



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 503

APPLICANT	LN
RESPONDENT	N Family Trust
SECOND RESPONDENT	IE
THIRD OR SUBSEQUENT RESPONDENT	FO
THIRD OR SUBSEQUENT RESPONDENT	SD

The Tribunal orders:

1. IE, FO and SD as Trustees of the N Family Trust are to pay LN \$2,688.32 on or before 16 October 2023.
2. If there is any additional cost (above the [Fencing Company]'s quote of \$5,376.65) associated with building a small retaining wall at the washing line end of the fence, the parties are each liable to pay half of that cost, and the Trust is to pay their share of the extra cost within 21 working days of LN supplying the Trust with a copy of the final invoice for the fencing work.
3. LN is to organise the construction of a fence near a portion of the boundary between [Address 1] and [Address 2]. The work is to take place as soon as reasonably possible subject only to the availability of materials and contractors.
4. The area to be fenced is around 14 metres long adjacent to the side of the house at [Address 1] (approximately between the front of the house and the first long window after the washing line).
5. The fence is to be a 1.8m high [Fence Type] classic fence. It is to be bolted to the concrete path beside [Address 1]. Where this is not possible (by the clothesline deck) a small retaining wall is to be built so that the fence can be bolted to the new retaining wall, and the fence can be level along its full length.
6. If necessary, part of the existing deck under the washing line at [Address 1] may be removed in order to build the small retaining wall. No more of this deck is to be removed than is reasonably required to build the retaining wall.

7. The fence is to be built as close as reasonably possible to 83cm from the side of the house at [Address 1].
8. If the parties agree to use a different style of fencing, then any extra costs are to be shared equally between them.
9. If access to [Address 1] is required to carry out the work to build the fence, LN and her contractors are authorised, with any equipment, to enter upon [Address 1] at all reasonable times to do such things as are reasonably necessary to carry out the work on the fence, provided that reasonable notice is first given to the N Family Trust.
10. Any such entry to [Address 1] shall be exercised so as to cause as little damage possible to the land entered upon and as little disturbance as possible to persons lawfully on the property. Any such entry does not authorise LN or any person to cut down, lop or injure any tree or shrub on [Address 1] without the consent of the N Family Trust.
11. LN is to keep the N Family Trust reasonably informed about the progress with the preparation for building the fence and should give The Trust at least three days' notice before work commences.

Reasons:

12. The parties are next door neighbours. LN owns and lives in [Address 2]. The N Family Trust (the Trust) own [Address 1], and IE and SD live there. There is no fence on the boundary between the two properties. LN would like a fence on part of the boundary between the two properties and would also like to have some retaining work done on a bank that is on her property. LN has served a fencing notice and the Trust have served a cross notice.
13. LN's claim was brought under the Fencing Act and in tort (a claim in nuisance that the Trust is liable to pay the cost of retaining banks on LN's property and trespass). LN also sought orders that the Trust is liable to pay her legal fees and certain other costs she has incurred.
14. At the second hearing of this claim, LN withdrew her claim in relation to liability to pay for retaining the bank area. This was because the likely cost of the retaining work that LN would like to have done well exceeds the \$30,000.00 limit of this Tribunal. At this stage LN only has a quote for engineering design work for the retaining walls which is for around \$16,000.00. The cost of actually completing the retaining work and obtaining the consents required may be as high as \$200,000.00.
15. At the hearing I explained to LN that if I make orders about any part of this work in the Tribunal (such as liability to pay for the engineering design work), LN will not be able to bring a further claim for a contribution to future work. This is because it is not possible to split a cause of action to bring it within the jurisdiction of the Tribunal, and because my determination of liability for part of the costs of retaining work would be likely to prevent a further claim on the same issue in this or any other forum because the cause of action would be considered to be "res judicata" (already adjudicated).
16. In light of this information LN withdrew her claim in relation to the liability of the Trust to contribute to any work on retaining her land.
17. For the avoidance of doubt, I record that LN reserves her right to make a further claim in relation to the retaining of the bank in the future in the Tribunal or possibly in the District Court or High Court.
18. The issues remaining to be resolved in the claim are:
 - a. What is the reasonable cost of an adequate fence between the properties and where should the fence be built?
 - b. Is the Trust liable for any other costs or damages?

What is the reasonable cost of an adequate fence between the properties and where should the fence be built?

19. I find that a fence is required for the approximately 14 m area between [Address 1] and [Address 2] that is next to the side of the house at [Address 1] (approximately between the front of the house and the first long window after the washing line).
20. The fence is to be a 1.8m high [Fence Type] classic fence. It is to be bolted to the concrete path beside [Address 1]. Where this is not possible (by the clothesline deck) a small retaining wall is to be built so that the new fence can be bolted to the new retaining wall.
21. The fence is to be built as close as possible to 83cm from the side of the house at [Address 1].
22. LN and the Trust are each liable to pay half of the cost of the fence. I find that the best estimate of the likely cost of the fence is \$5,376.65.
23. If there is any additional cost (above the [Fencing Company] quote of \$5,376.65) associated with building a small retaining wall at the washing line end of the fence, the parties are each liable to pay half of that cost, and the Trust is to pay their share of the extra cost within 21 working days of LN supplying a final invoice for the fencing work.
24. The parties may agree a different style of fence, and if they are able to do so then any extra costs applicable are to be shared equally between them.

Background

25. At present there is no fence between the properties owned by LN and the Trust. The Trust's property is below LN's property. There is a bank between them – which is mostly if not entirely on LN's property. There is an area around 14 m long which is relatively flat, outside the side door to the Trust's house. The Trust has a concrete path which is 91cm wide along most of this stretch, then there is a small wooden deck at the end of the path and the Trust has a washing line over this deck.
26. The Trust has owned its house for around 48 years. The Trust says it always thought that the path and deck were entirely on its property. The Trust had built a further deck and a small wood shed on the land next to the path. The Trust says it knew this land was part of LN's property, but had the permission of a previous owner to build these structures. Since she bought her property LN has asked the Trust to remove these structures from her property, and this has been done. The path and the deck remain.
27. LN bought her property around two years ago. There is a flatish area at the bottom of her section near the Trust's path, on which she hopes to build a small kitset sleep out. She looked at the Council plans for the area and realised there was a possibility that part of the Trust's path and deck were partly on her property.
28. LN has had a survey of the area done, and this has confirmed that some of the path and remaining washing line deck are on LN's property. The path and deck are 91 cm wide, and around 14 m long. The legal boundary is actually 64cms from the Trust's house. This means that part of the path and deck beside the house is on LN's property. The extent of the encroachment ranges from 27 cm into LN's land at one end of the path (the hose end) to 20 cm at the other (by the back door, the washing line end).
29. LN would like to build a fence along the legal boundary. This will mean that she has the best possible access to the area where she wants to build her kitset sleep out. She says if the fence is not on the boundary, it will make her access around the proposed sleep out very tight.
30. The Trust says that if a fence is built on the legal boundary the space between the fence and its house will be so tight that it will not be practically possible to access the side door to its house, will not be able to use the washing line and will not be able to open the electrical meter box on the side

of the hose fully (the door of the fuse box is around 73cm wide). It also says that there are services such as electricity, water and sewerage under the path which may be damaged if the path has to be cut or removed to build a fence. The Trust suggests that a fence should be built on LN's land along the side of the existing path to preserve its access to the side of the house.

The law

31. The Fencing Act 1978 ("the FA") provides a regime where occupiers of neighbouring land are responsible for sharing the costs of work on an adequate fence. Generally, if there is no fence between adjoining properties the occupiers are each liable for half of the cost of building one.
32. LN has served a fencing notice under the FA on the Trust and the Trust has served a cross notice. The parties are agreed that a fence should be built in this area to create privacy and to demarcate the boundary. They are unable to agree on where the fence should be built or on the style of the fence.
33. Section 11 FA provides that if it is impractical or undesirable to erect a fence on the boundary of adjoining lands, and the occupiers cannot agree on a line of a fence the Tribunal may determine whether a fence is necessary and if so, what line should be adopted. There is provision for the Tribunal to make an order for compensation (whether an annual payment or otherwise) in consideration of loss of occupation of land.

Decision about the fence

34. As part of the second hearing of this claim I conducted a site visit. I am satisfied that a fence is necessary along 14m area near the side of [Address 1]. While there hasn't been a fence before, it is clear that LN is hoping to utilise her land near this area, and that given the issues between the parties it is desirable to have a fence for privacy and certainty about the areas each party are entitled to occupy.
35. Having inspected the area I am satisfied that it is not practical or desirable to build a fence on the legal boundary in this 14m area. This is because a fence on the boundary would be so close to [Address 1] (around 63cm from the house at one end of the path) that the Trust would be effectively unable to access the door at the side of the house. The electricity meter box could not be opened properly. I consider that there are likely to be services under the path, and accept that there is a possibility that if the path or part of the path is removed to enable a fence to be built of the boundary, then there could be damage to those services.
36. The Trust suggested that a fence should be built along the side of the existing path. This would clearly be the best solution for the Trust, because it would preserve all of their use of the path and the deck under the washing line. However, LN has said she proposes to use her land beside the path. If there is another option to build a fence that would minimise the encroachment on to LN's land I consider this to be preferable.
37. One of the options that LN has proposed for a fence is a metal prefabricated fence which can be bolted to the concrete path, so that the fence can be built on the path without the need to remove any of the path. This will mean that the fence can be built close to or on the boundary without the risk of damaging services along the side of the house under the path.
38. I consider that this is the best option for a fence in this case. Happily, this seems to be a relatively cost-effective fencing option as well based on the quotes the parties submitted.
39. I consider that the fence should be built as close as reasonably possible to 83cm from the side of the Trust's house. This distance is approximately halfway between the side of the Trust's house, and the likely side of the sleep out that LN proposes to build. A distance of 83 cm will provide the Trust with reasonable access to their side door, and enable the meter box to be opened fully with a little clearance. It will also allow LN reasonable access around her proposed sleep out.

40. The Trust may need to move the hose and washing line from their current positions, but I do not consider that an order that the fence be further on LN's side of the boundary can be justified simply to allow these to remain in their current position.
41. A fence built 83cm from the side of the Trust's house will be a small distance on to LN's land. LN told the Tribunal that the position of the fence will not affect the placement of her proposed sleep out – this will be calculated with reference to the legal boundary, not to the line of the fence. I consider the intrusion into LN's land to be relatively minimal and do not consider that any order for payment of compensation by the Trust is appropriate.
42. At the hearing both parties expressed a preference to have the fence maintain a uniform style and height of 1.8m along its full length. After the concrete path the land falls away slightly. A small retaining wall may need to be built in the area of the wooden deck under the washing line so that the [Fence Type] metal fence can be bolted to a solid base. If this is the required, then some part of the existing deck under the washing line may need to be removed.
43. I consider that both parties will benefit, aesthetically at least, from having a fence of a consistent height and style and so I find that the cost of building a small retaining wall, if required, is to be shared equally between the parties.
44. LN has obtained a quote from [Fencing Company] to supply and install a [Fence Type] fence along the concrete path and then a wooden fence for the area beyond the path. The quote is for \$5,376.65. This is the best estimate of the cost of building the fence I have ordered, and I find that the Trust is liable to pay half of this amount to LN to enable the fence to be built.
45. As noted above the parties both preferred to have the [Fence Type] style fence along the full length of the fence (rather than part [Fence Type] and part wooden fence). I find that the parties are liable to each pay half of any additional cost associated with building the small retaining wall required to enable this to happen. If there are any such additional costs LN is to provide the Trust with a copy of the final invoice for the work, and the Trust is to pay half of the amount over \$5,376.65 within 21 working days of receiving the invoice.

Is the Trust liable for any other costs or damages?

46. The Trust is not liable to make any payment for any other costs or damages to LN.
47. LN's claim included a claim for legal fees she has incurred in relation to the dispute with the Trust. Some of the fees related to fencing that is still the subject of this claim. Some of the fees related to liability for retaining walls which is no longer the subject of this claim.
48. In any event the Disputes Tribunals Act 1988 provides that awards of costs (such as legal fees) can only be made in very limited circumstances, which I do not consider apply in this case. For this reason, the Trust is not liable to pay LN's legal fees.
49. LN has paid \$380.00 to obtain a LIM Report for the Trust's property. She says this was necessary in order to work out the complicated boundary issue between the properties. She seeks an order that the Trust is liable to pay this cost.
50. Section 10(4)(a) FA provides that except in cases where immediate work is required, which is not the case here, in the absence of agreement to the contrary a neighbour cannot be liable to contribute to the cost of any work on a fence done before a fencing notice is served on them. This being the case the Trust is not liable to pay any part of the cost of the LIM report.
51. The position is the same in relation to the boundary survey of the property. However at the first hearing of this claim the Trust agreed to pay half of the cost of the survey. No orders are therefore required in relation to the boundary survey.

52. LN also seeks an order for damages in relation to trespass by IE and SD on the area along the boundary near the Trust's house which is actually LN's property.
53. There was a small deck and wood storage shed next to the path by the Trust's house (on LN's property). These had been built by the Trust with the consent of a previous neighbour. The Trust have now removed the shed and most of the deck at LN's request. There has been historical use by the Trust of this portion of LN's property.
54. As noted above part (around 20cms) of the concrete path and the remaining deck below the washing line of [Address 1] are actually on LN's property. The Trust still uses the path and the wooden deck, and there will inevitably be some use of LN's property when they do so.
55. LN also says that there was a recent incident where she was playing music and IE went onto her property, entering through a side gate, possibly with the intention of turning the music down. LN says she saw IE, stopped him, and has since served a Trespass Notice revoking any implied licence that IE or SD may have had to come on to LN's property.
56. LN says that she has suffered emotional harm and stress as a result of this incident and the historical trespass on the boundary.
57. Trespass to land is a tort which happens when a person enters the land of another without a lawful excuse. The Tribunal has jurisdiction in relation to claims in tort in respect of damage to or loss of property (section 10(c) Disputes Tribunal Act 1988). In this case I do not consider that there has been any loss or property or damage to property as a result of any trespass to land by the Trust.
58. I accept that the structures on LN's land were put there with consent of a previous owner, and have now been removed. The continued use of the path is practically unavoidable and I do not consider that it causes any damage. Once a fence is erected there will be much less possibility for any inadvertent trespass by either party. At the time of the music incident, it is most likely that IE had an implied licence to enter LN's property. Even if this is not the case there is no evidence of any damage to or loss of property, and so it is unlikely that the Tribunal has any jurisdiction to make any orders in any event. For these reasons I do not consider that LN is entitled to damages for trespass to land.

Referee: L Trevelyan

Date: 18 September 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>.