



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2019] NZDT 1309

APPLICANT **Mr M**
 Wairoa

RESPONDENT **Ms U**
 Wairoa

The Tribunal orders:

1. The claim is dismissed.

Reasons

1. Mr M replaced a boundary fence between his property and his neighbor, Ms U.
2. He filed a claim in the Tribunal seeking half the cost of the fence (\$282.25) plus the cost of removing a flax (\$80.00).
3. Ms U defended the claim on the basis that she had not agreed to the work being done, that the finished product was an eyesore from her side, and that Mr M had removed the flax without consent.
4. The issues to be resolved are:
 - (a) Was the fence inadequate at the time it was replaced?
 - (b) If it was, did Mr M follow the notice procedures in the Fencing Act to entitle him to claim a half share?
 - (c) If not, is Mr M entitled to a contribution on the basis either that Ms U had damaged the fence, or immediate work was required?
 - (d) Is Ms U entitled to a set off for the flax plant that was removed?

Was the fence inadequate before it was replaced?

5. Section 9 of the Fencing Act 1978 states that, subject to the provisions of the Act, the occupiers of adjoining lands not divided by an adequate fence are liable to contribute in equal proportions to work on a fence.
6. I find that the fence between Mr M and Ms U was inadequate at the time it was replaced. The fence was old, and had fallen over across about half its length. The fence was no longer suitable for serving its purpose and was due to be repaired or replaced.

7. Consequently, provided the Act was followed, Ms U was required to pay half of the cost of the replacement fence.

Did Mr M follow the notice procedures in the Fencing Act to entitle him to claim a half share?

8. To claim half the cost of the fence under s9, Mr M needs to show that he complied with s10. That section required Mr M to serve a notice on Ms U that:

(a) specified the boundary in question;

(b) specified the work to be done with sufficient particularity to enable Ms U to comprehend the nature of the work proposed and the materials to be used; and

(c) estimate the cost of the work; and

(d) specify the consequences of failing to comply with the notice (i.e., work proceeding on the basis of the notice with half the cost recoverable).

9. I find that Mr M failed to comply with these requirements. Mr M sent a letter to Ms U dated 23 October 2018 about his intentions, but that letter did not contain the information required by s10. The letter failed to note that Mr M intended to switch the posts and rails to Ms U's side of the fence, does not estimate the cost and does not specify the consequences of not responding.

10. As Mr M did not comply with s10, he cannot seek a half share on the basis of his notified work.

11. I have had regard to the fact that Ms U now has the benefit of the work done on the fence. This does not salvage Mr M's claim. The Act sets out a clear prescription for the process to follow to ensure there is proper consultation. Ms U has been left with a fence that favours Mr M, with the rails on her side. A photo she produced showed that this was unsightly, as some of the old rails appeared to have been reused. Ms U was not advised when the work would proceed or what it would cost and had no say in the work done.

12. In the absence of proper procedure, the right to a share in terms of the notice provisions is lost.

Is Mr M entitled to a contribution on the basis either that Ms U had damaged the fence, or immediate work was required?

13. Mr M is entitled to claim a contribution to the work on the fence despite his lack of proper notice if he can show either that the fence was damaged by Ms U (s17) or immediate work was required (s16).

14. Mr M was concerned that the fence had fallen over as a result of the flax bushes pushing into the structure on Ms U's side of the fence. Photos were presented which made this look likely, although the relative contributions of the flax and the age of the timber supports for the fence is unknown.

15. In any event, it was clear that, as half the fence had fallen over, immediate work was required. Therefore, whether it was the flax that caused it or not, Mr M was entitled to do work without notice and charge half the cost because of the immediate loss of part of the structure.

16. However, when ss16 or 17 are invoked, the half share that can be recovered is only for the cost of the immediate work required (i.e., to stand up the part of the fence that was fallen over or replace the fence that was damaged). This section cannot be used to get around the notice provisions of the Act and replace the whole fence without proper consultation.

17. Accordingly, some amount would be able to be charged to cover what Ms U would have been liable to pay had the fence been repaired where it had fallen over. As about half the fence was down, this is approximately half of half the cost.

18. The total cost was \$564.50. Mr M did not present his underlying materials costs, nor a breakdown of the time involved, but I accept that this was his actual cost. It appeared reasonable and commensurate with the work done.
19. Half the cost of half of this fence is approximately \$140.00. This is sufficient to cover half the immediate work required to stand up the part of the fence that had fallen over.
20. Mr M sought an additional \$80.00 for the labour to remove a flax. This is not recoverable. Mr M was not able to prove on the evidence presented that this flax was in the way of the fence. Even if he could, the flax was on Ms U's property. Ms U was clearly distressed by the disregard that Mr M had shown for her harakeke that her mother had planted.
21. The Act makes it clear that there is no right to enter onto a neighbour's property and remove plants without consent (s26(2)(b)).
22. Accordingly, the labour cost of the removal of the flax is not recoverable.

Is Ms U entitled to a set off for the lost flax?

23. Ms U had written to Mr M stating that she would file a claim to seek damages for the lost flax and for hurt and humiliation, but this did not occur. However, this does not prevent a set-off being made for her loss against any sum that she would have had to pay.
24. Whilst the flax can be replaced by a split from another flax, this would take time and effort. A new flax can be purchased, but either way, it would take some years to grow to the size of what had been there.
25. I am satisfied that the sum of \$140.00 represents the reasonable time and effort involved in replacing a large flax, noting the additional time it would take to grow to fill the gap. This results in a full set off for any contribution that otherwise would have been required for part of the work done to repair the fence.

Conclusion

26. In summary, inadequate notice was provided to Ms U of the work done on the fence, and this has compromised the claim. Whilst a limited contribution would have been required had the flax not been removed, the value of what was lost when the flax was removed is a full set off to any contribution required.
27. For these reasons, the claim is dismissed.

Referee:

J Robertshawe

Date: 21 August 2019



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 or a mistake was made.

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 28 days of the decision having been made. If you are outside of time, 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.

Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 28 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, and 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://disputetribunal.govt.nz>.