer go ahead due to the abrupt stalling of the retaining wall repair work.
10. ET says there was a shortfall of \$27,045 between his estimated cost and the insurance pay-out. He files a counterclaim seeking \$13,522.50 from DL which represents half of that short fall. He does so as he believes the retaining wall will provide a "substantial structural benefit" to DL's property, something DL denies.

## Issues

11. The general or common law principle states that every landowner has a duty not perform any activity on their land which would cause damage to another person's land. This is known as the right of support for the land in its natural state.
12. But the "right of support" does not require the property owner to take positive action to provide support to someone else's land. Rather, it means that you cannot remove existing support to a neighbouring property without substituting it with appropriate alternative support.
13. If an owner's actions cause damage to their neighbour's land, then they would be responsible for that damage but damage or any loss whether financial or otherwise, caused by their inaction cannot lead to a cause of action.
14. Considering the above, I outlined the following questions:
  - a. Can the retaining wall be categorised as a fence, thereby, triggering the provisions of the Fencing Act under which both parties must equally meet the cost of the retaining wall?
  - b. Was there an agreement between the parties that binds DL to undertake the repairs to the retaining wall at his cost?
  - c. Has either party suffered a loss or incurred a cost that can be claimed against the other?
15. To successfully claim \$13,522.50 from DL, ET needs to prove on the balance of probabilities that either the retaining wall is a fence thereby triggering the provisions of the Fencing Act or there is another legal obligation on DL to pay this amount.
16. To claim his costs amounting to \$12,471.85, DL needs to prove on the balance of probabilities that ET entered into a binding agreement with him, relying on which he has incurred costs.

### Is the retaining wall a fence?

17. The retaining wall is near the boundary of 26 and [Address 2]. There is some indication that certain insurance pay-outs have been made by the insurance companies on the understanding that retaining wall equates to a fence between the two properties.
18. Furthermore, a [report] dated 7 December 2021 stated that damaged wall is a "common boundary wall shared between [Address 1] and [Address 2]". It proposed a "combined global conceptual remedial works solution".
19. A GIS survey was conducted which stated that the retaining wall was solely on ET's property. This report was subject to a second opinion by TX of W Ltd who agreed with the findings. TX also provided analysis that the retaining wall has important structural implications to DL's land and dwelling.
20. While ET agrees that the retaining wall is not a fence in a strict sense, he is of the view that it can be treated as such due to the structural support it offers DL's property.
21. I disagree, as a fence for the purposes of the Fencing Act must meet the definition of a fence under the act. A key requirement under the act is that it must be along the boundary separating the lands of adjoining occupiers.
22. The GIS survey report which has been approved by another surveyor is the most crucial piece of evidence which makes it quite clear that the retaining wall is solely on ET's property. It then becomes irrelevant whether or not the wall provides any structural support to DL's property.
23. As I find the retaining wall is not a fence, ET cannot claim any contributions from DL under the Fencing Act.

24. There is no other evidence before me to suggest that a legal obligation exists on DL to pay the contribution sought by ET.

**Was there an agreement between the parties that binds ET to undertake the repairs to the retaining wall at his cost?**

25. When the retaining wall partially collapsed, DL took the lead on the remediation work on both properties. He lives in [City 1] whereas at the time ET was based in [City 2].

26. DL says he organised reports, dealt with council and got a company called [Construction Company] on board who signed separate agreements with DL and ET in December 2022.

27. [Construction Company] were going to build the retaining wall for ET at a cost of \$84,522.5. A similar agreement was entered with DL for repairs to his walkway and fence. The two agreements were separate but the repair work on DL's property depended on completion of the retaining wall.

28. In my view, DL was assisting ET with the repairs and doing some background work for him as he did have an interest in the repair. It is likely that ET and DL initially pursued a global and joint solution to the damages to their respective properties and therefore shared certain initial costs equally.

29. But between 27 January 2023 and 1 February 2023, ET has changed his position triggered by his view that DL was getting a substantial benefit while he was bearing the cost. At that point, he halted the work and asked for a contribution from DL. But as both parties had separate contracts with [Construction Company], there was no corresponding contractual relationship or a binding agreement between ET and DL.

30. This situation, up until 27 January 2023 was akin to two parties working together to fix a problem that impacted both. I do not find that the conduct of the parties amounted to a contract or a binding agreement being formed. They have shared certain costs equally and borne certain costs individually depending on what they saw as fair and reasonable at the time.

31. Accordingly, I do not find there was an agreement between the parties that bound ET to undertake repairs to the retaining wall at his cost.

**Has either party suffered a loss or incurred a cost that can be claimed against the other?**

32. While I accept, DL continues to incur costs for scaffold erection to secure the walkway and has paid for assessment and consent fees associated with the repairs. I find that these costs are at best associated with ET's inaction to repair his retaining wall and its likely he would have incurred some of these costs regardless. But as the law does not place an obligation on ET to repair his wall, there is also no obligation on him to pay costs incurred by someone else due to his inaction.

33. ET is not claiming a loss and since he has not repaired the retaining wall, he has not incurred a cost. His counterclaim relates to contributions to his retaining wall which cannot succeed as there is no legal obligation on DL to contribute to his cost.

34. I find that the costs need to lie where they fall. The Tribunal cannot order DL to contribute towards repairs of a structure that is on ET's property and equally it cannot order ET to pay compensation to DL for costs or damages arising out of ET's inaction to repair his retaining wall.

35. Therefore, both the claim and the counterclaim are dismissed.

**Referee: S Malaviya**  
**Date: 9 October 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>.