



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1430

APPLICANT **LT and QT**

RESPONDENT **OT Limited**

The Tribunal orders:

Mr and Mrs T may proceed to complete the fence which they have partially built between their property at L Road and the property of OT Ltd at L Road, in L. The materials and structure are to be the same as those used in the partial fence, that is, timber posts and rails, with Trimrib 0.40 760 mm Zinacore on OT Ltd's side of the fence. The height is to be the same as that of the partial, already completed, fence; and

the fence may be built along the line of the previous fence, or as close as practically possible to it, whether or not that line is on the boundary between the parties' properties; and

Mr and Mrs T may build a retaining wall, as described in their notice given OT Ltd under the Fencing Act 1978, dated 14 September 2020; and

Mr T, or anyone contracted to Mr and Mrs T for the purpose, may enter on the land of OT Ltd to carry out the fence construction; and

OT Ltd is to pay Mr and Mrs T \$2,124.86 within 28 days as its contribution to the cost of the fence.

Reasons

[1] Mr and Mrs T and OT Ltd ("OTL"), represented by director Mr R, own adjoining properties. The Ts seek an order from the Disputes Tribunal that OTL contribute to the cost of a fence to be erected between their properties, as well as orders relating to the nature, cost and location of the fence.

[2] The Ts said that they have lived in their house since 1993. During that time, they had, with the co-operation of previous neighbours, erected a fence that had palings on the neighbours' side, and iron on their own side. This was because the Ts had a swimming pool, and they wanted a strong and secure fence. They had increased the height of the fence, which was 1.8m, with trellis, for privacy and to ensure that the neighbours' children could not access the pool. A garage that was located on the neighbouring land was very close to the boundary, and one corner of it abutted the corner of the swimming pool fence. The neighbours sold the property to OTL, which intended to remove the garage and build another dwelling close to the fence. OTL, as the developer of the property, was required by

the applicable resource consent to mitigate any adverse effect on the T's property that might result from its development work. The resource consent noted that the removal of the garage would leave a gap in the boundary fence, and advised that OTL should construct fencing to fill that gap.

[3] Mrs T said that, after OTL had removed the garage, it took no steps to fill the resulting gap. The Ts patched this temporarily, in order to comply with privacy and safety requirements relating to their pool. Mrs T said that Mr R then removed palings from the remaining fence on his side, and also broke a post. As a result, the trellis became unstable and had to be removed. Mr R then removed additional palings from another area of the fence. Mr T then, on 7 August 2020, demolished what remained of the damaged fence, and constructed new fencing alongside the pool, on the line where the previous fencing had been. He used iron for this, with the posts and rails on the side facing the T's own property. The City Council approved this on 28 August as complying with its swimming pool safety requirements.

[4] Mr T then concreted posts in place across the area where the garage had been removed. His intention was to continue constructing fencing so that a new and uniform fence would run along the entire length between the two properties. He did his work along the line where the previous fence had been, in accordance with the existing survey pegs that were there. Mr R then came and cut these posts off at ground level. The Ts provided a video that showed that Mr R also removed and took away some sheets of iron.

[5] Mr R then delivered to the Ts a document dated 31 August, that stated it was a "Fence Notice". It did not propose any particular work to be done, but demanded that Mr T stop the work that he was doing, and stated that any further done would be removed. After that, on 14 September, the Ts delivered a notice under the Fencing Act to Mr R. That notice stated that the Ts wanted a fence, constructed of posts, rails and iron, and set out the details of it. The work would be done by Mr T, and the materials would cost \$4,249.62. Mr R responded with a cross-notice, in which he said that he wanted the fencing that Mr T had done removed, because it was not on the boundary, and a paling fence constructed instead. He made it clear that he did not want to see any iron on the fence.

[6] The Ts provided evidence that, although their Fencing Act notice had stated that iron was more expensive than paling, in fact this was not so. They had had a quote for \$4,750.00 for paling fencing, and the cost of the materials for an iron fence as stated in their notice was \$4,249.62.

[7] The Ts said that they had no reason to believe that the previous fence had not been more or less on the boundary, and that they had used the existing survey pegs in the work they had done. Mr R had had his property professionally surveyed when he had purchased it, but he had refused to show them the details of it, or to provide them with evidence that the existing fence had not in fact been on the boundary.

[8] Mr R defended the claim on a number of grounds. First, he said, the original fence and garage had in fact been entirely on OTL's property, and he had been entitled to remove them or deal with them without regard to Mr and Mrs T's interests. He said that the original fence had encroached 1.2m into his property. Mr R provided diagrams of the property that indicated that the fence might not have been placed on the boundary, but did not provide details of the survey that he had had done, or any other evidence in support of his claim that the fence encroached 1.2m into OTL's land.

[9] Mr R said that he had originally damaged the fence (which he considered he had been entitled to do) in order to increase the height of the palings on his side. He had not contacted the Ts before doing so, or discussed his intentions with them. He said that Mr T had then demolished the fence, and that Mr T was therefore responsible for any damage that had been done, and for replacing it.

[10] Mr R acknowledged that he had had the survey done before any issues about the fence arose. He also accepted that he had declined to make the details of the survey available to the Ts, and had not pointed out to Mr T, as Mr T constructed the new area of fence, that he considered Mr T to be locating the fence on OTL's land.

[11]. Mr R said that he wanted the fence to be as it had previously been, with palings on his side. He did not want any iron to be visible from his side of the fence. He also wanted the fence to be placed

exactly on the boundary. Thus, his request was that the fence that Mr T had built should be removed, and that a new fence should be constructed along the entirety of the boundary.

The issue

[12] At issue is the question of what kind of fence should be constructed, and where it should be positioned.

The law

[13] The parties have not come to any agreement about the fence. The Ts have served a notice under the Fencing Act 1978, and Mr R has served a cross-notice. I must consider the provisions of the Fencing Act in making my decision. I must also take into account whether one party has caused damage such as to make that party responsible for its repair.

Did Mr R damage the fence?

[14] In my view, Mr R was responsible for the initial damage done to the fence. His removal of the garage, his failure to deal with the resulting gap, and his subsequent removal of palings and fence posts, were all unjustified. I do not think that it matters whether or not the fence was exactly on the boundary. The existing fence was treated as the boundary fence by the parties. In any event, the evidence that I was given did not establish whether Mr R's assertion that the previous fence had not been on the boundary was in fact correct. Mr R, having had a survey done, did not provide the evidence that he had relating to the boundary. The Rs reasonably assumed throughout, in the absence of evidence to the contrary, that the existing pegs were on the boundary.

[15] Mr and Mrs R have not claimed for damage done to the fence. Their claim relates to the cost of building the fence as set out in their Fencing Act notice. I consider that, once the fence had been damaged, it was no longer an adequate fence, and the Rs are justified in claiming that OTL contribute to the cost of a new one.

What kind of fence should be built?

[16] I consider that the structure and materials as proposed by the Ts is appropriate in the circumstances. Mr R did not co-operate with the Ts when they attempted to deal with the damage that he had done to the fence, and they were obliged to act quickly to ensure that the swimming pool was safely fenced. Mr R was aware of Mr T's building work, but did not intervene to object. The partial fence that Mr T has built is of new materials and, from the photos and videos provided, is well constructed and acceptable in appearance. Whether iron or palings is chosen is a matter in this case of taste and utility, rather than cost. The Ts, having the need for additional security, would normally be obliged to pay for any feature over and above what would be needed for adequacy under the Fencing Act. In this case, there is very little difference in cost between iron and timber, and a large portion of a new fence has already been constructed, which was required because of Mr R's actions. I consider it would be wasteful and pointless to require the new, partial, fence to be removed and rebuilt. Thus, my order is that the Ts are entitled to an iron fence of the kind that they have described in their Fencing Act notice. They may complete the fence between the properties, to the road, using the same materials and construction methods that Mr T has used in the part of the fence that he has already completed.

Where should the fence be built?

[16] It is not uncommon for fences to be constructed along a line that is not the precise boundary between properties. In this case, Mr R had not complained that the previous fence was not on the boundary (if in fact that was so). Rather, Mr R had intended to improve the previous fence by adding more timber to it. If, as he says, the survey he had obtained had established that the fence was not on the boundary, he should have informed the Ts of this at the time, and raised his objections then. Mr R was aware that Mr T was rebuilding the fence, and knew where the new fence was going. Mr R did not, however, raise any objection to its location until the work around the swimming pool had been

completed, and the City Council had approved it. At that point, in my view, it was too late for Mr R to object, and he must accept the fence line as the Ts have followed it, according to the old survey pegs.

The retaining wall

[17] Mr and Mrs T have provided evidence that a small retaining wall will be required at the end of the fence nearest to the road, in order to obtain a uniform height of the fence. The cost of this is included in the sum that they have claimed. I consider that their evidence shows that this is a necessary part of achieving a satisfactory fence.

Result

[16] The construction work of the partial fence that Mr T has built should remain in place. The fence may be completed by Mr T along, or as close to it as practically possible, the line of the previous fence. OTL is liable to contribute half of the cost of materials as detailed by the Ts in their Fencing Act notice, which is \$2,124.86.

Referee: C Hawes
Date: 16 March 2021



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 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 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 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>.