QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Jones & Anor v Searle* [2019] QCATA 68
PARTIES:	**DANIEL JONES** **ROCHELLE JONES** (applicant/appellant) v **ANDREW SEARLE** (respondent)
APPLICATION NO/S:	APL180-18
ORIGINATING APPLICATION NO/S:	Q45/18
MATTER TYPE:	Appeals
DELIVERED ON:	9 May 2019
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Justice Carmody
ORDERS:	**1. Leave to appeal granted.** **2. Appeal is dismissed.**
CATCHWORDS:	APPEAL – NEIGHBOURHOOD DISPUTE – DIVIDING FENCE – where parties own adjoining properties – where the location of the boundary line is disputed – where tribunal ordered timber fence plus survey fees be split equally – where the applicant complains that the fencing order was wrongly made because there is a sufficient existing dividing fence inside the boundary line – where the applicants assert that they had paid for a property survey report before they bought their lot and should not be responsible for half the cost of a new survey that was not needed – whether grounds for leave to appeal – where the appeal is dismissed. *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011 (Qld) s 40(4) *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 32

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act).

REASONS FOR DECISION

[1] When ordering the construction of the dividing fence the tribunal split the $1380 quote for surveying and $2618 construction cost (or $3,999 in total) equally between the parties with each contributing $1999.50. However, the GST inclusive cost of the fencing component was $4136 (not $3999). Each party was, therefore, intended by the tribunal to contribute $2068 (not $1999.50).

[2] Accordingly, the order was stayed on 19 September 2018 and leave to appeal granted (even though it was not sought in the Form 39) so the arithmetical error could be corrected but the applicants contend that leave to appeal is justified on other grounds.

The fencing order

[3] The applicants claim that ordering them to contribute to the proposed fence at all is unjust because the existing dog wire fence on their side of the boundary line is sufficient for the intended purpose.[1]

[4] According to the applicant, lots in this rural residential locality 2000sqm in area and have farm fences not commonly solid timber fences due to rainwater runoff and the wet season or no fences at all due to the cost including the respondent's other neighbours and the tribunal wrongly placed emphasis on the respondent's misrepresentations about:

- when the dog wire fence was erected
- when the neighbour's hardwood screen was not put up i.e. not until after the application was filed
- whether the top side of his block was for sale and he was waiting for that process to be finalised before fencing that boundary because the property was not on the market until five weeks after his claim was filed
- true extent of water issues at the property because the respondent had to dig trenches and build walls to divert water running over his property.

[5] The respondent denies misleading the tribunal about any relevant matter concerning the boundary fence including about the existing chicken wire fence, the fencing on any of the applicant's property boundaries as at the time of hearing and reference to the top boundary fence to reinforce how common timber fences were in the area in support of a similar fence on his back boundary shared with the applicants, why there is no fence on the boundary with the other neighbour, the effect of a timber paling fence or water flow or the need for a resurvey to install a jointly owned fence on the true boundary line.

[6] The existing star picket with dog wire fence is actually on the applicant's side of the boundary. As such it is not a complaint 'dividing fence' regardless of how fit for purpose it is or when it was erected.

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1 T1-10:5.

[7] However, the parties are now willing to contribute equally to a $3,060 ($1,530 x 2) solid hardwood dividing fence. This means that there is no longer any error in the tribunal's decision or order in need of correction on appeal and therefore no utility in a grant of leave.

The survey costs

[8] The respondents still want the applicants to pay half the survey costs.

[9] The applicants, however, say the tribunal erred in apportioning the cost for surveying equally because they paid $1,375 for a survey in August 2016 as confirmed by the remaining corner peg[2] and as the adjoining owner they are not liable for any reasonable cost of engaging the surveyor.

[10] If adjoining owners do not agree on the position of the common boundary for carrying out fencing work and where, as here, the statutory process provided for in s 40(4) of the *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011 (Fences Act) is not availed of each is liable for half the reasonable cost of engaging a registered surveyor. If either pays the entire cost 50% of it is recoverable from the other as a debt.

[11] The tribunal proposed a new survey to avoid uncertainty and future argument without making a finding either way as to the applicant's claim about the 2016 property surveyed. As neither party objected at the time there is no legal basis for disturbing the survey order or changing its terms. If the survey confirms the common boundary as being the same as pegged the applicant will have a defence to any future debt liability or possibly an enforceable right to reimbursement.

[12] The appeal is dismissed.

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2 T1-10:40