



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>Muggeridge v Hackney [2016] NSWCATCD 65</b>
<b>Hearing dates:</b>	16 March 2016, 14 June 2016
<b>Decision date:</b>	01 July 2016
<b>Jurisdiction:</b>	Consumer and Commercial Division
<b>Before:</b>	D Goldstein, Senior Member
<b>Decision:</b>	<ol style="list-style-type: none"><li>1. For the reasons provided, Therese Christine Muggeridge-Nguyen, Matthew Muggeridge and Sonya Muggeridge are responsible for making the necessary arrangements for the fencing work as referred to and described in paragraph 52 of the Reasons for Decision to be carried out within 3 months of the date of these orders.</li><li>2. Therese Christine Muggeridge-Nguyen, Matthew Muggeridge and Sonya Muggeridge of the one part and Ljulja Hackney and Ian Gordon Hackney of the other part must pay for the costs of the fencing work in equal proportions, including fees on the Application for Development Consent.</li><li>3. The parties have liberty to apply for an extension of time if the period of 3 months is inadequate to allow the fencing work to be carried out.</li></ol>
<b>Catchwords:</b>	Sufficient dividing fence, orders for fencing work
<b>Legislation Cited:</b>	Civil and Administrative Tribunal Act 2013 Dividing Fences Act 1991
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Therese Christine Muggeridge-Nguyen, Matthew Muggeridge and Sonya Muggeridge (Applicants) Ljulja Hackney and Ian Gordon Hackney (Respondents)
<b>Representation:</b>	The parties were self-represented
<b>File Number(s):</b>	COM 15/68391
<b>Publication restriction:</b>	Unrestricted

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## REASONS FOR DECISION

- 1 In this application the applicants seek an order for an adjoining owner to agree to pay for the costs involved in repairing an existing damaged dividing fence.
- 2 The parties reside in Gateacre Avenue Lane Cove. The applicants' property is lot 45 on DP 4842. The respondents' property is at lot 46 DP 4842. I find that the applicants and the respondents are adjoining owners. So much is common ground between the parties.
- 3 On 16 March 2016 after reviewing and considering the evidence filed and served by the parties, I made the following orders:
  - '2. The parties must obtain each obtain at least 1 written quote from a contractor duly licensed under the Home Building Act 1989 to carry out the recommended repairs referred to in the Woolacotts Consulting Engineers report dated 25 February 2016 such repairs to be carried out in accordance with the Building Code of Australia and the warranties contained in section 18B of the Home Building Act 1989 and provide such quotes to each other and the Tribunal no later than 22 April 2015.
  3. The parties must obtain each obtain at least 1 written quote from a contractor to remove tree stumps from either side of the dividing fence the subject of these proceedings and further to remove all trees and vegetation growing on and through the dividing fence and provide such quotes to each other and the Tribunal no later than 22 April 2015.
  4. The affidavit of Matthew Muggeridge sworn 4 March 2016 is exhibit B in the proceedings in connection with the need to obtain Development Consent for repairs to the dividing fence the subject of these proceedings.
  4. The respondents have until 29 March 2016 to file in the Tribunal and serve the applicants with an affidavit in reply addressing the need to obtain Development Consent in connection with repairs to the dividing fence the subject of these proceedings.'
- 4 When the proceedings were heard on 14 June 2016 the respondents conceded that rectification work to the retaining wall would require a development application to be lodged with the Lane Cove Council.
- 5 The parties have not been able to reach any agreement about the dividing fence, or the repairs to it that are required.
- 6 The respondents' position is that the dividing fence does not require repair. They state that the wall is 'just an ugly wall' and was in that 'ugly' state when the applicants purchased Lot 45.
- 7 The applicants in my view have sought to use this application to impose an expensive repair/rebuild of the dividing fence on the respondents.
- 8 The general principles of the *Dividing Fences Act 1991* (the 'Act') are set out in s 6, which states:
  - '(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.'
- 9 Section 4 of the Act sets out the requirements to make a determination of what is a sufficient dividing fence as follows:

'In any proceedings under this Act, the Local Court or a local land 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.'

10 Section 4 requires the Tribunal to consider all the circumstances of the case in making a determination as to the standard of a sufficient dividing fence.

11 If the Tribunal finds that there is no sufficient dividing fence then the jurisdiction granted by the Act to make fencing orders is triggered. This finding is fundamental to making any orders under s 14 of the Act.

12 Once the Tribunal finds that there is no sufficient dividing fence for the subject of an application before it, it is then open to the Tribunal to determine the standard of a sufficient dividing fence for which adjoining land owners should contribute in accordance with the Act.

13 Section 7 of the Act sets out the general position as regards contributions between adjoining owners. It states:

'(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.

(3) An adjoining owner who desires to carry out the trimming, lopping or removal of vegetation (as referred to in paragraph (b) of the definition of **fencing work** in section 3) for a purpose other than the provision of a sufficient dividing fence is liable for the expenses of carrying out the work to the extent to which those expenses are attributable to work done for that other purpose'

14 The Act defines a 'fence' to mean:

'a structure, ditch or embankment, or a hedge or similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the whole of the boundary separating the land of adjoining owners'

15 The applicants' engineering expert has described the fence in issue as being of masonry (brick) construction extending for the full length of the subject boundary. The height of the walls is about 1.4m at the front and gradually increases to about 3 m in height towards the rear of the applicants' property. I accept this evidence as it is consistent with all photographic evidence of the fence in the proceedings.

16 I find that the structure in issue is a fence which bounds land and is a fence for the

purposes of the Act.

17 A 'dividing fence' is defined in section 3 of the Act to mean:

'a fence separating the land of adjoining owners, whether on the common boundary of adjoining lands or on a line other than the common boundary.'

18 I find on the evidence before the Tribunal that the fence which I have found exists, separates the land of the parties to the Tribunal proceedings. Such a fence is shown in an Engineer's plan which is contained within the applicants' papers being drawing number 116892500 01.

19 There is a dispute or perhaps an inability to agree about the precise location of the fence. The respondents say that the fence is wholly on their property. The applicants say that the line of the fence crosses the boundary between the properties. In my view the precise location of the fence is not critical. I am satisfied that it is a fence which separates lots 45 and 46 and therefore fits within the definition of a 'dividing fence' as referred to in section 3 of the Act.

20 There are competing engineer's reports contained in the documents that have been filed in the Tribunal. I have come to the conclusion that I prefer the Woolacotts report dated 25 February 2016, filed by the respondents, to the reports filed on behalf of the applicants. The Woolacotts report has more detail and explanation to support their conclusions and it is for that reason that I prefer their evidence.

21 The respondents submit that despite the Woolacotts report the retaining wall is not in danger, or a danger, or in need of repair. They submit it is just ugly.

22 At the hearing I stated that I would not accept the respondents lay opinions in preference to their engineer's opinions.

23 The Woolacotts report discloses that the dividing fence has four principal areas of damage that are evident on the face of the wall, two major areas at each end of the nominated section of wall and two relatively minor areas in between.

24 Woolacotts describes the condition of the dividing fence at chainage:

- (a) 9.5;
- (b) 7;
- (c) 3.5; and
- (d) 1.5.

25 The damage reported at chainage 9.5 is significant cracking of the wall with out of plane lateral displacement of the lower section of wall of approximately 15 mm and localised sections of masonry removed from around the lower cracks. Woolacotts state from a survey drawing at chainage 8.6 the top of the wall has displaced 60mm relative to the bottom of the wall yielding an average outward slope of 2.2° and similarly at chainage 6.8 a 70 mm top displacement at an average slope of 2.4° but at chainage 10.4 the wall is measured as vertical. In connection with this area Woolacotts states that the 2.2° to 2.4° outward lean of the wall is not significant for this type of wall construction, however the extensive cracking and out of plane displacement has

damaged the structural integrity of the wall and requires rectification.

- 26 There are similar comments in relation to the other locations referred to above including minor vertical cracks, displacement of the dividing fence with outward slopes of 2.4°, damage to the dividing fence by tree growth is recorded as well as weed growth from mortar joints. The Woolacotts' report records significant damage to the dividing fence at chainage 1.5 with out of plane lateral displacement of approximately 30mm at the lower section of the wall with loss of localised sections of masonry from the dividing fence. The full extent of the damage to this section of the dividing fence is set out in the Woolacotts report at page 7.
- 27 As stated above I accept all of this evidence. I find that repairs to the dividing fence are required contrary to the respondent's submission as evidenced by the section of the Woolacotts report which is titled 'Recommended repairs.'
- 28 I would add that there is evidence before the Tribunal which demonstrates that the damage to the dividing fence has in some cases been caused by trees growing in its near vicinity and in other cases by trees growing out of and through the dividing fence.
- 29 I find on the basis of all of the evidence before the Tribunal that the dividing fence is not a sufficient dividing fence because of its damaged state as disclosed in the Woolacotts report which indicates that in at least 2 locations the structural integrity of the dividing fence has been impaired. I also find that if the dividing fence were repaired, it would be a 'sufficient' dividing fence.
- 30 Given that I have found that the dividing fence is not a sufficient dividing fence, I may make orders pursuant to section 14(1) of the Act. That section states:
- '(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.'
- 31 Section 3 defines 'fencing work' as that phrase is used in section 14(1) of the Act. The definition of 'fencing work' is:
- '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.'

32 The parties filed documents in response to my 16 March 2016 orders which were designed to obtain evidence which would assist in making final orders pursuant to section 14(1) of the Act.

33 The applicants filed evidence on 1 and 22 April 2016 as follows:

- (a) Jim's Trees quotation dated 22 March 2016;
- (b) drawing 1–4748 from ABVD Design consulting structural and civil engineers for proposed retaining wall;
- (c) Retaining Wall Constructions Pty Ltd quotation sheet dated 6 April 2016 in the sum of \$67,050.00 + GST;
- (d) SAL Sydney constructions quotation dated 13 April 2016 in the sum of \$64,000.00 + GST;
- (e) Retaining Wall Constructions Pty Ltd quotation sheet dated 6 April 2016 in the sum of \$28,415.00 + GST;
- (f) SAL Sydney constructions quotation dated 2 June 2015 in the sum of \$24,800.00 + GST;
- (g) Agreement dated 23 May 1967; and
- (h) Affidavit Matthew Muggeridge sworn 31 March 2016.

34 The respondents have filed a written submission and quotations from:

- (a) Living Planet landscapes dated 24 May 2016 in the sum of \$5,700.00 + GST;
- (b) Living Planet landscapes dated 21 April 2016 in the sum of \$3,500.00 + GST;
- (c) Boardman & Marriott dated 26 March 2016 in the sum of \$7,630.00 inclusive of GST; and
- (d) Woolacotts email of 8 April 2016 being a fee proposal to document repairs to dividing fence recommended in report dated 25 February 2016.

35 I have had regard to the evidence filed by the parties in response to my orders of 16 March. As stated the purpose of the 16 March 2016 orders was to obtain evidence which would assist in making final orders pursuant to section 14(1) of the Act.

### Order 3

36 I will deal with the subject of order 3 first as it is the most straightforward. I would add that it is common ground between the parties and their experts that tree stumps along the lines of the dividing fence have caused it to be damaged. The respondent's expert states that the tree stumps, roots and weed vegetation ought to be removed.

37 The evidence of the owners is from Jim's Trees. Its quotation is dated 22 March 2016 in the sum of \$10,560.00 inclusive of GST. The quote is for:

'To grind out stumps and roots behind retaining wall for the first 12 metres as discussed.

Remove all green waste from site, leave grinding spoil.

To grind out stumps and roots from behind retaining wall for the remaining distance.  
Remove all green waste from site, leave grinding spoil.'

- 38 The respondents' evidence was from Living Planet Landscapes quotation dated 24 May 2016 in the sum of \$5,700.00 + GST. The quote was for:

'Part 1– Motel side:

1 Removal of a number of stumps manually by hand, starting from street pathway til 12 metres in wards under pile of chopped up tree.

2 Remove all visible stumps along boundary all the way to the back fence

3. Removal of weeds along fence line starting from street pathway til halfway up the carpark.

4 Labourers

5. Rubbish taken away

Part 2 - Neighbouring house:

1 Removal of weeds along brick wall from the start to the end of the wall (backyard boundary)

2 Rubbish taken away

3 Labourers'

- 39 The 2 quotes are essentially for the same work. However the Living Planet Landscapes quotation describes the work to be performed in greater detail and is for a lesser price. It also provides for the removal of 'Rubbish' whereas the Jim's Trees quotes states that grinding spoil will be left on site. I have formed the view that the Living Planet Landscapes quotation dated 24 May 2016 in the sum of \$5,700.00 + GST is the preferred quotation for the reasons stated. When making an order under section 14 (1)(a) of the Act regarding the fencing work to be carried out, I will order that the work referred to in the Living Planet Landscapes quotation dated 24 May 2016 will be included.

## Order 2

- 40 The purpose of order 2 was for the parties to obtain quotes for carrying out the repairs recommended by Woolacotts.
- 41 I confirm that when the proceedings were heard on 14 June 2016 the respondent conceded that rectification work to the dividing fence would require a development application to be lodged with the Lane Cove Council. The applicants have always taken the position that such consent is required.
- 42 The applicants have provided a range of documents in response to order 2. Their position was outlined in a letter to the Tribunal on 1 April 2016 where they stated that:
- 'builders have been unwilling to quote on such repair without an engineers drawing.'....  
'As per Matthew Muggeridge's affidavit dated 31 March 2016 in the interest of ensuring that NCAT are able to make a swift decision for both parties, we have instructed an engineer to complete drawings that would meet all DA requirements in addition to those set out in Member Goldstein's direction number 2 dated 16/3/2016.'
- 43 I find that there is no independent evidence of builders being unwilling to quote on the repairs referred to in order 2 of the orders made on 16 March 2016. The only evidence

there is of that is applicants' assertion.

- 44 The applicants stated in a letter to the Tribunal dated 22 April 2016 that they had their engineers provide designs and drawings to match the recommendations made by Woolacotts on 25 February 2016. Thereafter they obtained quotations based on their own engineers' drawing dated 29 March 2016. The quotes that they have obtained were from RWC Retaining Wall Constructions dated 6 April 2016 in the sum of \$73,920.00. In addition the applicants obtained a quote from SAL Sydney Constructions dated 13 April 2016 in the sum of \$70,400.00.
- 45 In addition the applicants produced two further quotes from RWC Retaining Wall Constructions also dated 6 April 2016 in the sum of \$28,415.00 excluding GST and a quote from SAL Sydney Constructions dated 2 June 2015 in the sum of \$24,800.00 excluding GST.
- 46 None of the quotes referred to in the two preceding paragraphs state that they are based on the recommended repairs referred to in the Woolacotts Consulting Engineers report dated 25 February 2016, as referred to in order 2 of the orders made on 16 March 2016. To the contrary they are based on the drawings produced by the applicants' engineers. I take this as stubborn refusal by the applicants to comply with Tribunal orders. It seems to me that the applicants have exhibited a desire or a determination to proceed in the way that they consider best, despite the views of the Tribunal or the respondents.
- 47 I reject the quotes provided by the applicants as referred to above in purported compliance with the orders made on 16 March 2016.
- 48 The respondents have provided a quote from Boardman & Marriott dated 26 March 2016 in the sum of \$7,630.00 inclusive of GST. This quote does not specifically refer to the Woolacotts report although it does refer to an 'engineers report'. The work referred to in this quote relates to the repair work stated in the Woolacotts report. For this reason I have decided that the repairs to the dividing fence wall should be carried out in accordance with the Boardman & Marriott quote dated 26 March 2016.
- 49 I have also had regard to the Woolacotts email of 8 April 2016 which is a fee proposal to document repairs to the dividing fence as recommended in its report dated 25 February 2016. Since an application for development consent is required in connection with the repairs to the dividing fence, I find that the Woolacotts fee proposal of \$2,000.00 is acceptable for the purposes of providing drawings to support the application for development consent.

### **Final orders**

- 50 It is common ground that rectification work to the dividing fence will require a development application to be lodged with the Lane Cove Council.
- 51 Given that I have preferred the respondents' estimates of the cost of the repairs to the dividing fence I will make the following orders under section 14 of the Act.
- 52



The fencing work to be carried out to repair the dividing fence is as follows:

- (a) The engagement of Woolacotts to document repairs to the dividing fence recommended in its report dated 25 February 2016 on the basis of its fee proposal contained in its email of 8 April;
- (b) making an application to Lane Cove Council for Development Consent for repairs to the dividing fence in accordance with the Woolacotts report dated 25 February 2016;
- (c) engaging Living Planet Landscapes to carry out the work referred to in its quotation dated 24 May 2016 in the sum of \$5,700.00 + GST and
- (d) engaging Boardman & Marriott to carry out the work referred to in its quotation dated 26 March 2016 in accordance with the Lane Cove Councils' Development Consent and without disturbing or damaging the water and gas lines/pipes that run parallel to the dividing fence on lot 45 on DP 4842.

53 The fencing work should be carried out within 3 months of the date of this order.

54 In the event that the period of 3 months is inadequate to allow the fencing work to be carried out, the parties have liberty to apply for an extension of time.

55 I order the applicants and the respondents to pay for the costs of the fencing work as referred to in equal proportions.

56 If the Act does not provide adequate jurisdiction for me to order the parties to make an application for Development Consent to the Lane Cove Council, as referred to above, I have taken the view that section 29 (2)(a) of the *Civil and Administrative Tribunal Act* 2013 does provide me with the necessary jurisdiction. That section states:

'General jurisdiction

(1) The Tribunal has **general jurisdiction** over a matter if:

(a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and

(b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.

**Note.** The general jurisdiction of the Tribunal includes (but is not limited to) functions conferred on the Tribunal by enabling legislation to review or otherwise re-examine decisions of persons or bodies other than in connection with the exercise of the Tribunal's administrative review jurisdiction.

(2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its general jurisdiction:

(a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,'

57 The order requiring the making of an application for Development Consent to the Lane Cove Council is an ancillary order.

58 During the hearing the respondents stated that they intended to sell their land which they assumed would be re-developed by the demolition of the premises constructed on their land and the erection of a new building. In that context they stated that a new dividing fence would no doubt be constructed by the new owners. However there is as I understand the situation, no contract in existence for the sale of the land. It is therefore

not possible to state if such a state of affairs will exist in the future, or if so when.

- 59 In these proceedings I am confronted with the difficulty that the applicants appear to have a tendency to ignore Tribunal orders and proceed in the way they think best regarding dividing fence. On the other hand the respondents' implied position seems to be that they will take no action to repair the dividing fence because they anticipate that their land will be sold and that in the fullness of time a new dividing fence will be constructed by the future owner of their land once an anticipated redevelopment of the land is completed.
- 60 Having regard to the difficulty that I have adverted to in the preceding paragraph, I have determined that the best way to proceed is to make an order that the applicants are to be responsible for making the necessary arrangements for the fencing work to be carried out. The respondents will be protected by this order because they will not be liable for fencing work that does not come within the orders that I will make for the fencing work as I have detailed it in paragraph 52.
- 61 The parties are at liberty to make an application for costs pursuant to section 60 of the *Civil and Administrative Tribunal Act 2013* should they wish to do so.

**D Goldstein**

**Senior Member**

**Civil and Administrative Tribunal of New South Wales**

**1 July 2016**

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.

Registrar

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Decision last updated: 06 October 2016