



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 527

APPLICANT **OJ**
SECOND **RJ**
APPLICANT
RESPONDENT **BX**
SECOND **KX**
RESPONDENT

The Tribunal orders:

The claim by OJ and RJ is dismissed.
The counter claim by BX and KX is dismissed.

Reasons

1. The parties own neighbouring properties. OJ and RJ's property sits at the rear of BX and KX's property and is accessed via a driveway that commences at the road as a shared driveway and then, at the rear of BX and KX's house, becomes the sole property of OJ and RJ for some 26m. The balance of the driveway towards the road, some 56m, commences at the road with a low set back wooden fence with shrubs along the driveway for some 35m with the balance of some 21m up to the start of the section solely owned by OJ and RJ comprising wooden gates of a farm style.
2. The section of the boundary at the rear between BX and KX's property and the driveway owned by OJ and RJ was unfenced and BX and KX desired a fence to be erected of a close boarded post and rail style to provide privacy to the rear yard which was used by them and B&B guests. BX and KX had been discussing the erection of a fence along part of the boundary between the properties with OJ's partner. While BX and KX thought that negotiations were amicable it became apparent this was not the case. OJ's partner advised that they required a formal notice to be served on them under s.10 of the Fencing Act 1978 (the FA). BX and KX did this and were responded to with a cross notice. Further notices were exchanged but without agreement being reached as to the fencing work required to be carried out.
3. BX and KX then had a fence erected, they claim just on their side of the centre line of the boundary which OJ and her partner just had surveyed. However, no agreement had been reached regarding that work.
4. OJ now claims \$10,000 in compensation for the erection of the fence. Although she does not say so in her Notice of Claim, she requires the fence erected by BX and KX to be removed at their expense.
5. BX and KX have counterclaimed for \$2849.99 being half the cost of the fence erected by them.

6. An additional matter has been raised in that OJ and RJ claim that BX and KX caused a survey peg to be removed while carrying out the sealing of their car park at the rear of their property.
7. The issues to be decided then are whether BX and KX are liable to pay for the removal of the fence erected by them and for the erection of a new fence; whether OJ and RJ are liable for half the costs of erection of the new fence; and whether the survey peg has been moved or destroyed with liability for its replacement being on BX and KX.

Findings

Removal and replacement of fence erected by BX and KX

8. I find BX and KX are not liable for the costs of removal of the fence erected by them and for half the cost of erection of a new fence.
9. OJ and RJ submit that the new fence erected by BX and KX was erected without their consent and that it is not what they want along their boundary. The newly erected fence is 1.8m high of a close boarded type with alternative panels showing rails and flush boards on the other. This is commonly referred to as a “good neighbour” style of boarded fence. OJ and RJ submit this fence is “in conflict with the environment and the rural nature of the locality” and is out of keeping with other fencing in their immediate neighbourhood which tend towards a rustic post and rail style with hedging. In any event, the new fence was erected as a boundary fence without their permission, and they desire its removal at BX and KX’s cost and the erection of a new post and rail fence with accompanying hedging which would be continuous along the whole of the driveway boundary with no access gates to the rear of BX and KX’s property which both parties would pay half of.
10. While the erection of a boundary fence by a neighbour during an exchange of Fencing Act notices over what should be erected would naturally cause deep annoyance on the part of the other neighbour, I find in this case that what has been erected remains an adequate fence as defined in s.2 of the FA:
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
11. “Fence” is defined as:
fence means a fence, whether or not continuous or extending along the whole boundary separating the lands of adjoining occupiers; and includes all gates, culverts, and channels that are part of or are incidental to a fence; and also includes any natural or artificial watercourse or live fence, or any ditch or channel or raised ground that serves as a dividing fence
12. The starting point in all FA cases where there is an existing fence that a party wishes to have removed is whether what is there is an adequate fence as I advised in my order of the 26th January 2023. In this case I find that it is.
13. While OJ and RJ maintain that it conflicts with the environment and the rural nature of the locality, the locality that I observed on a site visit was a residential one. There was no evidence of any agricultural undertakings that I could see. Being residential, there is the usual multiplicity of fencing styles and there are some post and rail fences of the style sought by them. There is also the usual prolific planting of trees, shrubs and hedges both within properties and along boundaries. There is no evidence of rural style post and rail fences with accompanying hedges predominating around that neighbourhood or being mandated say by an original sub-divider when creating the original subdivision.
14. The new fence then is of a style that is frequently seen in residential environments. However, it is new and all other fencing in the locality has been in place for some time and has weathered in with plantings having matured. A coat of black paint on the driveway side of the fence would help it blend in and a planting of a hedge along the side of it by the Applicants would also help the fence blend in.

15. I find the fence is otherwise adequate in that appears to be soundly constructed. Although it is constructed on BX and KX's side of the boundary it still defines where the boundary is and maintains the privacy of BX and KX's rear yard where there was none before. At 1.8 m in height, it is within the 2m limit under the [Town] Council by-laws.
16. I find the claim that the gates should be removed for a continuous fence along the boundary to be unreasonable as BX and KX have legal access along the first section of the driveway to the rear of their property which access would be defeated if there were no gates, and the Tribunal would not have jurisdiction to order their removal.
17. As to the front section of the driveway extending down to the roadway, I find this section of fence to be adequate also. It consists of a mature hedge some 1.5m in height, well clipped and healthy. Replacing this section of fence is unnecessary as it also is along the boundary and offers privacy to both sides although not to the extent that a close boarded fence would.
18. Consequently, having found that the new fence erected by BX and KX and the existing fence down to the road to be adequate, OJ's and RJ' claim is dismissed.

Survey peg

19. With respect to the Applicants' claim that the survey peg was removed by BX and KX or their contractors, I note that BX exposed the peg for me at the site visit. It was under a shallow layer of gravel and easily located. In any event, the Tribunal does not have jurisdiction to order survey costs under s.24(1)(a) of the FA.

The counterclaim

20. I find BX and KX's claim for half the costs of the erection of a new fence must be dismissed as I advised in my order of the 26th January 2023. Under s.13 of the FA, such a claim must first be determined by a court or the Disputes Tribunal. The net effect of sections 10 – 13 of the FA is that if a party erects a fence without first going through the FA process, they are unable to claim a share of the cost of the fence by the other neighbour.

Referee: G R Meyer
Date: 29 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>.