



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 167

APPLICANT SN

RESPONDENT CU

**SECOND
RESPONDENT** KU

The Tribunal orders:

The claim by SN against CU and KU is dismissed.

Reasons

1. SN engaged a contractor to build a boundary fence on her rural property. SN now brings a claim against CU and KU for \$8,682.00.
2. The issues to be resolved are:
 - (a) Was the work undertaken in compliance with the Fencing Act 1978 (FA) S10?
 - (b) If not, was the work undertaken in compliance with the FA S16?
 - (c) If so, was the new fence necessary?
 - (d) If so, was the cost reasonable considering the terrain?
 - (e) If so, what is the remedy?

Was the work undertaken in compliance with the Fencing Act 1978 (FA) S10?

3. Section 9 of the FA states that subject to the provisions of the Act and any order of the Court under 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.”
4. The provision of the Act that is relevant is section 10. Under section 10 an occupier who wishes the adjacent occupier to contribute to the fence “shall serve him a notice in form 1 of Schedule 1 or to the like effect.”
5. Where immediate work is not required, section 10(4)(c) states that “in the absence of an agreement to the contrary the occupier of the adjoining land shall not be liable to contribute to the cost of any of the following:
“any part of the work that is done after the due service of such notice and cross-notice and while differences between the parties remain to be resolved either by agreement or by the court”.

6. It was not disputed that there was no agreement between the parties as to how the construction of the boundary fence would proceed.
7. SN submitted a copy of a letter to CU and KU dated 13 May 2022 entitled "Fencing Notice". It was not disputed that CU and KU received the letter and it was not disputed that it was a "fencing notice" as referred to in Schedule 1 of the FA.
8. Further it was not disputed that CU and KU provided an objection to the Fencing Notice by a letter dated 23 May and proposed to SN "*to arrange the erection of half of the fence and we will arrange the erection of the other half. You can choose which half we wish to fence when it comes to the rougher terrain*".
9. There were a number of letters between the parties until a second letter called Fencing Notice dated 21 September 22 was delivered to CU and KU and picked up by them on 4 October. CU and KU sent a letter to be delivered to SN by registered post in response reiterating their original offer but clearly not agreeing to the quote by the contractor that SN said she was going to employ.
10. SN said that she did not receive the response until 18 October.
11. SN said that therefore she had complied with the FA, by giving a second fencing act notice and that any objection wasn't received till after the 21 days. Therefore, The FA section 10 was complied with and CU and KU were required to contribute half the cost of the boundary fence in compliance with the FA.
12. There was some discussion during the hearing about the actual delivery dates. To resolve that issue, I refer to The FA section 12. Section 12 provides:

Any notice or cross-notice required or authorised by this Act to be served on any person shall be delivered to that person, and may be delivered to him either personally or by posting it by registered letter addressed to that person at his last known place of abode or business in New Zealand. A notice or cross-notice so posted shall be deemed to have been served at the time when the registered letter would in the ordinary course of post be delivered.
13. I am satisfied that the notice and cross notice in response to the notice were delivered as required within the time frames outlined in the FA.
14. In making my finding I take into account that CU and KU gave their objection letter to the post to deliver on 13 October 2023. I calculate the number of days between 23 September and when SN gave her 'notice' to the post to deliver to CU and KU and 13 October when CU and KU gave their response to the post to deliver to SN as 19 days.
15. Even if I am wrong in that calculation, I also accept that the first notice of fencing had been complied with and a response cross notice had already been received by SN with the 21 days on that occasion. There was nothing in the evidence to suggest that the first notice was not still a live issue.
16. I am also satisfied, after hearing from the parties and reading the cross-notice response, that while the parties were relatively close to an agreement, there were still 'differences between the parties needing to be resolved.'
17. For these reasons I am satisfied that SN has not proved on the balance of probabilities that the Fencing Act 1974 requirements have been complied with and therefore S10(4)(c) applies to any request for a half share from her neighbours.

If not, was the work done in compliance with the FA S16?

18. SN submitted that she also relied on section 16 of the FA. Section 16 provides:

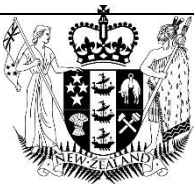
“Contribution where immediate work required

Subject to the provisions of [section 17](#), if any fence is damaged or destroyed by sudden accident or other cause and requires immediate work, either of the adjoining occupiers may do that work without any notice, and may recover half the cost thereof from the other occupier.”

19. SN said that after six months of unsuccessfully negotiating and trying to reach an agreement her pine seedlings were due to be planted and she had to have the fence built to stop CU and KU stock from wandering in and trampling the new seedlings.
20. SN said that cattle were disturbing the survey pegs.
21. She said she could not afford to have either of those things happen and the work on the fence became urgent.
22. SN said that the fence was 90 odd years old and hadn't been adequate for years. She said that CU and KU's stock had been wandering onto her land for some time.
23. SN said that the 'foresters' that she employed some time ago had destroyed parts of the old fence as well.
24. I am not satisfied that SN undertook the construction of a new fence in compliance with s16 of the FA. I make my findings for the following reasons:
25. I take into account that the fence was by SN's own account not damaged or destroyed by sudden accident or other causes requiring immediate work.
26. The fact that SN wanted to plant new seedlings and couldn't wait any longer does not mean that s16 can be applied. If that was the case, then section 16 of the act could be applied to overrule S10(4) of the act, regardless of when the fence became inadequate. I do not consider that SN's explanation demonstrates that the fence was damaged or destroyed by sudden accident or other cause as stated in the section requiring "immediate" work. If that was the case then the fence would have required immediate work when it first became inadequate, some time before.
27. For these reasons I do not consider that the Fencing Act 1978 Section 16 can be invoked to support SN's claim that CU and KU should be required to share the cost of the fence that she had the contractor construct.
28. For these reasons I find that SN has not proved that CU and KU are required under the fencing act to pay half of her costs for the construction of the boundary fence.
29. For these reasons there is no need for me to consider the remaining issues.
30. For these reasons the claim by SN against the CU and KU is dismissed.

Referee: K Johnson

Date: 04 May 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>.