

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Egan v North Goonyella Bodycorp Two* [2021] QCAT 110

PARTIES: **ANTHONY JAMES EGAN**

(applicant)

v.

NORTH GOONYELLA BODYCORP TWO

(respondent)

FILE NO; Mackay Q 7/20

MATTER TYPE: Dividing Fence dispute

DELIVERED ON: 22 February 2021

HEARING DATE: 04 September 2020

DECISION OF: Member J M Aberdeen (Acting Magistrate)

ORDERS: **IT IS ORDERED that a new sufficient dividing fence be erected on the common boundary between the property of the Applicant, at 1/23 Cabbage Tree Road, Andergrove, Queensland, 4740, and the property of the Respondent, at 18 Sutton Court, Andergrove, Queensland, 4740, as follows –**

- (i) The fence is to be erected on the boundary between the properties;**
- (ii) The existing fence is to be removed, and the costs of removal are to be shared between the parties on a 50/50 basis;**
- (iii) A new fence is to be erected consisting of the following –**
 - a. Treated timber posts, with concrete footings to the required depth;**
 - b. Horizontal rails are to be of treated timber, three (3) in number, and affixed to the posts;**
 - c. Palings are to be of treated timber, affixed to the rails;**
 - d. The parties are to share the costs of supply and erection of the posts, rails, and palings, on a 50/50 basis;**
- (iv) The Applicant, at his own cost, is at liberty to arrange for a nib wall to be erected, during the course of construction of the timber fence, if he wishes to do so;**

- (v) The parties are to obtain their own quotations for the timber fence work as above to be performed (that is, the nib wall component is not be included), and to provide copies of all such quotations to the other party;**
- (vi) The parties are to endeavour to agree to the engagement of a contractor on the basis of the quote most agreeable to both parties;**
- (vii) The Applicant is to be the point of contact for all contractors engaged in respect of the works involved; and is to advise in a timely way the Respondent, *via* email to Ms Irene Webb, of all arrangements with respect to the removal and construction of the fences;**
- (viii) The Applicant and the Respondent shall each allow such reasonable access to their respective properties as may be required by the engaged contractors to enable the above works to be carried out;**
- (ix) The parties have liberty to apply.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – Dividing fence dispute – whether an existing fence is a “sufficient dividing fence” – relevant considerations in determining whether the existing fence is sufficient, so as to require contribution between adjoining owners

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 7, ss 11, 12, 13, s 20(1), ss 35, 36

Dividing Fences Act 1861 (Qld), Preamble, s 5, s 13

Wong v Arthur [2020] QCAT 89 (Member Lumb)

Forestenko & Donnelly v Lloyd [2015] QCATA 154 (Snr Member Stilgoe OAM)

White v Steer [2018] QCATA 30 (Member Howe)

APPEARANCES & The Applicant appeared on his own behalf.

REPRESENTATION: The Respondent was represented by Ms Irene Webb (by telephone).

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

REGISTRY: Mackay

NUMBER: Q 7/20

Applicant: **ANTHONY JAMES EGAN**

and

Respondent: **NORTH GOONYELLA BODYCORP TWO****DECISION**

- [1] This an Application under section 30(3) of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (“**NDA**”);
- [2] The Applicant, Mr Anthony Egan, lives with his family at 1/23 Cabbage Tree Road, Andergrove, a suburb of Mackay;
- [3] The Respondent (**NGB2**) is the Body Corporate in respect of a multi-occupancy dwelling, consisting of four townhouses, located at 18 Sutton Court, Andergrove;
- [4] The two properties, that of the Applicant and that of the Respondent, share a common boundary (*ie* dividing) fence. It is this fence which is the subject of the present application;
- [5] The parties are not agreed on any particular quotation to carry out the work required to dismantle the existing dividing fence, and to erect a new dividing fence;
- [6] This absence of agreement is at least partly attributable to a difference of opinion as to a preliminary fact, namely – is the existing fence a “**sufficient dividing fence**”? The Applicant contends that, due to the age, and present condition of the fence, it is *not* a sufficient dividing fence. The Respondent submits to the contrary – that, although

it may need some relatively minor maintenance, it *is*, nevertheless, a “sufficient dividing fence”.

- [7] The jurisdiction of QCAT to make an Order in the terms sought by the Applicant is dependent upon there being an absence of a “sufficient dividing fence” at the present time¹. This threshold issue, therefore, is of critical importance in resolving this dispute.

Material on the Record:

- [8] Each of the parties has filed material in this matter. The determination of the primary issue, in my opinion, depends upon the view taken by the Tribunal based upon the material submitted by each party.
- [9] For clarity, and later reference (should such be required) the material considered is as follows –

Exhibit 1	Claim (Form 53) filed 21/01/2020
Exhibit 2	Quote <i>JAI-COR</i> dated 31/10/2019
Exhibit 3	Quote <i>Nigel Brown Contracting</i> dated 14/06/19
Exhibit 4	Notice to Contribute (Form 2) dated 19/09/2019
Exhibit 5	Bundle of email messages – Applicant to Respondent
Exhibit 6	Response (Form 36) filed 12/02/2020
Exhibit 6A	Series of photographs - Respondent
Exhibit 7	Bundle of emails passing between the parties
Exhibit 8	Statutory Declaration by Ms Irene Webb, declared 06/03/2020
Exhibit 9	Affidavit of Ms Irene Webb, affirmed 02/09/2020
Exhibit 10	Quote <i>Mackay Fencing</i> dated 12/12/2019
Exhibit 11	Affidavit of Applicant

¹ Section 20(1) of **NDA** parallels the policy behind section 6 of the *Dividing Fences Act 1991* (NSW), and premises the liability of an adjoining owner to contribute to the construction of a “sufficient dividing fence” upon the condition that “there is no sufficient dividing fence between two parcels of [adjoining] land”. Note also the Flowchart at [K-040] of the *QCAT Minor Civil Dispute Bench Book*.

What is a “sufficient dividing fence”?

[10] Section 12 of the **NDA** defines a “dividing fence”, so far as relevant to this dispute, as follows -

(1) A **dividing fence** means a fence on the common boundary of adjoining lands.

[11] Section 13 of the **NDA** defines a “sufficient dividing fence”, so far as relevant to this dispute, as follows –

(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; ...

(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; ...

[12] In this case, there is no dispute that both the existing fence, and the fence proposed by the Applicant, comply with section 13(1); and that both are (to be) made of wood;

[13] Neither party has suggested, at any time, that both the existing fence, and the proposed fence, are not (to be) on the common boundary of their adjoining lands; and accordingly I find that section 12 of the **NDA** is satisfied;

[14] What, then, is entailed within the term “sufficient” in this context?

[15] The word “sufficient” has been defined as “enough; adequate”². This is a convenient starting point; but it begs the further questions – Enough *to what?* and Adequate *for what?* The primary meaning provided by the *Oxford English Dictionary* is –

“Of a quantity, extent, or scope adequate to a certain purpose or object.”

[16] Thus extended, it is reasonably clear that “sufficient” is related to purpose, or object.

² *Oxford Dictionary of English*, 3rd Ed, Online; accessed 18 January 2021.

[17] This seems to be supported by the history of fencing legislation. The idea of a “sufficient” fence finds a central place in the *Fencing Act of 1861*³. Decisions on the Act indicate that the purpose of the fence was a primary consideration in an assessment of “sufficiency”⁴.

[18] This interpretation is expressly supported by section 36 of the NDA, which states that the Tribunal, in considering whether a dividing fence is a “sufficient dividing fence”, may consider all the circumstances, including –

“(b) the purposes for which the 2 parcels of land consisting of the adjoining land are used, or intended to be used.”

[19] I think the term “sufficient” in the expression “sufficient dividing fence” governs both “dividing” and “fence” – *ie*, the division of the properties must be accurate (*ie*, on the common boundary) and that its purpose as a dividing structure should be obvious to any reasonable observer as being a common boundary marker; and further, the fence should be “sufficient” as a fence enclosing a residential (as in this case) portion of land.

[20] Of course, there are fences – and then there are fences: the potential diversity of fencing styles is endless. It is not the function of the Tribunal to decide which of various types of fence may best suit a particular location. Rather, the Tribunal is concerned to ensure basic conditions are observed (*eg* as laid down in section 13); and that contribution between adjoining owners is fair and equitable.

[21] The New South Wales Law Reform Commission, in its report into *Dividing Fences*, adverted to the problems associated with the determination of whether or not a fence could be regarded as a “sufficient” fence⁵ –

[3.25] Various attempts have been made to define a “sufficient” or “adequate” fence for the purpose of dividing fences legislation in other jurisdictions, either by a list of acceptable types of fence or by some general standard, such as whether it can resist the trespass of cattle or is sufficient for the purposes of the adjoining owners. The result has been either too restrictive or too vague to provide any real guidance. The Commission regards the approach taken in the Northern Territory’s *Fences Act 1972* as preferable. It provides that where a court has to determine what is a sufficient fence under the Act, it shall take a list of specified items into account. As the fencing needs and uses of adjoining owners vary considerably, this approach has the benefit of allowing magistrates and land boards a degree

³ 25 Vict No 12; 2 *Cooper’s Statutes of Queensland* (1881) p 1160. The “fences” encompassed by the Act were also “dividing” fences, as indicated by the Preamble to the Act: “*Whereas it is expedient to amend the law relating to the erection and upholding of fences dividing lands belonging to different owners...*”. Other jurisdictions also utilized the touchstone of “sufficient” in the context of fencing: *eg Cochram v Cross* (1906) 8 WALR 90; *The Fences Statute 1874* (Victoria).

⁴ See *eg Seib v Schonfeld, ex parte Schonfeld* [1910] St R Qd 12 (FC).

⁵ [1988] NSWLRC 59, footnotes omitted.

of flexibility while directing them to take into account a number of factors. The differential weight to be attached to each factor will vary in each case and may be adjusted by the adjudicator. While this approach will not give an exact answer when a party wishes to determine whether a particular fence is sufficient, it should allow them to come to a reasonably informed conclusion.

- [22] There is no suggestion in this case that the existing fence is not an accurate boundary marker between the properties, and it can be expected that any replacement fence will follow that same line.
- [23] Nor has it been suggested that the proposed fence, of treated pine timber, is in any way inappropriate; indeed, it would seem to be intended to replace *in kind* the existing fence. No issue has been raised between the parties as to the *style* of fence proposed.
- [24] As indicated, the sole point of contention is that, from the Respondent's perspective, the existing fence is a "sufficient dividing fence". If that is so, the Tribunal can make no order for its demolition, and replacement.

What is the condition of the existing fence?

- [25] The determination of this question turns upon (i) the condition of the existing fence, and (ii) the purposes served by a "sufficient" fence between residential properties.
- [26] The Applicant provided material as to the condition of the existing fence. A report from Mr Nigel BROWN, of "Nigel Brown Contracting"⁶, dated 23 March 2020, stated, as to the condition of the fence –

"Upon inspection of the fence my findings were as follows :

1. Fence posts were loose and rotted below ground level across the entire rear boundary;
2. The palings were rotten and many were no longer attached to lower rail."

- [27] Mr Brown attributed the cause of this condition to two factors:
- (i) The ground level of the Respondent's property was significantly higher than Mr Egan's property, which resulted in constant moisture of soil against the fence; and
 - (ii) Water run-off does not have a diverted route, and further contributes to the moisture by flowing through the fence.

⁶ QBCC No 15177682 cited; Exh 11, 1st document.

[28] Mr Jason EGAN, of Jai-Cor⁷, has provided a Statutory Declaration pertaining to the condition of the fence:

“On inspection of the fence I note there are several issues with the existing fence, such as broken palings, warped palings, rotting paling, the fence is quite old and only has 2 rails holding the palings, by only having 2 railings this will result in warping of the palings, all new fences are installed with 3 railings which help prevent warping, below is the following defects and issues with the fence I have noted.

The fence has palings rotting along the bottom due to the neighbouring land is built up against the fence which has resulted in these rotting, please see attached photos reference R1, R2, R3, R4.

A lot of the fence paling are also broken, please see attached photos, reference B1, B2, B3, B4, B5.

There are also warped fence palings due to only 2 rails installed and the age of the fence, please see attached photos, reference W1, W2, W3, W4, W5.”

[29] The Respondent has filed a Statutory Declaration under the hand of Ms Alice BARBOUR, the proprietor of Seabreeze Realty⁸, and the real estate agent responsible for looking after the Respondent’s property since 2016. On about 5 February 2020, Ms Barbour inspected the existing fence, after speaking with Ms Irene WEBB, a representative for the Respondent, and owner of one of the units on the Respondent’s property.

[30] Ms Barbour expressed the opinion to Ms Webb that there was “nothing wrong with the fence” – that it needed a good clean with a gurney, that there may have been a few loose palings which could be replaced, but that the fence was “quite sturdy”⁹. Ms Barbour also indicated that she did not believe the fence was unsafe¹⁰. Ms Barbour also took a number of photographs of the fence.

[31] The evidence before me includes an envelope marked “Photos Fence”, which was filed¹¹, apparently with the Response, on 12 February 2020. This contains three copies of a set of seven (7) photos date-stamped “05.02.2020”. There are in addition a further six (6) photographs, without date-stamps, which I assume were taken on a different occasion, or by a different camera. I will have more to say about these photos below.

⁷ Exh No 11, 2nd document; see also Exh No 2, quotation from Jai-Cor. The Respondent indicated a belief that Mr Jason Egan was the Applicant’s brother, an assertion which was not rebutted by the Applicant.

⁸ Annexure to Exh No 8.

⁹ Stat Dec para 2.

¹⁰ Stat Dec para 3.

¹¹ Exh No 6A.

- [32] The Respondent also filed a Statutory Declaration under the hand of Ms Irene Webb¹², and an Affidavit also under the hand of Ms Webb¹³.
- [33] The Statutory Declaration deals with a number of issues, including Ms Barbour's opinion as to the condition of the existing fence. Ms Webb also mentions that "one or two contractors" had previously told her that the fence did not need replacing. Her belief was that the existing fence was in a "satisfactory condition". Ms Webb did not give any age for the fence; she did state that –
- "[The Applicant] asserts that the fence is 29 years old and all the other fences around are 5-10 years old, so therefore the fence should be replaced. Fences can last up to 100 years or more. The age of the fence does not dictate the replacement of a fence."
- [34] The Applicant in his Claim stated that the existing fence is 29 years (approx.) old¹⁴, and the condition of the fence was "poor, rotten, and unsafe".
- [35] Ms Webb's affidavit addresses matters other than those pertaining particularly to the fence (*eg* weeds, trespass by the Applicant). She states her opinion, as a previous owner-builder¹⁵, that none of the fence posts were loose when she visited the property on 20 August 2020. She states that "most of the palings" were attached, and that "the rot...is primarily the mould that needs to be washed off". Both, she states, are maintenance issues, and are easily rectified.
- [36] The Respondent also relies upon the opinion of a Mr Neil WARREN, of Mackay Fencing¹⁶. Mr Warren has provided an email to Ms Webb in the following terms¹⁷ –
- "This email confirms that I have done a quick inspection of the division fence on the LHS of the driveway from [C]abbage Tree Rd. [i]nto the units and it is my opinion that the division fence is sound and in a good state and should last another 5 years in normal conditions."
- [37] Mr Warren also notes, in a subsequent email to Ms Webb, that he had been in business in Mackay for 24 years, and had done about 750 fences a year for 24 years, a total of some 19,000 fences. He also noted "I reckon I know if the fence is good or bad".

Consideration:

¹² Exh No 8, filed 10 March 2020.

¹³ Exh No 9, filed 02 September 2020.

¹⁴ Exh No 1, page 3, section 6. This information is required by the prescribed Form 53, in sections 6 and 11. The Applicant does not appear (to me at least) to be raising the argument attributed to him by Ms Webb.

¹⁵ Exh No 9, para 9.

¹⁶ QBCC 1105717; see Exh No 10, Quotation to Ms Webb from Mackay Fencing dated 12/12/19.

¹⁷ Exhibit B (3 pp) to Exh No 9.

- [38] I have before me a number of photographs, some provided by the Applicant, and some provided by the Respondent.
- [39] The Respondent's photos are all taken from some distance away from the fence. Of the six photos that do not bear date-stamps, a few are blurred, while the others are relatively dark, and reveal little detail. None are "close-ups" of any part of the fence. All photos have been taken from the Respondent's side of the fence. From this side of the fence, the bottoms of the palings cannot be seen. That view is only available from the Applicant's side of the fence.
- [40] The photos taken by Ms Barbour on 5 February 2020 are taken from a closer distance to the fence. They also appear to have been taken only from the Respondent's side of the fence. Bowing can be noticed in a few palings. The bases of the posts, and of the palings, are below ground, and not visible. The horizontal rails, to which the palings are attached, show obvious blackening on both top and bottom rails. I am unable to tell, from the photographs, whether this is mould, or whether it is some form of rot. Ms Webb asserts that cleaning the fence with a gurney would clear this away. That may be the case if this discolouration was due solely to mould. I have no evidence before me as to exactly what this discolouration entails, whether cleaning with a gurney would remove it, or whether the underlying timber would have been in any way affected by its presence.
- [41] The Applicant has provided a number of photos which are attached to the Statutory Declaration of Mr Jason Egan, referred to above¹⁸. Photographs R1 to R4, show substantial damage to the bottoms of palings on the Applicants side of the fence. The extent of the damage varies, but ranges from mild to severe, in that in the latter case, part of the whole of the paling ends appear to have rotted away.
- [42] Photos B1 to B5 all show broken palings. Bases of some palings appear to have become rotted (B3).
- [43] Photo W1 shows a severely warped paling. Similarly with photo W.2, which shows the warping causing the foot of the paling to project some distance out from the rail. There appears to have been a paling or board affixed to the bottom of the palings. This may have been done to prevent further warping¹⁹. Photo W3 shows mild warping outwards of one, or perhaps a couple of palings. Photo W4 shows warping of a paling at the top end, where it has become de-attached from the rail. There may

¹⁸ Exh No 11, 2nd document, Photographic Annexures.

¹⁹ These photos may have been taken from the Respondent's side of the fence.

also be considerable warping to the paling on the extreme right of the photograph. Photo W5 shows an “above” view, looking down at the top of the fence. I am somewhat cautious about inferences to be drawn from this photo. It appears to show the Respondent’s side of the fence on the left, and the Applicant’s side of the fence on the right. The Respondent’s side of the fence might have a double row of palings attached to it; or perhaps additional palings nailed over the gaps in the row of palings directly against the fence. The most I think I can draw from the photo is that there may be some vertical twisting in these palings, as the tops of the palings don’t line up particularly well.

Conclusions as to current condition:

[44] The existing fence is some 1.8 m high. It is proposed to replace it with a 1.8 m fence, of very similar construction to the existing fence. Possible differences with the proposed fence identified in the material are (i) an increase in the number of rails from two, to three, to reduce warping of the palings, and (ii) it is recommended that a concrete structure be provided to address the difference in heights between the properties; this is variously referred to as a “concrete mowing strip”²⁰, “concrete protection strip”²¹, “rat wall”²², or a “nib wall”²³.

[45] The photographic evidence that the bottoms of the palings, visible from the Applicant’s side of the fence, are rotting, is clear, and is not refuted by anything submitted to the Tribunal by the Respondent. Mr Warren undertook a “quick inspection” of the fence from the Respondent’s side. As against that, I have the photos clearly showing the rot in the palings, and the opinion of Mr Brown that “fence posts were loose and rotten below ground level across the entire rear boundary”. Mr Brown’s report, containing these descriptions, has been available for quite some time. The Respondent has not challenged any of the photos submitted by the Applicant as to their provenance or accuracy. Nor has the Respondent challenged, by way of evidence²⁴, Mr Brown’s statement that the fence posts were rotted below the ground. It would seem logical to me that, having regard to the extent of rot to the base of the palings, it would not at all be surprising that the footings of the posts would also show similar deterioration.

²⁰ Exh No 3.

²¹ Perhaps “step”: Exh No 2.

²² Exh No 5, third page.

²³ Exh No 11, Annexure: Report by Nigel Brown.

²⁴ Ms Webb has deposed, in Exh No 9, at [9]: “...I totally disagree with the comments made by Nigel Brown ‘fence posts were loose and rotten below ground level across the entire rear boundary’.” It would seem to me to have been a fairly simple exercise for the Respondent to excavate beside random fence posts, and photograph the condition of the posts. No evidence of that sort was presented by the Respondent.

- [46] As stated, Mr Brown's report containing his observations has been available for a substantial period of time and, in my opinion, the Respondent has had ample opportunity to secure evidence to the contrary.
- [47] I place no real weight upon opinions that the fence seemed to be "solid" or "sound". Any structure can only be as sound as its foundations; and in this case, the evidence supports the view that the foundations of the fence are probably compromised.
- [48] A substantial number of palings are broken, warped or rotten. They would at best need replacement, in any event.
- [49] The only evidence I have as to the condition of the rails is their outward appearance assessed by reference to the photographs. In particular, I have had regard to photos D1 to D6 inclusive, in the last attachment to the Affidavit of Mr Anthony Egan²⁵. The rails appear to be encrusted which might (at least partially) be some sort of mould. Photo D6, a closer view, shows clear evidence of deterioration in the timber. This may be a result of weathering, in which case it indicates that the existing fence is of some age. I have no evidence to assist me in determining the structural integrity of the rails in general, and I am consequently unable to make any finding, other than that they are of considerable age, as I have indicated.
- [50] Having regard to the photos which have been adduced by the Applicant, I accept Mr Brown's opinion as to the condition of the fence in preference to the opinion of Mr Warren²⁶.
- [51] My overall impression is that this fence has passed its most useful period, and is in the process of deterioration. Whether this is because of sub-tropical conditions generally, a lack of appropriate maintenance over the years, or changes in land profiles which have resulted in increased moisture in the area of the footings of the fence, are matters which fall well beyond the limits the evidence I have received.

Is the existing fence "sufficient"?

²⁵ Exh No 11.

²⁶ Who, to be fair, conducted only a quick inspection, from one side only.

[52] The possible range of what may constitute a “sufficient” fence is limitless. The **NDA** itself recognises a variation in heights necessary to constitute a “sufficient” dividing fence, *ie* from a minimum of 0.5m to a maximum of 1.8 m. Obviously, what might be “sufficient” could vary depending on height – a 500mm fence is not going to achieve the same results as a 1.8m fence:

- A 500mm fence will not do a great deal to deter trespassers²⁷;
- Nor will it be effective in restraining pets, or small children;
- It will not require the type of foundations necessary to safely support a 1.8m;
- There is little privacy afforded by a 500mm fence.

[53] Yet each of these functions could be seen, to varying degrees, as desirable in a residential property fence. Any fence should have a reasonable lifespan – in this respect, section 13(3) sets out minimal mandatory requirements as to the materials of construction.

[54] In his Claim, Mr Egan has referred to the safety factor²⁸. I believe that this is a valid concern in any fencing decision. I draw some support for this approach from the recent observation of Member Lumb in *Wong v Arthur*²⁹, where the member observed –

“ 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.”

[55] In *Wong’s Case*, one of the issues – as in the present case – was whether an existing fence was a “substantial” fence. Member Lumb said –

²⁷ I don’t suggest that the term “fence” should be accorded too broad an interpretation by reference to “defence”, of which it is an elision: *Oxford English Dictionary Online*, “fence”, [5] accessed 20/01/2021. In this respect the most that could be said of modern residential fencing is that a fence marks out property as being private property, perhaps indicating that access is not encouraged in the case of those who do not have a legitimate reason for entry. A 1.8m fence *could* be erected to make unwelcome access more difficult, but equally could simply reflect a desire for a little more privacy, or even sound reduction from a busy thoroughfare. At one stage, the law recognised the privacy inherent in an “enclosed” yard, or place (*Vagrants, Gaming and Other Offences Act 1931*, s 4(1)(viii)(a)[Repealed]; the modern counterpart to this provision requires no such boundary indicator (*Summary Offences Act 2005*, s.11).

²⁸ Exh No 1, section 6.

²⁹ [2020] QCAT 89 at [8]; see also *Forestenko & Donnelly v Lloyd* [2015] QACTA 154 (Senior Member Stilgoe OAM), at [12] “privacy and utility” and [13] *semble* “safety of the children”.

“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.”

- [56] To adapt Member Lumb’s language – can it be said in this case that “the point has been reached” where the existing fence is no longer a “sufficient dividing fence”?
I believe it has.
- [57] It is, no doubt, in each case, a question of fact, and of degree. It is a question upon which opinions of reasonable people may honestly differ; perhaps especially where personal cost may be involved.
- [58] Palings, of course, may be replaced. In this case, neither party has attempted to place before me any firm number, or even a realistic estimate, how many palings would have to be replaced to overcome breakage, warping, and rot. Of course, whether it would be economical to replace palings into the same positions as the present palings, without any other alterations to the fence, would be a live issue – would it simply be placing new palings there to rot, as did the previous ones?
- [59] Taking into account their apparent state (*eg* Photo D6), can the rails be restored and re-used? Will the nails required to affix the new palings found properly in the old rails?
- [60] Assuming that the replacement of palings, and restoration and re-use of rails present no difficulties, and could be economically repaired, the underlying problem will remain with the rotting of the posts upon which the entire structure depends.
- [61] A 1.8m fence, made of timber, is of a substantial weight, and must, in the interests of safety of both the adjoining occupants, their guests, and their children (if any), be

relied upon to withstand everyday wear, tear and – especially in the sub-tropics – weather: the higher the fence, the greater is the impact of wind.

[62] On the basis of the findings I have made, as indicated above, I am of the opinion that the structure and safety of the existing fence has been compromised, and I am not persuaded that reasonable repairs would be effective to remove the significant risk of collapse in the foreseeable future.

[63] I find that the existing fence is *not* a “sufficient dividing fence”.

Orders:

[64] Section 35 of the **NDA** sets out the matters about which I may make orders in this matter.

[65] Although a number of quotations have been received in evidence, some of them are quite dated. I do not intend to attempt to estimate current costs, which may have changed since the quotes were issued.

[66] The references to a “nib wall” and other descriptives, raises the possibility that such a structure should be erected, in conjunction with the new fence. However, it appears to me that this “nib wall” is in the nature of a retaining wall. I have the authority to make an order that that be included³⁰. It is the case, however, that retaining walls, and in this case the nib wall, would benefit Mr Egan rather than the Respondent. This will have an impact upon apportionment of costs in respect of the nib wall component.

[67] I note that the quotation from Mackay Fencing, to Ms Webb, of 12 December 2019, refers to “Palings with a Nil gap”. The gap between the palings was not an issue directly agitated in this hearing. It would seem obvious to me that a “Nil Gap” will result in a greater number of palings than the present fence, and might also have an effect upon conditions in both of the respective properties, *eg* breeze, light, visibility, and possibly drainage. In the absence of evidence and submissions on this point, I do not intend to order a “Nil Gap”. If that was the intention of both parties, then it

³⁰ See *White v Steer* [2018] QCATA 30 at [14] to [17], cited in *Wong v Arthur*, above.

should not cause any real difficulty, having regard to the terms of the order I will be making.

[68] The Order of the Tribunal is as follows –

IT IS ORDERED that a new sufficient dividing fence be erected on the common boundary between the property of the Applicant, at 1/23 Cabbage Tree Road, Andergrove, Queensland, 4740, and the property of the Respondent, at 18 Sutton Court, Andergrove, Queensland, 4740, as follows –

- (x) The fence is to be erected on the boundary between the properties;**
- (xi) The existing fence is to be removed, and the costs of removal are to be shared between the parties on a 50/50 basis;**
- (xii) A new fence is to be erected consisting of the following –**
 - a. Treated timber posts, with concrete footings to the required depth;**
 - b. Horizontal rails are to be of treated timber, three (3) in number, and affixed to the posts;**
 - c. Palings are to be of treated timber, affixed to the rails;**
 - d. The parties are to share the costs of supply and erection of the posts, rails, and palings, on a 50/50 basis;**
- (xiii) The Applicant, at his own cost, is at liberty to arrange for a nib wall to be erected, during the course of construction of the timber fence, if he wishes to do so;**
- (xiv) The parties are to obtain their own quotations for the timber fence work as above to be performed (that is, the nib wall component is not be included), and to provide copies of all such quotations to the other party;**
- (xv) The parties are to endeavour to agree to the engagement of a contractor on the basis of the quote most agreeable to both parties;**
- (xvi) The Applicant is to be the point of contact for all contractors engaged in respect of the works involved; and is to advise in a timely way the Respondent, *via* email to Ms Irene Webb, of all arrangements with respect to the removal and construction of the fences;**
- (xvii) The Applicant and the Respondent shall each allow such reasonable access to their respective properties as may be required by the engaged contractors to enable the above works to be carried out;**

(xviii) The parties have liberty to apply³¹.

[69] I direct that a copy of these reasons be provided simultaneously by email to each party, and that the delivery of this decision is to be at 9:00am on 22 February 2021.

J M Aberdeen

Member/Acting Magistrate

22 February 2021³²

Mackay

³¹ If the parties cannot agree on a contractor, or a quote, or any other issue arising out of this Order, the matter may be re-listed in the Tribunal, before me, for such further Orders as may be required to give effect to the Order above. I would, however, remind the parties that the **NDA** encourages neighbours to attempt to resolve a dividing fence issue informally: see s 7(c). An issue so resolved is likely to be more acceptable to the parties, than a decision imposed upon them by the Tribunal.

³² Paragraph 41 amended upon revision 25 February 2021.