



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Fallon v Croese [2016] NSWCATCD 40
Hearing dates:	29 March 2016
Decision date:	11 May 2016
Jurisdiction:	Consumer and Commercial Division
Before:	K Ross, General Member
Decision:	<ol style="list-style-type: none">1 A new Colorbond sheet metal dividing fence 1.8 metres high, in woodland grey, is to be erected on the common boundary line between the applicant's and the respondents' adjoining lands, as surveyed by Parker Scanlon.2 The fencing work is to be carried out by a contractor of the respondents' choice ("the fencing contractor").3 The applicants are to contribute the sum of \$1,225.00 to the cost of erection of the fence.4 Subject to availability of the fencing contractor, the fencing work is to commence not later than 31 August 2016.5 The fencing work is to be carried out in a good and workmanlike manner using new materials. The contractor must be appropriately qualified and licensed.6 The respondents are to provide details of the proposed contractor, including contact and license details and a detailed scope of works to the applicants not less than 7 days before construction of the fence is to commence.7 The respondents must pay the whole cost of the fencing work to the fencing contractor on or before the date of completion of the fencing work and will be the only party to give instructions to the fencing contractor in relation to the carrying out of the fencing work.8 The applicants are to pay the respondents their contribution on the day of completion of the fencing work, without deduction or allowance.9 In the event that these orders are not complied with

either party may apply to renew these proceedings at any time up until 30 May 2017.

Catchwords:	Fencing work
Legislation Cited:	Dividing Fences Act 1991
Category:	Principal judgment
Parties:	Brian Fallon & Jennifer Fallon (applicants) Jason Croese & Tracey Croese (respondents)
Representation:	The applicants appeared in person Jason Croese appeared in person and on behalf of Tracey Croese
File Number(s):	COM 15/62984
Publication restriction:	Unrestricted

REASONS FOR DECISION

- 1 In this matter the applicants seek an order for the erection of a 1.8 m high colorbond fence in woodland grey along the boundary between their property and the adjoining property owned by the respondents. They seek that the fence be erected as soon as possible, by Newstart Construction Pty Ltd, in accordance with that contractor's quotation dated 28 March 2016. They seek to contribute one half of the cost of the fence which could have been built in 2014, (\$1,225.00) with the respondents to pay the balance of the cost, on the basis that they say the respondents repudiated an agreement reached in 2014 in respect of the fence.
- 2 The respondents agree that a fence is required but seek to have the erection of the fence delayed until further into the construction of the dwelling on the respondents' land in approximately two month's time. They seek that the work be done by Artscape Solutions Pty Ltd in accordance with its quotation dated 16 April 2016 in the sum of \$4,977.50, with each party to pay one half of the quoted amount.

The applicants' evidence

- 3 The applicants provide a folder of evidence to which the Tribunal has had regard. It contains a copy of the fencing notice, correspondence between the parties, mediated agreement, photographs and correspondence with Council.
- 4 The applicant served a fencing notice on 27 November 2014. At that time construction of the applicants' home had commenced. The respondents had not commenced construction on their land. The fencing notice attached a quotation from Newstart Constructions to erect a 1.8 m high colorbond fence on the boundary, with one sleeper under each panel as required, for a total cost of \$2,450.00. The notice sought that the parties share equally the estimated cost of the fence.
- 5 Agreement was not reached and the applicants commenced proceedings in the Wyong

- Local Court. The parties attended mediation and an agreement was reached that the parties would share equally in the cost of erection of the fence. The proceedings were withdrawn.
- 6 At around this time a dispute arose between the respondent and another neighbour. The details of that dispute are not relevant to the matter before the Tribunal.
- 7 A dispute then arose between the parties about the necessity or otherwise for the applicants to construct a retaining wall along the boundary before the fence was erected. The applicants relied upon Council advice that no retaining wall was required. The respondent insisted that the applicants had raised the level of the land and were responsible to construct a retaining wall.
- 8 The applicants again commenced proceedings in the Local Court, seeking an order for the erection of the fence in accordance with the original quote, and for the respondents to contribute one half of the cost of that quote. Those proceedings were transferred to the Tribunal.
- 9 The applicants deny that they have altered their land by filling it. However they now submit that the respondents, having commenced construction on their land, have cut the land such that the original fence can no longer be built. They have obtained a fresh quotation from Newstart Constructions. That quotation is for \$4,000.00, plus a further \$2,600.00 to provide for 3 sleepers under each panel.

The respondent's evidence

- 10 The respondents also provide a bundle of documents to which the Tribunal has had regard. They raise three issues which they seek to have the Tribunal resolve, issues in respect of drainage from the applicants' driveway, removal of spoil which they allege has been placed on their land, and the construction of the fence on natural ground level. The Tribunal advised the respondents at the hearing that the drainage and spoil issues do not fall within the jurisdiction of the Tribunal on this application. Accordingly the issue which the respondents press is that the fence be constructed on natural ground level. The respondents rely upon a topographical survey of their lot to indicate the natural ground level. They argue that the fence should not exceed 1.8 metres from natural ground level in order to comply with Council requirements.
- 11 The applicants produced the fresh quotation (paragraph 9 above) from Newstart Constructions at the hearing. The Tribunal accordingly allowed the respondent to provide a quotation in response, and the applicants to make submissions in respect of that quote. The respondents produced two quotations from Artscope, one with 3 sleepers comparable to the Newstart quote, in the sum of \$5,995.00, and a second quote for a stepped fence in the sum of \$4,977.50.
- 12 The respondents object to the Newstart quotation, on the basis that the respondent and the Newstart contractor has been engaged in a dispute after the contractor allegedly parked his vehicle on the respondents' land. On the other hand the applicants object to the Artscope quotation on the basis that the contractor states that he will only accept

instructions from the respondent.

The law

13 The Dividing Fences Act 1991 (the Act) defines a fence as follows:

"fence" means 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, and includes:

- (a) any gate, cattlegrid or apparatus necessary for the operation of the fence, and
- (b) any natural or artificial watercourse which separates the land of adjoining owners, and
- (c) any foundation or support necessary for the support and maintenance of the fence, but does not include a retaining wall (except as provided by paragraph (c)) or a wall which is part of a house, garage or other building.

14 The general principles of the Act are set out in s 6, which states:

6 General principle-liability for fencing work

(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.

15 Section 4 of the Act sets out the requirements to make a determination of what is a sufficient dividing fence as follows:

4 Determination as to "sufficient dividing fence"

In any proceedings under this Act, the Local Court or the 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.

16 The orders which the Tribunal is empowered to make are set out in s 14 of the Act:

14 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.

Decision

- 17 The Tribunal is satisfied that there has been a valid notice to carry out fencing work served in accordance with s 21 of the Act 1991.
- 18 The application for an order was made not less than one month after the date of service of the Notice.
- 19 There is no dispute that there is no sufficient dividing fence.
- 20 The jurisdiction of the Tribunal is limited in dividing fence disputes. The Tribunal, having found that there is no sufficient dividing fence, may make an order, relevantly in this matter, as to the fencing work to be carried out, the manner in which contributions are to be apportioned, and the time within which the work is to be carried out. The fence includes any foundation or support necessary for the support and maintenance of the fence, but does not include a retaining wall.
- 21 In this matter the quotation for the fence has risen since the commencement of this matter, from \$2,450.00 to up to \$6,600.00. The difference in the quotations is related to the necessity to retain land on the boundary. The original quote allowed for 1 sleeper under each panel, whereas the most recent quotations require 2 or 3 sleepers. The Tribunal is satisfied that the sleepers are not required as foundations or supports for the fence. They are required to retain the land because of the cutting and filling on each side of the boundary. The sleepers amount to retaining walls. The Tribunal has no jurisdiction to make orders in relation to them.
- 22 The Tribunal is satisfied that it is appropriate to make an order that a 1.8 m high colorbond fence, in charcoal grey, be erected on the boundary as surveyed by Parker & Scanlon.
- 23 The Tribunal is satisfied that at the time the fencing notice was served and the original agreement reached, a sufficient dividing fence could have been erected on the boundary at a cost of \$2,450.00. The Tribunal is not satisfied that the respondents had any sufficient reason to prevent the erection of the fence at that time. In addition, the changes to the quotations since that time have been necessitated by works carried out by the respondents on their land. The Tribunal is satisfied that the applicants should contribute one half of the cost of the original quote, as their contribution to the erection of the fence.
- 24 The Tribunal is not satisfied that it is appropriate to order the immediate erection of the fence as sought by the applicants. There is a real possibility that damage will be caused during the construction works. In addition, there needs to be retaining walls erected by the respondents before the fence can be erected. The applicants seek to

have the work carried out immediately and say that it can be completed from their property but the Tribunal is not satisfied that that is the case, bearing in mind the requirement for the erection of the sleeper retaining wall below the fence.

- 25 Because the respondents will be responsible for a larger share of the account the Tribunal is satisfied that the respondents should engage the contractor of their choice to facilitate the construction of the fence. It appears to the Tribunal that the quotation of Artscope in the sum of \$4,977.50 is appropriate to provide a sufficient dividing fence along the boundary. However that quotation includes retaining walls, and it is inappropriate for the Tribunal to make an order in respect of those retaining walls.

K Ross

General Member

Civil and Administrative Tribunal of New South Wales

11 May 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 July 2016