

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Wong v Arthur* [2020] QCAT 89

PARTIES: **CHI TAK WONG**  
(applicant)

v

**MANUEL ARTHUR**  
(respondent)

APPLICATION NO/S: MCDO1850-18

MATTER TYPE: Other minor civil dispute matters

DELIVERED ON: 31 March 2020

HEARING DATE: 10 September 2019

HEARD AT: Brisbane

DECISION OF: Member Lumb

ORDERS: **The Application be dismissed.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE  
TRIBUNALS – QUEENSLAND CIVIL AND  
ADMINISTRATIVE TRIBUNAL – minor civil dispute –  
dividing fence – common boundary – sleeper retaining  
wall with timber dividing fence above it – Tribunal’s  
jurisdiction in relation to retaining walls – whether or not  
the timber dividing fence was a ‘sufficient dividing  
fence’

*Neighbourhood Disputes (Dividing Fences and Trees)*  
*Act 2011 (Qld)*, s 11, s 12, s 13, s 31, s 33, s 35, s 36  
*Queensland Civil and Administrative Tribunal Rules*  
2009 (Qld), s 83

*White v Steer* [2018] QCATA 30

APPEARANCES &  
REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

## REASONS FOR DECISION

### Introduction

- [1] By an Application for minor civil dispute – dividing fences filed on 21 December 2018 ('the Application'), the Applicant sought orders against his neighbour, the Respondent, under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* ('the NDA') in relation to a dividing fence between the parties' respective properties.

### Background

- [2] The Applicant served a Form 2 Notice to Contribute for Fencing Work (pursuant to s 31 of the NDA) seeking a 50% contribution towards the amount of \$9,889.00 for the cost of replacing a timber retaining wall and timber fence between adjoining properties located in Mansfield in the State of Queensland. The properties are owned by the Applicant and the Respondent respectively. The Applicant's property is to the left of the Respondent's property as viewed from the street.
- [3] The Applicant's property is at a lower level than the Respondent's property. The Respondent contends that the difference in levels is due to a cut in the natural earth level occurring at the time the Applicant's house was built.
- [4] The parties sought to resolve the dispute between themselves and despite negotiating in good faith have not been able to resolve their differences.
- [5] The Applicant tendered various photographs of the retaining wall and the dividing fence separating the respective properties (exhibit 1 and 2 (eight photographs in total)).
- [6] It is evident from the photographs that the structure referred to by the parties as the 'retaining wall' comprises horizontal timber sleepers supported by vertical timber posts. A timber fence, comprising closely set vertical palings affixed to horizontal railings, in turn affixed to vertical timber posts, sits atop the retaining wall with the vertical timber posts affixed to both the horizontal timber sleepers and the vertical posts of the retaining wall.
- [7] It was said by the Applicant, and it is evident from the photographs, that the retaining wall has given way at two sections, at the front of his property and at the rear of his property. At the rear section, the section of sleepers has broken apart under the apparent force of the earth behind it. At the front section, the retaining wall is bowed but the sleepers appear to remain intact.
- [8] The Applicant says that the dividing fence that sits above each of those sections is leaning towards his property. Having regard to the photographs, I find that the rear section of the timber fence, comprising what I would describe as two panels, is leaning forward towards the Applicant's property although not to an extent that would appear to pose any safety threat.
- [9] The other photographs do not enable a similar finding to be made in relation to the front section of the timber fence, although, having regard to the bowing of the retaining wall under that section, this is possible.

- [10] With respect to the remaining sections of the retaining wall and timber fencing, I accept the Respondent's submission that such structures are in a satisfactory condition. That is demonstrated by the photograph being exhibit 1D.
- [11] The amount claimed by the Applicant is based on a quotation from Sunnyboys Fencing dated 28 July 2018 (exhibit 3) which quotes a price of \$9,889.00 (inclusive of GST) for replacing the entire 28 metre section of retaining wall using 200mm x 75mm treated hardwood posts and 200mm x 75mm treated pine horizontal sleepers; replacing the timber fence of the same length with 1.8 metre high butted paling fence using 100mm x 75mm treated hardwood posts, three 100mm x 38mm treated pine rails and 100mm x 16mm treated pine palings; demolition and removal of the retaining wall and fence; 'geomatting', drainage gravel and 65mm socked 'aggy' (I assume shorthand for agricultural) pipe behind the wall; delivery and concrete. This quote was the cheapest of three quotes obtained by the Applicant, the other two quotes being \$21,351.00 (GST inclusive) and \$20,944.00 (plus GST) respectively.
- [12] The Respondent relied on a quotation also from Sunnyboys Fencing dated 28 July 2018 which provided a quotation for the replacement of 10 metres of retaining wall and timber paling fence (which the Respondent stated represented a five metre section at the front of the properties and a five metre section at the rear). The quoted price was \$4,180.00. The Respondent submitted that those two sections were the only ones that needed replacing and further submitted that he should only be responsible for about 20% of the quoted price on the basis that the retaining wall was largely, if not entirely, for the benefit of the Applicant, given the amount of cut on the Applicant's property necessitating the retaining wall. The Respondent acknowledged that there was some fill at the front section of his property adjacent to the retaining wall in that location.
- [13] The first question that arises is whether the Tribunal has jurisdiction to deal with this matter.

### **Jurisdiction**

- [14] QCAT has jurisdiction to hear and decide any matter arising under Chapter 2 of the NDA.<sup>1</sup>
- [15] Section 35(1) provides for the making of orders for an application in relation to fencing work for a dividing fence.
- [16] A 'dividing fence' means a fence on the common boundary of adjoining lands.<sup>2</sup>
- [17] The meaning of 'fence' is found in s 11 and, importantly for the present case, a retaining wall is not a fence.<sup>3</sup>
- [18] 'Retaining wall' is not defined in the NDA. That phrase is defined in the Macquarie Dictionary to mean a wall built to hold back a mass of earth, etc.
- [19] As noted above, the parties referred to the wall comprising horizontal sleepers as a 'retaining wall'. The fencing contractors who provided quotations did likewise.

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<sup>1</sup> Section 33 of the NDA.

<sup>2</sup> Definition of 'dividing fence' in the Dictionary to, and s 12 of, the NDA.

<sup>3</sup> Section 11(2)(a) of the NDA.

There was no dispute that the retaining wall held back earth on the Respondent's property. I am satisfied that the wall comprising horizontal sleepers was a 'retaining wall' for the purposes of the NDA. The retaining wall is not a 'fence' for the purposes of that Act.

[20] In my view, the only power invested in QCAT to make an order concerning a retaining wall is provided by s 35(1)(f) which permits QCAT to decide and order any other work to be carried out that is necessary to carry out the fencing work ordered under s 35, including work for a retaining wall.

[21] In *White v Steer*,<sup>4</sup> it was said by Member Howe:

[14] The NDA gives the tribunal jurisdiction to make orders about fencing work. It is clear the tribunal has no jurisdiction to make orders about retaining walls other than as an adjunct to an order about fencing work pursuant to s 35. It is an ancillary power only.

[15] The limit of that ancillary power is not made clear in the legislation. One of the extrinsic aids available where legislation is ambiguous or unclear in meaning is the explanatory note or memorandum relating to the Bill introducing the legislation into parliament. Here the explanatory notes to the Bill explain that the definition of a fence excludes a retaining wall for a specific purpose. The comments of the New South Wales Law Reform Commission on the subject of dividing fences are considered pertinent and the following extract from the Commission is set out in the explanatory notes: Retaining walls serve quite different purposes from fences. They are usually substantial and extensive structures which repose within the subsurface of the land of one adjoining owner .... Retaining walls are usually erected solely for the benefit of the owner who undertakes excavation work.

[16] The explanatory notes continue: Generally retaining walls involve engineering specifications prior to construction. They are more than the mere levelling of dirt. Unlike fences, it is not usually possible to make both adjoining owners liable for the cost of maintaining, repairing or replacing a retaining wall. This is because usually a retaining wall is of greater benefit to one of the adjoining owners. However, the kinds of orders which QCAT can make about carrying out fencing work include work for a retaining wall if the repair of the fence is dependent upon the work for the retaining wall.

[17] It is clear that the tribunal can only make an order about a retaining wall where the retaining wall work is necessary to give effect to an order about fencing work ...

[22] I respectfully agree with Member Howe's observation that the power under s 35(1)(f) of the NDA to make orders in respect of a retaining wall can be described as an 'ancillary power' only.

[23] In my view, an order in respect of a retaining wall cannot be made in the absence of a finding that an order should be made in relation to a 'dividing fence'.

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<sup>4</sup> [2018] QCATA 30.

[24] The threshold question is whether the timber fence in the present case (as distinct from the retaining wall) is a ‘sufficient dividing fence’.

**Is the timber fence a sufficient dividing fence?**

[25] Section 13 of the NDA provides:

- (1) A dividing fence is a *sufficient dividing fence* if—
  - (a) for adjoining land consisting of 2 parcels of residential land, the dividing fence—
    - (i) is between a minimum of 0.5m and a maximum of 1.8m in height; and
    - (ii) consists substantially of prescribed material; or
  - (b) for adjoining land consisting of 2 parcels of pastoral land, the dividing fence is sufficient to restrain livestock of the type grazing on each of the parcels of land; or
  - (c) in any case—
    - (i) the adjoining owners agree the dividing fence is a sufficient dividing fence; or
    - (ii) QCAT decides the dividing fence is a sufficient dividing fence.
- (2) For this chapter, the existence of a fence, other than a dividing fence, on adjoining land must not be taken into account in deciding whether there is a sufficient dividing fence.
- (3) In this section—

*prescribed material*, for a dividing fence, means any of the following materials unless the material does not comply with a requirement under a relevant local law—

- (a) wood, including timber palings and lattice panels;
- (b) chain wire;
- (c) metal panels or rods;
- (d) bricks;
- (e) rendered cement;
- (f) concrete blocks;
- (g) hedge or other vegetative barrier;
- (h) other material of which a dividing fence is ordinarily constructed.

[26] Section 36 of the NDA provides:

In deciding an application about whether a dividing fence is a sufficient dividing fence, QCAT may consider all the circumstances of the application, including the following—

- (a) any existing or previously existing dividing fence;

- (b) the purposes for which the 2 parcels of land consisting of the adjoining land are used, or intended to be used;
- (c) the kind of dividing fence normally used in the area;
- (d) whether the dividing fence is capable of being maintained by the adjoining owners;
- (e) any policy adopted, or local law made, in relation to dividing fences by a local government for the area where either parcel of land is situated;
- (f) any requirement for fencing work in a development approval for the land of either adjoining owner;
- (g) any written agreement made between the adjoining owners for the purposes of this chapter.

- [27] I accept that the timber fence existed at the time that the Applicant purchased his property approximately eight years ago. The respective properties are used for residential purposes. I am satisfied that the timber fence is no higher than 1.8 metres but exceeds 0.5 metres in height and also that it consists of prescribed material namely wood, including timber palings. I also find that the timber fence is capable of being maintained by the parties and that no written agreement has been made between the parties for the purposes of Chapter 2 of the NDA.
- [28] The evidence adduced to the Tribunal did not address any of the matters set out in subsections 36(c), (e) and (f) of the NDA.
- [29] As noted above, the rear section of the timber fence is leaning slightly forward towards the Applicant's property. On the available evidence, I cannot be satisfied on the balance of probabilities that the front section of the timber fence is also leaning forward.
- [30] In my view, the state of the timber fence at present is such that it is a sufficient timber fence for the purposes of the NDA. A 'sufficient dividing fence' may fall into such disrepair that it can no longer be described as a sufficient dividing fence. However, in my view, that point has not yet been reached in relation to the dividing timber fence the subject of this dispute. The fact that the rear section of fence is leaning towards the Applicant's property as indicated in the relevant photograph does not, in my view, mean that the timber fence is not a sufficient dividing fence. Even if I had been satisfied that the front section of the timber fence was also leaning, I would still have been satisfied as to the sufficiency of the fence on the basis of the photographs tendered. I consider that, presently, the timber fence is satisfactorily performing its function as a dividing fence.
- [31] The main issue that has arisen is in relation to the retaining wall. It has fallen into significant disrepair insofar as the two sections identified above are concerned. However, the retaining wall is not a dividing fence for the purposes of the NDA. I consider that no order under the NDA ought to be made in relation to the timber fence and, as a consequence, the Tribunal has no jurisdiction to make any order in relation to the retaining wall.

- [32] I would add that, if I had been satisfied that the timber fence was not a sufficient dividing fence, I would have concluded that the fence was capable of repair by replacement of only the two sections of timber fencing the subject of the quotation obtained by the Respondent (in which event I would have considered that a 50/50 split of such cost would have been appropriate).

### **Conclusion**

- [33] For the reasons set out above, I find that the timber fence is a sufficient dividing fence, the retaining wall is not a 'fence' for the purposes of the NDA and that the orders sought should not be made.
- [34] I dismiss the Application.
- [35] There is no basis for ordering costs having regard to the conclusion reached by the Tribunal and s 83 of the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld).