

AUSTRALIA / JUDGMENT

Ward v Herkelman [2023] NSWCATCD 146

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Ward v Herkelman [2023] NSWCATCD 146

Hearing dates: 14 August 2023

Date of orders: 1 September 2023

Decision date: 01 September 2023

Jurisdiction: Consumer and Commercial Division

Before: J Searson, General Member

Decision: (1) The existing dividing fence between the applicant's and the respondent's adjoining lands is to be demolished and removed and the fence line cleared sufficiently to allow the fencing work to be carried out as part of the fencing work the subject of these orders.

- (2) A new Colorbond dividing fence 1.8 meters high in "ironstone" colour is to be erected on the common boundary line (as identified in the survey report of Daly Smith dated 4 May 2018) between the applicant's and the respondent's adjoining lands. The fence is to taper down to 1.2 meters height (as per council regulations) as per the quote of Andersons Fencing & Gates dated 19 July 2023
- (3) The fencing work is to be carried out by of Andersons Fencing & Gates Pty Ltd ("fencing contractor") in accordance with their quote of 19 July 2023 for a Colorbond fence.
- (4) The respondent's contribution to the cost of the fencing work will be 50% of the cost of 42 meters of fencing work as quoted by of Andersons Fencing & Gates dated 19 July 2023 being \$2810.
- (5) The applicant will be the only party to give instructions to the Fencing Contractor in relation to the carrying out of the fencing work.
- (6) Subject to availability of the Fencing Contractor, the fencing work is to be completed within two (2) months of the date of these orders.

- (7) The fencing work is to be carried out in a good and workmanlike manner using new materials.
- (8) The fencing work is to be paid for by the applicant and the respondent is to contribute to the cost of the fencing work by way of making a payment to the applicant as set out in these orders.
- (9) By 14 days of the completion of the fencing work, the applicant is to send to the respondent in writing a copy of all tax invoices that pertain to the fencing work the subject of these orders.
- (10) By 28 days of the date on which the applicant has sent the respondent a copy of all the tax invoices that pertain to the fencing work the subject of these orders, the respondent is to pay the applicant 50% of the cost of the fencing work.

Catchwords: DIVIDING FENCES — Whether sufficient dividing fence — Type of replacement fence — Contribution to cost of fencing work

Legislation Cited: Civil and Administrative Tribunal Act 2013

Dividing Fences Act 1991

Threatened Species Conservation Act 1995

Western Lands Act 1901

Cases Cited: Ahern v Havler (ownership to 7) NZ LR 245

Alwiah v Watts & Anor[2004] NSWSC 948

Jiang v Cousins [2019] NSWCATAP 118 at 69

Larney v Johannson [2013] NSWCA 409

Lindsay v Johnston [2014] NSWCATCD 45

Nicholls v Fortmann [2020] NSWCATAP 52

Purcell v Chadwick [2018] NSWCATAP 250

Texts Cited: None cited

Category: Principal judgment

Parties: Philip Ward (Applicant)

Wilma Herkelman (Respondent)

Representation: Applicant (Self-Represented)

Ms Daalmeyer (Respondent)

File Number(s): COM 23/26857

Publication restriction: Nil

REASONS FOR DECISION

Background

1. The applicant in this matter filed an application on 7 June 2023 seeking orders in relation to a dividing fences dispute with the respondent.
2. The orders sought by the applicant were opposed by the respondent.
3. The applicant sought orders as follows:
 1. An order determining the boundary or line on which the fencing work is to be carried out.
 2. An order determining the fencing work to be carried out (including the kind of dividing fence involved).
 3. An order determining the manner in which contributions for the fencing work are to be apportioned or re-apportioned between the parties or the amount that each adjoining owner is liable to pay for that work.
 4. An order determining the time within which the fencing work is to be carried out.
1. The matter was heard on 14 August 2023 in Gosford.
2. The applicant and respondent are owners of adjoining land with the applicant being the owner of 38 Stingaree Point Drive, Dora Creek, New South Wales and the respondent being the owner of 36 Stingaree Point Drive, Dora Creek, New South Wales.

Evidence

1. The applicant appeared at the hearing and relied on his filed documentary evidence and some affirmed oral evidence.
2. Ms Daalmeyer appeared on behalf of the respondent and relied on the filed documentary evidence of the respondent. Ms Daalmeyer also gave some affirmed oral evidence.
3. The parties were given the opportunity to cross examine each other.
4. The Tribunal heard the evidence and reserved its decision.
5. The Tribunal has read and considered all of the oral and documentary evidence of the parties.

The Law

1. Under section 28 of the Civil and Administrative Tribunal Act 2013 (NSW) ("CAT Act") the Civil and Administrative Tribunal ("Tribunal", "NCAT") has the jurisdiction and functions that may be conferred on it by or under that act or any other legislation.

2. Section 13 of the Dividing Fences Act 1991 ("DFA") confers jurisdiction on NCAT to hear and determine any matter that may arise under the DFA.
3. The general principles of the DFA are set out in section 6, which creates liability between the parties and relevantly states that:
 1. An adjoining owner is liable, in respect of adjoining lands where there is no sufficient dividing fence, to contribute to the carrying out of fencing work that results or would result in the provision of a dividing fence of a standard not greater than the standard for a sufficient dividing fence.
 2. This section applies whether or not a dividing fence already separates the adjoining lands.
1. Section 3 of the DFA defines a number of terms as follows:

adjoining owners means the owners of land on either side of a common boundary

owner includes:

- (a) any person who jointly or severally (whether at law or in equity) is entitled to land for any estate of freehold in possession or who receives or is entitled to receive any rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession or otherwise, and
- (b) any person who is the holder of a lease (the unexpired term of which is not less than 5 years) when a notice to carry out fencing work in accordance with this Act is given by, or served on, that person.

fencing work means:

- (a) the design, construction, replacement, repair or maintenance of the whole or part of a dividing fence, and
- (b) the surveying or preparation of land (including the trimming, lopping or removal of vegetation) along or on either side of the common boundary of adjoining lands for such a purpose,

and includes:

- (c) the planting, replanting and maintenance of a hedge or similar vegetative barrier, and
 - (d) the cleaning, deepening, enlargement or alteration of a ditch, embankment or watercourse that serves as a dividing fence.
1. Section 7 of the DFA allows for a contribution order to be made between parties, relevantly
 1. Adjoining owners are liable to contribute in equal proportions to the carrying out of fencing work in respect of a dividing fence of a standard not greater than the standard for a sufficient dividing fence.

2. An adjoining owner who desires to carry out fencing work involving a dividing fence of a standard greater than the standard for a sufficient dividing fence is liable for the fencing work to the extent to which it exceeds the standard for a sufficient dividing fence.
1. Section 14 of the DFA sets out the orders that can be made by the Tribunal in relation to an application for fencing work as follows:

Orders as to fencing work

- (1) The Local Court or the Civil and Administrative Tribunal may, in respect of an application under this Act, make an order determining any one or more of the following:
 - (a) the boundary or line on which the fencing work is to be carried out, whether or not that boundary or line is on the common boundary of the adjoining lands,
 - (b) the fencing work to be carried out (including the kind of dividing fence involved),
 - (c) the manner in which contributions for the fencing work are to be apportioned or re-apportioned or the amount that each adjoining owner is liable to pay for that work,
 - (d) which portion of the dividing fence is to be constructed or repaired by either owner,
 - (e) the time within which the fencing work is to be carried out,
 - (f) the amount of any compensation (in the form of an annual payment to either of the adjoining owners) in consideration of loss of occupation of any land,
 - (g) that, in the circumstances, no dividing fence is required in respect of all or part of the boundary of the adjoining lands.
- (1A) Despite subsection (1), no order may be made for the carrying out of fencing work on critical habitat within the meaning of the Threatened Species Conservation Act 1995 without the consent of the Director-General of National Parks and Wildlife.
- (2) The occupation of land on either side of a dividing fence, as a result of an order determining that fencing work is to be carried out otherwise than on the common boundary of the adjoining lands, is not taken to be adverse possession as against the owner or to affect the title to or possession of the land, except for the purposes of this Act.

Issues for determination

1. The Tribunal must consider and determine the following issues in order to resolve this matter:
 1. Whether the Tribunal has jurisdiction under the DFA?
 2. If so is there currently a sufficient dividing fence?

3. If not, what is the appropriate sufficient dividing fence to be constructed (including height and materials), where should it be constructed, who should construct it, what contribution should be made regarding costs, and what, if any, access orders should be made so that the fence can be constructed.

Jurisdiction

Notice to carry out fencing work

1. The applicant served a fencing notice in accordance with section 11 of the DFA on the respondent on or about 25 October 2022. This notice proposed to replace the existing fence and install 42 meters of colourbond fence. It was proposed that the fence be 1.8 meters in height. The total cost of the works was estimated to be \$5680. It was proposed that the parties would pay 50% each of the costs of the fence. It was proposed that the fence would be placed on the boundary line as per an attached survey report.
2. The Tribunal finds that the Notice dated 25 October 2022 complies with the requirements of section 11(2) of the DFA and is a valid notice for the purposes of the DFA.
3. The application has been brought more than a month after the service of the fencing notice required by section 12(2) of the DFA.
4. Therefore, the Tribunal has jurisdiction to hear and determine this matter.

Is there currently a sufficient dividing fence?

1. Section 4 of the DFA provides guidance for the determination of what is a sufficient dividing fence as follows:

In any proceedings under this Act, the Local Court or the Civil and Administrative Tribunal is to consider all the circumstances of the case when determining the standard for a sufficient dividing fence for the purposes of this Act, including the following:

- (a) the existing dividing fence (if any),
- (b) the purposes for which the adjoining lands are used or intended to be used,
- (c) the privacy or other concerns of the adjoining land owners,
- (d) the kind of dividing fence usual in the locality,
- (e) any policy or code relating to dividing fences adopted by the council of the local government area in which the adjoining lands are situated,
- (f) any relevant environmental planning instrument relating to the adjoining lands or to the locality in which they are situated,

- (g) in the case of a dividing fence affecting land the subject of a lease under the Western Lands Act 1901, any order in force under section 18A of that Act immediately before the repeal of that Act.
1. Section 4 of the DFA as noted above requires the Tribunal to consider "all the circumstances of the case" in making a determination as to the standard of a sufficient dividing fence.
 2. If the Tribunal finds that there is no sufficient dividing fence then the jurisdiction granted by the Act to make fencing orders is enlivened. This finding is therefore fundamental to the making any orders under section 14 of the DFA.
 3. In the matter of Lindsay v Johnston [2014] NSWCATCD 45 the Tribunal stated at 39 that "The test of whether a fence is a sufficient dividing fence in s 4 of the Dividing Fences Act is that the Tribunal must consider all the circumstances including the criteria set out in the that section".
 4. In the matter of Nicholls v Fortmann [2020] NSWCATAP 52 the appeal panel said at 33 "In regard to whether a fence is a "sufficient dividing fence", s 4 of the DFA states that the Tribunal is to consider "all the circumstances of the case", including the matters set out in s 4(a)-(g) of the DFA. There is nothing in s 4 of the DFA to mandate the weight to be given to the various factors in s 4(a)-(g) or any other relevant circumstance or stipulate that one factor is to be given greater weight than any other factor.
 5. In Purcell v Chadwick [2018] NSWCATAP 250 the Appeal Panel said at [22] to [28]:

The Tribunal does not have jurisdiction to make an order under the Act unless any existing fence is found to be insufficient: see *Alwiah v Watts & Anor* [2004] NSWSC 948 approved in *Larney v Johansson* [2013] NSWCA 409.

The term "sufficient" is protean.

In determining what is a "sufficient dividing fence", s 4 of the Act provides:

4 Determination as to "sufficient dividing fence"

In any proceedings under this Act, the Local Court or the Civil and Administrative Tribunal is to consider all the circumstances of the case when determining the standard for a sufficient dividing fence for the purposes of this Act, including the following:

- (a) the existing dividing fence (if any),
- (b) the purposes for which the adjoining lands are used or intended to be used,
- (c) the privacy or other concerns of the adjoining land owners,
- (d) the kind of dividing fence usual in the locality,
- (e) any policy or code relating to dividing fences adopted by the council of the local government area in which the adjoining lands are situated,

- (f) any relevant environmental planning instrument relating to the adjoining lands or to the locality in which they are situated,
- (g) in the case of a dividing fence affecting land the subject of a lease under the Western Lands Act 1901, any order in force under section 18A of that Act immediately before the repeal of that Act.

The section provides a list of factors as part of an inclusive definition, and otherwise requires the Tribunal "to consider all the circumstances of the case when determining the standard for a sufficient dividing fence for the purposes of [the Act]". It is inappropriate to attempt to prescribe all the circumstances which might be relevant.

However, as is evident from the list of factors in the Act, they include a consideration of the existing fence, the purposes for which "the adjoining lands are used or intended to be used", and the "privacy or other concerns of the adjoining landowners".

Taken together, it is clear that the nature of the adjoining land, and how a landowner wishes to use and enjoy their land, are relevant factors in determining the sufficiency of a fence.

The question of whether a particular fence is sufficient is one of degree. As recognised by Adams J in *Larney v Johansson* [2012] NSWSC 1297 at [11], a fence might be sufficient "but some fences might be more sufficient than others". While his Honour was considering what might be a sufficient fence for the purpose of an order under s 14 of the Act, his Honour's comments are nonetheless relevant to examining the sufficiency of an existing fence.

1. In the present matter the Tribunal has considered all of the circumstances including the criteria set out in s 4 of the DFA.
2. The current fence dividing the properties consists of a wire netting rural style fence with wooden posts and star pickets. It is said to be approximately 40 years old. The photographic evidence shows that it is currently in a poor state of repair and is collapsing and bent in portions. The wooden fence posts are rotting. Vegetation is overgrowing the fence in portions of it.
3. Both parties use their land for the purposes of a residence only. Both parties appear to reside at their premises.
4. Both parties appeared to raised concerns with respect to their privacy in relation to the current state of the fence. The current fence affords little if any privacy to either party.
5. The existing fence and the proposed fence are both of a type which is common in the locality. From the photographic evidence of both of the parties it appears that both "breezeway" style and colourbond fences are common in the surrounding locality.

6. The respondent had reference to the Lake Macquarie Development Control Plan 2014 which had been adopted by the Local Council. That plan states that "side and rear boundary fences must not exceed 1.8 meters above the existing ground level" and further "for sloping sites, side and rear boundary fences may be regularly stepped provided the average height does not exceed 1.8 meters".
7. The respondent also had reference to the Lake Macquarie Council Development control plan which states that "fencing must not occur within six meters of the Deed High Water Mark". Further, "Fencing in the area between the foreshore building line and 6 meters from the Deed High Water Mark must not exceed 1.2 meters".
8. There was no evidence as to the dividing fence affecting land the subject of a lease under the Western Lands Act 1901, any order in force under section 18A of that Act immediately before the repeal of that Act.
9. The Tribunal, after careful consideration, finds that there is currently no sufficient fence between the applicant's and respondent's respective properties. In coming to this finding the Tribunal has had regard to all of the circumstances of the case before it as required by s 4 of the DFA. In particular the Tribunal has had regard to the privacy and other concerns of the parties and the state and age of the current fence.

Fencing works

1. The applicant proposed that the current fence should be replaced by a 1.8 meter high colourbond fence on the true boundary line, "ironstone" in colour. The respondent sought that there be either a "breezeway" style fence, or that any fence be "pale eucalypt" in colour to match their existing fence on their other boundary.
2. Having considered all of the material before it the Tribunal finds that the appropriate fencing works would be to demolish the current fence in its entirety and replace it with a 1.8 meter high colourbond fence, tapering down to front 3 panels to 1.2 meters high, as per the quote from Andersons Fencing & Gates dated 19 July 2023. The appropriate colour of the fence to be "ironstone" as this appears to be in keeping with the surrounding fences in the neighbourhood.
3. The fence should be placed on the true boundary line as set out in the survey report of Daly Smith dated 4 May 2018. This is for a number of reasons. Firstly, it appeared during the hearing that unfortunately there was a degree of animosity between the parties. Placing the fence on the true boundary line would negate further proceedings with respect to any compensation for loss of use of the land in this or other forums.
4. Secondly, as noted in the matter of Jiang v Cousins [2019] NSWCATAP 118 at 69 "When the location of a dividing fence is considered, it is desirable that the fence be on the common boundary: see Ahern v Havler (ownership to 7) NZ LR 245 per Tompkins J at 246 (referring to New Zealand legislation)".

5. The applicant appeared to seek an order that the respondent be ordered to obtain her own survey report. The Tribunal does not believe that this is necessary for a number of reasons. Firstly, the applicant has already obtained his own survey report. There is no evidence to suggest that this report is unreliable. Secondly, it does not appear that the applicant or the respondent have followed the procedure under s 18 of the DFA which sets out the process for the defining of the boundary line where there is a dispute about it.
6. Section 14(1)(d) of the DFA gives the Tribunal power to make orders about which portion of the dividing fence is to be constructed or repaired by either owner. Having regard to all of the evidence and material placed before it the Tribunal is satisfied that the fencing work should be performed by Andersons Fencing & Gates as per their quote dated 19 July 2023 and under the direction and control of the applicant. This is because this is the most cost effective quote for the work.
7. Section 14(c) of the DFA allows the Tribunal to make orders regarding the contributions to the costs of fencing work. The Tribunal considers that the parties should share the cost of demolition of the old fence and the construction of the new fence in equal shares of 50% each. It is noted that both parties obtained quotes for a fence of 1.8 meters in height. There were no reasons provided by either party as to why the Tribunal should depart from the position described in s 7 of the DFA. The respondent alleged damage to the current fence by the applicant. However, due to the age and condition of the current fence the Tribunal is not persuaded that any alleged damage should change the contributions payable by the parties. There appears to be no reason to depart from the general principle in section 7(1) of the DFA as the proposed fence is not considered to be of a standard that is greater than the standard for a sufficient dividing fence. Therefore, in the current circumstances, the Tribunal will order that the parties each pay 50% of the cost of the demolition and building of the new fence as per the quote of Andersons Fencing & Gates dated 19 July 2023.
8. The Tribunal will also make orders about the time for the work to take place. Subject to the availability of the fencing contractor, the fencing work is to be completed within two months of the date of these orders. The fencing work is to be carried out in a good and workmanlike manner using new materials. The respondent is to pay their contribution being 50% of the fencing work direct to applicant after completion.

Conclusion

1. For the reasons set out above the Tribunal will make the following orders:
1. The existing dividing fence between the applicant's and the respondent's adjoining lands is to be demolished and removed and the fence line cleared sufficiently to allow the fencing work to be carried out as part of the fencing work the subject of these orders.

2. A new Colorbond dividing fence 1.8 meters high in "ironstone" colour is to be erected on the common boundary line (as identified in the survey report of Daly Smith dated 4 May 2018) between the applicant's and the respondent's adjoining lands. The fence is to taper down to 1.2 meters height (as per council regulations) as per the quote of Andersons Fencing & Gates dated 19 July 2023
3. The fencing work is to be carried out by of Andersons Fencing & Gates Pty Ltd ("fencing contractor") in accordance with their quote of 19 July 2023 for a Colorbond fence.
4. The respondent's contribution to the cost of the fencing work will be 50% of the cost of 42 meters of fencing work as quoted by of Andersons Fencing & Gates dated 19 July 2023 being \$2810.
5. The applicant will be the only party to give instructions to the Fencing Contractor in relation to the carrying out of the fencing work.
6. Subject to availability of the Fencing Contractor, the fencing work is to be completed within two (2) months of the date of these orders.
7. The fencing work is to be carried out in a good and workmanlike manner using new materials.
8. The fencing work is to be paid for by the applicant and the respondent is to contribute to the cost of the fencing work by way of making a payment to the applicant as set out in these orders.
9. By 14 of days of the completion of the fencing work, the applicant is to send to the respondent in writing a copy of all tax invoices that pertain to the fencing work the subject of these orders.
10. By 28 days of the date on which the applicant has sent the respondent a copy of all the tax invoices that pertain to the fencing work the subject of these orders, the respondent is to pay the applicant 50% of the cost of the fencing work.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

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