



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 413

APPLICANT HC

APPLICANT KP

RESPONDENT QT

The Tribunal orders:

- A. QT is to pay \$2,610.00 to HC and KP on or before 30 July 2023, regardless of whether any work has been completed.
- B. The Applicant's builder [Builder] is to perform the work as set out in the company's quotation and scope of work dated 30 April 2023, at a time to be decided which is convenient to the company.
- C. The Applicants are to ensure that [Builder] gives QT 24 hours notice in writing placed in her letterbox of any incursions onto her property required in the building of the boundary fence.
- D. The boundary fence is to be built on the boundary. It is the responsibility of the Applicants to ensure that this is carried out correctly.
- E. In accordance with section 24(1)(k) of the Fencing Act 1978, and subject to Order C above, I order that [Builder] is entitled to access the property of QT, and to use necessary machinery, as [Builder] sees fit, in order to complete the building of the boundary fence in accordance with the quotation and scope of work dated 30 April 2023, including removal of the existing remains of the fence.
- F. The builder is entitled to trim the foliage, vegetation, bushes or other plant growth on QT's side of the boundary only to facilitate the building of the fence, but to no further than 15cm from the boundary. Trees, not including bushes, may only be trimmed to the boundary.
- G. If there is a further dispute arising out of any of the above, then one of the parties may file an application for a rehearing. This application will be referred to me to be set down for a hearing of the application to determine whether a new hearing of the original claim is required.

Reasons

1. On about 21 July 2022, during high winds, the corrugated iron boundary fence between the properties in [City] belonging to HC and KP, and their neighbour QT, was damaged, and part of the fence was blown down. KP and HC issued a notice under the Fencing Act 1978 to QT, who responded, objecting to the work. In subsequent discussions the parties could not reach any agreement and KP and HC filed a claim in the Disputes Tribunal.
2. This is a claim for an order under the Fencing Act 1978 as to the building of an adequate fence, and a claim that QT should pay for the entire fence since the fence had allegedly been damaged by her.
3. The issues to be determined were as follows:
 - a. Is the existing fence adequate and if not, could it be made adequate by repair or is it necessary to replace it?
 - b. Is QT required to pay more than a half share of the fence on the basis she had caused damage to the fence?
 - c. What are the appropriate orders that should be made by the Tribunal?

Is the existing fence adequate and if not, could it be made adequate by repair or is it necessary to replace it?

4. When one neighbour wants to use the Fencing Act 1978's provisions to require their neighbour to contribute to the building or rebuilding of a boundary fence, the first question is whether the existing fence is adequate. Section 2 of the Fencing Act defines "adequate fence" as follows:

"adequate fence" means 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.
5. This fence had a significant part of it blown over in a wind. The photos submitted in evidence and the evidence given by the parties show that the fence, even if adequate prior to the storm, which was disputed, it is certainly now no longer adequate. I note section 16 of the Fencing Act which provides that where damage of this kind has occurred one party can take immediate steps, and require the other party to pay. KP and HC did not do this, presumably in an attempt to get agreement from QT. Instead they issued a Fencing Act notice with their proposals, and QT responded in the time required in the Fencing Act, rejecting the proposals. At this point the claim was filed in the Disputes Tribunal.
6. QT said that the fence could be repaired and there was no need for it to be replaced. However there was evidence from the builder for the Applicants, T, that the existing fence posts had deteriorated with age, and though only some had snapped off in the storm, the implication was that it could happen again in another storm, since the remaining posts were no better than the broken ones. T also gave oral evidence by telephone to that effect. He said that the fence is not fit to be repaired and it was at the end of its lifespan. He also said that in a windy area, which this is, a wooden fence was better than a corrugated iron fence because the wind could circulate through a wooden fence, but with corrugated iron, it was simply a wind barrier. This would increase the likelihood of it blowing down again. He said as a Licenced Building Practitioner, he would be unable to certify the structural integrity of the fence if repaired and not replaced. I accepted his evidence after I questioned him, and QT questioned him.
7. QT's quotes indicated that the quotes were for repairs but none of the quotes dealt with the issue of the deteriorated fenceposts, and appeared to have been drafted under instructions to quote for a repair only. It is not known what most of the other builders believed about the condition of the other fenceposts but U from [Contractors] was contacted to give evidence. He said that the fence was a bad fence (he used another descriptive word) but he said he told QT that it was up to her what she wanted to do in response to that. He said he was asked only for a quote to repair the fence. In summary, his evidence was that the fence was certainly not adequate, and he had been asked only to quote for a repair.

8. The significance of the condition of the fenceposts was clear from the evidence of the Applicants. QT had not arranged for most of her witnesses to give evidence, and despite phone calls to them, they were not available, other than Mr U. His evidence was that QT had only given him a limited remit within which he was to supply a quote, that is, repair of the gap, but he had also seen that the rest of the fence was not in good shape. This accorded with the evidence of the Applicants and T. In the circumstances, I was not prepared to adjourn further, partly because in my view it would have been unfair to KP and HC. There had been at least 8 weeks since the previous hearing date, so QT had had ample time to prepare.
9. On the evidence available to me then, I find that the fence needs to be replaced to make it adequate. There was general evidence that corrugated iron fences are not cheaper than wooden fences, and this is also borne out in the quotes the parties obtained. At least one of QT's quotes to repair the original corrugated iron fence was actually more expensive than the Applicant's quote to build a new wooden fence. There was also evidence that suggested that corrugated iron fences are not recommended or built as often as they once were because they can be dangerous in high winds.

Is QT required to pay more than a half share of the fence on the basis she had caused damage to the fence?

10. Section 17 of the Fencing Act 1978 provides as follows;

"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."

11. HC and KP gave evidence, which was corroborated by T, their builder, and in his photos taken during his assessment, that there was foliage and vegetation hard up against the fence on QT's side. The Applicants argued that this had caused deterioration to the fence because it would have prevented the wooden supports for the fence to dry out after bad weather, which would have contributed to age deterioration.
12. During the course of the hearing KP and HC said that they did not really want to fully pursue this part of the claim, because in the end, they were all living in the same neighbourhood, and they preferred to try to obtain a settlement agreement with QT that they could all live with. In my view, it is always preferable in any neighbourhood dispute (of which the Tribunal hears quite a few) to see the parties agree. This was not possible however in this case, and so I must deal with the argument as it was put to me.
13. I find that vegetation is not something contemplated by this section of the Act as being damage for which, apart from the Act, QT would be liable. The section, in my view, contemplates action taken, either by negligence, nuisance or some other actionable wrong, which results in actual damage which could be the subject of a successful legal claim. During the hearing there was speculation that this fence could have been 25 years old. It would have deteriorated with age in that time with or without vegetation pressed up against the wooden supports on QT's side. I also doubt that it would be an actionable nuisance, or that QT owed a duty of care, to keep her vegetation pruned, without more evidence of the damage. A tree that might have fallen because it wasn't cared for, and causing damage, would probably fall under the section; but gradual damage that might or might not have actually caused long term damage over 25 years, is not readily comparable to such a one off event, and even if it could be legally actionable, it would require more evidence of the actual damage.
14. I also note that the section contemplates that such damage which is eligible to be considered as activating section 17 has the result of making the entire fence cost payable by the Respondent. There would be an issue here of proportionality which cannot, in my view, be ignored. To make someone liable for gradual damage, in circumstances as here, to the tune of 100%, would be unjust, in my view. If the section gave me the ability to find that a Respondent was, say, 55% liable, for example, that might have been a way of making it just. That option is not available under the section, however.

15. QT is therefore liable to pay only 50% of the cost of rebuilding the fence.

What are the appropriate orders that should be made by the Tribunal?

16. The Orders I can make are set out in section 24 of the Fencing Act 1978.

17. QT had the option of making an agreement with the other parties which would include specific terms she would want to have included in the agreement, which could have gone beyond the orders I am empowered to make. She was not prepared to do so. As a result, she is required to abide by my orders.

18. I have decided that the fence needs to be replaced and the parties must pay 50% of the cost each. I also make the orders, as set out more precisely in the first paragraph of this decision, as follows:

- a. QT is to pay the Applicants \$2,610.00, if necessary prior to the building of the fence by [Builders].
- b. [Builders] is to remove the existing boundary fence and is to build a new boundary fence in accordance with the quotation and scope of work dated 30 April 2023.
- c. The boundary fence must be built on the boundary, and nowhere else. I note that the Applicants are likely to be responsible for any errors in this regard.
- d. The dates of work are to be decided by the builder, [Builders], and the builder is to give 24 hours notice to QT of the work, in writing.
- e. In accordance with section 24(1)(k) of the Fencing Act, I order that the builder is entitled to access the property of QT, and use necessary machinery, as it sees fit in order to complete the building in accordance with the quotation and scope of work dated 30/4/23.
- f. The builder is entitled to trim the foliage, vegetation or other plant growth on QT's side of the boundary to facilitate the building of the fence, but to no further than 15cm from the boundary. Trees, not including bushes, can only be trimmed to the boundary.

19. Under section 43 of the Disputes Tribunal Act 1988, I can only order costs to be paid for a very limited number of reasons, one of which is that a party has unnecessarily prolonged the proceeding with the intention of preventing a prompt resolution to be reached. I have formed the view that QT had caused delays, but for costs to be ordered, I would need to be satisfied that delay was her intention. QT is not a lawyer and she cannot be expected to be aware of all the niceties of preparing for a hearing. It is unfortunate that delays have resulted but I am not of the view that QT set out intentionally to do this, and so I find she is not liable to pay the court and preparation costs of the Applicants.

Referee: M Wilson
Date: 10 July 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>.