

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Harrison v Anderson* [2024] QCAT 152

PARTIES: **RODGER DENNIS HARRISON**

(applicant)

v.

**MIRANDA ANDERSON**

(respondent)

FILE NO; Mackay Q 73/23

MATTER TYPE: Other minor civil disputes matters

DELIVERED ON: 23 April 2024

HEARING DATE: 6 October 2023, 3 November 2023, 26 & 28 March 2024

DECISION OF: Member J M Aberdeen (Acting Magistrate)

ORDERS: **The Application is dismissed**

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 give the Tribunal jurisdiction, and to  
require contribution between adjoining owners

*Queensland Civil and Administrative Tribunal Act 2009* (Qld)  
s 13

*Dividing Fences Act 1861* (Qld), ss.16, 19, 20, 26, 36

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

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

*Low v Body Corporate The Preston* 8268 [2014] QCATA 298 (Snr Member Stilgoe OAM)

*Alwiah v Watts* [2004] NSWSC 948

*Brown v Doyle* [2010] NSWSC 1269

*Larney v Johansson* [2012] NSWSC 1297

*Larney v Johansson* [2013] NSWCA 409

*Purcell v Chadwick* [2018] NSWCATAP 250

*Leigh v Bruder Expedition Pty Ltd* (2020) 6 QR 475 (CA)

APPEARANCES & The Applicant appeared by his agent, Ms Zoe KNIGHT, of Black's Real Estate

REPRESENTATION: The Respondent appeared in person.

### **DECISION**

[1] This is an application for an order under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (NDDFT Act), that a new dividing fence be constructed on the boundary line between two residential lots. The Applicant Mr Harrison owns 3 Lochmaben Court, Beaconsfield, a suburb of Mackay City. The Respondent Ms Anderson resides with her family next door to Mr Harrison, at 5 Lochmaben Court, Beaconsfield.

#### **The Claim:**

[2] By an Application filed on the 24 July 2023, the Applicant states, by way of particulars<sup>1</sup> –

“Remove and dispose of dilapidated timber fence. Replace with new timber fence. 39 metres. Full boundary shared between owners of 3 and 5. Plan attached. Current fence is falling apart and unstable, it is not able to be repaired.

...Timber fences are most common in this area. The other boundaries of 3 and 5 are also timber. Replacement to same is requested.”

[3] To this Application, the Respondent has lodged a Counter-Application, filed on 3 November 2023, in the following terms<sup>2</sup> –

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<sup>1</sup> **Exhibit 1:** “Application for minor civil dispute – dividing fences, page 5.

<sup>2</sup> **Exhibit 2** – “Minor civil debt – counter-application” – page 3.

“I don’t agree with replacing 39 metres of dividing fence. 32 metres at best can still be maintained, however the other party wishes to replace the fence. I have provided several quotes in order to resolve this with the other party and each time I have been denied. I feel not all quotes have been considered and I have responded to every communication and asked questions, being honest on my circumstances. I am a one income household and a single parent. I am doing my best to make my mortgage payments each week with the rising cost of living. None of which has been considered throughout the process. I am willing to contribute, however to a portion I can afford and not the full required amount on my behalf.”

[4] The material I have received in the course of the conduct of this matter includes –

**Exhibit 1:** Application (19 folios) including Application (pp 1-11); copy of Notice to contribute (pp 12-14); quotation from “Dog Gone Fencing” dated 15 May 2023 in the amount of **\$6,552.00** (p 15); and nine (9) colour photographs with written notes thereon (pp 16-19);

**Exhibit 2:** Counter-application (10 folios<sup>3</sup>) including Counter-application filed on 3 November 2023<sup>4</sup> (pp 1-6); quotation from “Mesh Handyman” dated 6 July 2023, in the amount of **\$5,673.00** (1 p); copies of ten (10) b&w photographs (pp 8-10).

**Exhibit 3:** A folder (9 folios), tendered by the Respondent on 6 October 2023<sup>5</sup>, containing six (6) colour photographs (p 1); copy of a quotation from “Mesh Handyman” dated 16 July 2023, in the amount of **\$1,080.00**, being for **repairs** to the existing fence (p 2); a further quotation from “Mesh Handyman” dated 6 July 2023, in the amount of **\$5,127.00**, being for the **replacement** of 32 metres of fencing (p 3); copy of a letter from the Applicant’s agent to the Respondent, dated 18 May 2023 (p 4); and copies of other documents which already formed part of the Applicant’s initial bundle of documents (pp 5-9).

**Exhibit 4:** Series of twenty-two (22) colour photographs (6 pp)<sup>6</sup>.

**Exhibit 4A:** Letter from Dog Gone Fencing dated 6 October 2023<sup>7</sup>.

**Exhibit 5:** Email from Mesh Handyman to the Respondent<sup>8</sup>.

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<sup>3</sup> Numbered by myself.

<sup>4</sup> Not filed until second day of hearing on 3 November 2023. The Respondent made no mention of an issue with tree roots, emanating from the Applicant’s property, until the hearing on Day 2: see **Transcript Day 2**, 3 November 2023, p 1-5.

<sup>5</sup> At hearing I marked this folder, with its contents, as Exhibit 2, for ease of reference. For the purpose of this decision, I have re-numbered the folder and contents as indicated above.

<sup>6</sup> Tendered on 6 October 2023, by the Applicant, consisting of a further series of photographs showing fences on properties in the vicinity of the two properties involved in this claim, together with close-up areas of the fence in question, focussing on their dilapidated condition.

<sup>7</sup> Tendered by the Applicant on 6 October 2023.

<sup>8</sup> Received from the Respondent by QCAT Brisbane on 9 January 2024, and forwarded to the QCAT Registry, Mackay, on 16 January 2024. Copy provided to the Applicant by email on 25 March 2024.

**Exhibit 6:** Series of nineteen (19) photographs taken by the Presiding Member on 26 and 28 March 2024, with a short Index to each photo.

**Exhibit 7:** Email received by QCAT registry, from the Applicant, on 11 April 2024.

**Exhibit 8:** Copy of email dated 19 April 2024, from Dog Gone Fencing, to Ms Zoe Knight, Blacks Real Estate (for the Applicant); received in Mackay QCAT Registry 19 April 2024.

- [5] At a basic level, the present dispute may seem turn upon the answer to the question: should this fence be repaired? ...or should it be completely replaced?
  
- [6] The answer to such a query requires careful attention to the evidence adduced, and the identification and assessment of any alleged defects, together with a comparison of the projected costs of rectification, considered against the costs of a completely new fence.
  
- [7] Upon such determinations, the Tribunal may then consider the further question of contribution, as between adjoining owners, to the repair or replacement costs, as the case may be.
  
- [8] There are a number of photographs, and some opinion evidence, relating to the condition of the existing fence. These are discussed at greater length below.
  
- [9] However, in the course of examining and assessing the alleged defects in the present dividing fence, a further issue has emerged. This issue is one which goes to the very jurisdiction of this Tribunal to make any orders as to “fencing work”.
  
- [10] Accordingly, this is a question to be determined before any issues of repair, replacement, and contribution are determined.

*A jurisdictional question – section 20(1):*

- [11] Section 20(1) of the *NDDFT Act* provides –
  - (1) If there is no sufficient dividing fence between two parcels of land consisting of adjoining land, an adjoining owner is liable to contribute to carrying out fencing work for a sufficient dividing fence.

- [12] The definition of “fencing work” includes both repair, and replacement<sup>9</sup>.
- [13] The general rule, as to contribution between co-owners<sup>10</sup> of a fence, is stated by the Act to be that “each [co-owner] is liable to contribute **equally** to carrying out” the necessary fencing work.<sup>11</sup> This “general” position may, under some circumstances be varied by the Tribunal, which is constrained, in all of its endeavours, to make orders which are “fair and equitable” to both parties.<sup>12</sup>
- [14] Section 20(1) sets out the Tribunal’s authority to order contribution to fencing costs by an adjoining owner. It is introduced with the words “**if there is no sufficient dividing fence...**”.
- [15] To my mind, there is really only one reasonable interpretation of this subsection, namely, that if an existing dividing fence is found by the Tribunal to be a “sufficient dividing fence”, the Tribunal, as a consequence cannot make any order for fencing work.
- [16] And, it seems to me, this is really a matter which goes to the jurisdiction of this Tribunal; if a previously-existing dividing fence is, upon examination, found by the Tribunal to be a “sufficient dividing fence”, that is the end of the matter.
- [17] In *Alwiah v Watts* [2004] NSWSC 948, Master Malpass, in the Supreme Court of New South Wales, had occasion to consider the analogous provisions of New South Wales’ *Dividing Fences Act 1991*. That Act, in section 6, stated:

#### **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.

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<sup>9</sup> Section 16, *NDDFT Act*.

<sup>10</sup> Section 19 declares the law to be that a dividing fence is “owned equally by the adjoining owners”.

<sup>11</sup> Section 20(1), *NDDFT Act*.

<sup>12</sup> Section 13(1), *QCAT Act*. Examples of variation from the general rule may be found where an Applicant wishes to construct a fence which in any respects exceeds the minimum basic requirements for a substantial dividing fence; this is not the case here, where the Applicant seeks a replacement of the fence to the same length, and with the same characteristics as the existing fence. A further variation may arise due to the operation of section 26, where an owner, or their licensee, negligently or deliberately, by an act or omission, damages or destroys a common fence. The Respondent here has not raised reliance upon section 26. See also QLRC Report No 72, Dec 2015, at [2.117]. In *Low v Body Corporate The Preston* 8268 [2014] QCATA 298, Senior Member Stilgoe OAM declined to depart from the general position of equal contribution based upon an appellant’s “lack of funds”.

(2) This section applies whether or not a dividing fence already separates the adjoining lands.

[18] In that case, the Plaintiff brought an application for an order (i) allowing him to increase the height of an existing dividing fence, and (ii) that part of a retaining wall be replaced by a fence. The Magistrate hearing the application dismissed the proceedings, on the basis that the Plaintiff had not satisfied him that the *existing* dividing fence (which it was sought to alter) was *not* an *insufficient* dividing fence.

[19] Such application by the Plaintiff was only allowable where there had been an error of law. Master Malpass concisely disposed of the appeal:

“[9] The purpose of the Act is expressed to be to provide for the apportionment of the cost of a dividing fence. I shall briefly refer to the structure of the legislation. Section 6 purports to enunciate a general principle (which is that an adjoining owner is liable to contribute to the carrying out of fencing work where there is no sufficient dividing fence). Section 4 sets out the matters to be considered when determining the standard for a sufficient dividing fence. Section 14 sets out the orders as to fencing work that may be made by the court.

[10] The content of the Act demonstrates that jurisdiction to make orders is dependent upon a finding that there is an insufficient dividing fence between the adjoining lands. Unless that finding is made, no orders can be made. Such a finding gives rise to the liability referred to in s.6 and enables the making of orders pursuant to s.14.

[11] The learned magistrate considered the evidence and the submissions. He was not satisfied that the existing arrangements could be regarded as an insufficient dividing fence. This was a finding that was supported by the evidence that had been placed before him. Indeed, not only was it reasonably open, it seemed to me to be the inevitable result. In my view it cannot be disturbed in this court. ...”

[20] The decision in *Alwiah v Watts* was considered<sup>13</sup>, again by the Supreme Court of New South Wales, in *Larney v Johansson* [2012] NSWSC 1297, which also involved a previously-existing dividing fence. Adams J stated, at [16]:

“... there already being a fence in existence, if it were indeed a sufficient dividing fence no question of liability to make a contribution to the carrying out of fencing work would arise because s 6(1) required there to be "no sufficient dividing fence" for such a liability to exist. If there were no such liability, the making of orders as to fencing work was unnecessary.”

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<sup>13</sup> Adams J also noted the decision in *Brown v Doyle* [2010] NSWSC 1269, where Hidden J, by way of *obiter*, had referred to *Alwiah*'s case with approval.

- [21] *Larney v Johannson* was then appealed to the Court of Appeal of New South Wales<sup>14</sup>, and that appeal also was dismissed<sup>15</sup>.
- [22] Having regard to the close relevant similarity between the legislation under review in the New South Wales decisions, and the terms of our section 20(1), I have no real hesitation in following the interpretation accorded to the analogous provision in the New South Wales legislation<sup>16</sup>.
- [23] As a result, it is necessary to review carefully all the material placed before the Tribunal with a view to deciding whether or not the existing dividing fence, in the present case, has been shown *not* to be a “sufficient dividing fence”.

*The present dividing fence:*

- [24] Although a substantial number of photos were tendered during the hearing – by both parties – after careful consideration, I formed the view that I had insufficient material upon which to base an informed decision as to what course should be taken with this fence; that is – repair, or replace?
- [25] On 26 March 2023, I attended upon Lochmaben Court, Beaconsfield, to view the front of both properties, and gain some idea of the overall situation with respect to the subject fence. Neither party was advised of my attendance at this time, and my view was confined to what appeared from the opposite side of the road to the residences concerned. After considering the two photos I had taken on this occasion, they assisted little in respect of the precise question in issue.
- [26] On 28 March 2023, by arrangement with both parties, I again attended the properties in company with the Acting Senior Registrar of the Magistrates Court. Ms Knight (for the Applicant), and Ms Anderson (the Respondent) were both present during my view. I walked the length of the fence on both sides, and I took seventeen (17) photos of various features of the fence, from both sides. On Friday 12 April 2023, I had copies of the nineteen photos I had taken of the properties delivered to both parties by email<sup>17</sup>.

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<sup>14</sup> *Larney v Johannson* [2013] NSWCA 409 (Meagher, Barrett, and Emmett JJA).

<sup>15</sup> See *per* Meagher JA at [1] and [8].

<sup>16</sup> In *Purcell v Chadwick* [2018] NSWCATAP 250, the Appeal Panel continued to apply *Alwiah v Watts*.

<sup>17</sup> I have marked these nineteen photos as **Exhibit 6** in this hearing, with photos numbered B.1 to B.19.

- [27] At no time has it been contended by either party that the existing fence between the properties is not constructed along the common boundary line. No survey evidence has been adduced by either party indicating to the contrary. I take the view, in the absence of any contrary contention, that it is open for me to accept that the existing fence is an existing dividing fence, and is positioned upon the boundary line between the properties.
- [28] In deciding whether an existing dividing fence is a “sufficient dividing fence”, section 36(a) requires that the Tribunal take into account *inter alia* “any existing or previously existing dividing fence”.
- [29] If, for some reason, *eg* that the existing fence is in a state of disrepair, an existing fence does *not* constitute a “sufficient dividing fence”, the Tribunal is empowered, under section 36(1)(d) to order that either adjoining owner should repair the defects in the existing fence. This is no doubt intended to enable the existing fence, through proper repair, to be turned into a “sufficient dividing fence”.
- [30] It is true that a need to repair does not appear within the stated criteria for a “sufficient” dividing fence contained in section 36 of the Act<sup>18</sup>; but the section specifically provides that the Tribunal “**may consider all the circumstances, including the following**” subparagraphs. The types of considerations under section 36 are accordingly not limited to the examples provided.
- [31] Noting the power of the Tribunal to order that a dividing fence, or part of it, be repaired, the question which presents itself in this case is –
- At what point does a repair option become unreasonable, and proper to be superceded by an order for complete replacement of an existing fence?*
- [32] The Act provides no specific guidance as to the extent of repairs which may be ordered, before replacement becomes the only reasonable alternative.
- [33] A starting point may be to consider the criteria specified by the Act, and to consider the existing state of the fence – does the fence, as it presently stands, satisfy the required criteria?<sup>19</sup>

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<sup>18</sup> In this case, subparagraphs (a) to (d) inclusive are relevant.

<sup>19</sup> In addition to the statutory criteria, there may be other relevant considerations: *se eg Forestenko & Donnelly v Lloyd* [2015] QACTA 154 (Senior Member Stilgoe OAM), at [12] “privacy and utility” and [13] *semble* “safety of the children”.



- [34] Firstly, as I have outlined above, there is no argument that the existing fence was not constructed on the boundary line between the properties. To require that a survey be carried out, where the issue has not been agitated by the parties, would, in my opinion, unnecessarily complicate and prolong the present case. I am prepared to draw the inference, on the present material, that the fence accurately represents the boundary between lots.
- [35] Secondly, the purposes for which the parcels of land are used, and by extension are presently intended to be used<sup>20</sup>, are normal residential purposes. As well, then, as defining the boundaries, a sufficient fence should where desired perform the common purposes of human residence. A primary purpose is to provide security to the occupiers and their families.
- [36] In this case, the existing fence runs from the rear boundary of both properties, to the inside boundary of the footpath alignment. Neither property presently has a front fence, nor is there any indication that either party wishes to extend the present fencing to include a front fence.
- [37] Security, then, is provided in both properties, by gates, which are roughly in line with the front of the each of the neighbouring dwellings. In the Applicant's property, there is a single-width wooden gate, which shuts off access to the back yard<sup>21</sup>. In the Respondent's property, there are high metal-framed wooden paling gates which serve a similar purpose<sup>22</sup>.
- [38] To indicate to a member of the public that the back yard is a private area, I am of the view that the present gating arrangements, by both location and construction, are sufficient.
- [39] Fences are generally accepted to have a purpose, not only to deter (and hopefully prevent) strangers from entering the fenced property, but also to keep family members, *ie* children – and pets – *inside* the fenced area.
- [40] The Applicant provided no evidence as to occupation of No 3 by children, or pets; but I don't believe such specific evidence is necessary. Occupation of residential premises may well change over time – especially in the case of rented premises; a family with no children, but which has a dog, could occupy the premises this month; but next month, it may be that a family with three children, and perhaps two dogs, move in. I

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<sup>20</sup> Section 36(b).

<sup>21</sup> See photo B.4 (gate opened); photo B.2 (gate closed).

<sup>22</sup> See photo B.1 (gates closed); Photos B.17 and B.19 (gates open).

think the value and utility of *any* residential premises can only be enhanced, both financially, and from the viewpoint of safety, by provision of a sufficient fence. Accordingly, I think that the “purpose” of residence has to be considered, not just in regard to the circumstances of the parties as at the time of decision, but should take into account possible future changes. I would also mention that the Respondent advised that she had a young daughter, 10 years of age, living in the premises at No 5 with her.

- [41] The present fence is a high paling fence. In the absence of any apparent holes in the fence which could allow the escape of very young children, or pets, I am of the view that, by reference to security, the present fence is a “sufficient” fence.
- [42] A further purpose – or perhaps, more appropriately, a condition – for a “sufficient” fence, is that of safety. A “sufficient” fence will not collapse, thus breaching the secure perimeter, and potentially causing injury to persons then in the vicinity of the fence<sup>23</sup>.
- [43] My inspection of the fence on the 28 March this year was not a full structural inspection. I am not a builder, or otherwise qualified, to express any opinion as to the soundness of the fence as a whole. The photographs taken by me were not intended to be an exhaustive pictorial of the entire structure, but were to indicate the extent of obvious shortcomings, if any. My observations revealed –
- (i) There were no apparent holes or breaches in the continuity of the fence;
  - (ii) The fence was standing quite upright;
  - (iii) There were very clearly some rails which needed replacement<sup>24</sup>;
  - (iv) The fence had been constructed with three (3) rails<sup>25</sup>;
  - (v) There appeared to be no missing palings;
  - (vi) Palings were in apparent fair to good condition, although discoloured.
- [44] I should note the following features observed during my inspection. In places there are two rows of palings, *ie* one on either side of the fence (see photos B.7, B.8 and B.9, taken from the Applicant’s side of the fence). The fact that there are two rows of palings is clear in photo B.9. On the Respondent’s side of the fence, behind the Respondent’s shed, there appear to be sections of fencing tied up and standing against the main section of the fence (see photo B.18). It was not possible to discern what had

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<sup>23</sup> Neither of the parties’ contractors raised particular concern about the safety of the fence.

<sup>24</sup> See photo B.5 (middle rail split); photo B.6 lower rail (substantial rot); photo B.10 middle & bottom rails (rotten); photo B.11 middle rail (rot); photo B.12 middle rail (rot – this might be the same rail as photo B.11); photo 13 bottom rail (rot).

<sup>25</sup> Although photo 11 does not appear to show a bottom rail in position.

occurred in the past with respect to these areas. It is possible that some repairs, or replacement, of parts of the fence had previously been undertaken. Consequently, the condition of the fence beneath these possibly-later alterations could not be observed.

- [45] Finally, Ms Knight, for the Applicant, has submitted material indicating that the type of fence proposed to replace the existing fence – a 1.8 metre-high fence of treated pine, with posts and three rails - is common within the locality in question<sup>26</sup>. I accept that proposition without hesitation, based upon (i) my view of the fence on 28 March, (ii) the fencing in place in the immediate surrounding residential area, as noted by me on 28 March, and (iii) the fact that this type of fence is extremely common in this city.

*Evidence as to the condition of the fence - from the Applicant:*

- [46] Both parties tendered and relied upon quotations from fence-building entities which dealt with the present condition of the existing fence. Neither party sought to call, in person, their contractor, or a suitable representative. The result is that I have no sworn evidence as to the extent of any defects contained within the existing fence.
- [47] Folio 15 of Exhibit 1 is a quotation, dated 15/05/2023<sup>27</sup>, provided to the Applicant by Dog Gone Fencing. The quote is in respect of replacement of 39 metres of 1.8 metre nil-gap paling fence totalling \$6,552.00. This quotation was apparently provided for replacement only, and not repair. This initial quotation was supplemented by a further letter from Dog Gone Fencing, dated 6 October 2023<sup>28</sup>, which stated:

“To whom it may concern:

Dog Gone Fencing has provided a quote for a full boundary fence replacement at 3 Lochmaben Court, Beaconsfield. Due to the current state of the posts, rails and palings, we have deemed the fence **uneconomical for repair due to the rotting timber**. Any attempt to repair the fence **may prolong the fence’s longevity**, however the cost of replacement [*sic* “repair” ?] will undoubtedly outweigh the cost of a new fence replacement due to the extra labour required to repair the fence.”

[emphasis added]

- [48] There were originally four (4) photographs of particular parts of the fence filed with the Claim (see Exhibit 1 folio 18). These initial photos were supplemented on the first

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<sup>26</sup> See section 36(c).

<sup>27</sup> Current for 30 days from date of issue. The quotation had expired well before the first hearing day on 6 October 2023.

<sup>28</sup> Which was the date of the first day of hearing. It is now **Exhibit 4A**.

day of hearing by a further fifteen (15) photos, also showing various parts of the fence (see Exhibit 4 Folios 2, 3, 4, and 5). The initial photos show, in clockwise sequence –

- (i) a post which has some longitudinal splitting in the base area, but the below-ground portion of the post is not visible; the particular post is not identified further in the material provided;
- (ii) a further post and rail, which appear to be weathered;
- (iii) a rotting middle rail; and
- (iv) a section of fence where the rail has come away from the upright.

[49] Assessing the position of these apparent defects by reference to two adjacent pallets which appear to be tied to the fence (see Exhibit 1, folio 19), at least two of these defects are perhaps mid-way along the Applicant's fence line (behind the rear alignment of the dwelling).

[50] With respect to the fifteen (15) photos tendered on 6 October, on Exhibit 4 (in clockwise sequence)–

- (i) Photos 1 and 2 (**on Folio 2**) are copies of two of the photographs attached to the original claim;
- (ii) Photo 4 shows some apparent sagging of a panel of palings towards the rear of the Applicant's fence; but it also appears that a second row of palings exists behind this sagging section. Whether this "second row" were affixed from by Respondent's side (which appears most likely) is unknown. This may be the opposite side of the fence to that shown on photo B.18 (taken from Respondent's side);
- (iii) Photo 4 shows a section of rotting middle rail;
- (iv) Photo 1 on **Folio 3** shows the same two pallets in the earlier photos described above;
- (v) Photo 2 shows a post/top rail joint, with visible nails;
- (vi) Photo 3 shows what I would describe as moderate cracking, possibly from weathering, of one side of a paling;
- (vii) Photo 4 shows one paling where the paling has come away from the top rail;
- (viii) Photo 1 on **Folio 4** shows a post which is, or might be, parting from the top rail. The top rail is weathered;
- (ix) Photos 2 and 4 show rot in a middle rail, or rails;
- (x) Photo 3 shows both the existing fence, and the rear fence of No 3, which appears to be relatively unweathered;
- (xi) On **Folio 5**, photo1 shows a view from towards the rear of the Applicant's property, along the fenceline, to the front gate. The two rails in the immediate foreground appear to have sustained rot damage;

- (xii) Photo 2 shows the view, from the side of No 3, of the section of fence which extends past the gate on the Applicant's side. To this can be compared photos B.2 and B3;
- (xiii) Photo 3 shows a paling which has come away from the top rail;
- (xiv) Photo 4 shows a small piece missing out of one paling; there may be minor damage to the lower rail, while the post displays vertical splitting (this small hole enables the paling to be placed in the front part of the fence, outside the side-gate of No 3; Photo B.3 depicts the same area)<sup>29</sup>;
- (xv) Photo 1 (of 2) on **Folio 6** shows a similar view to (xii) above.

[51] Photo 2 on **Folio 6** of Exhibit 4 shows a view along the top of the fence, which shows that the tops of the palings are relatively straight for some distance, and there is then some apparent discontinuity. This might coincide with the point where, on the Applicant's photos, the top rail has come away from the adjacent upright.

*Evidence as to the condition of the fence – from the Respondent:*

[52] The Respondent filed no material prior to the first day of hearing on 6 October 2023. On that day, the Respondent tendered, and I accepted, a number of documents in a Folder<sup>30</sup>. That Folder, and contents, are now Exhibit 3, and consist of nine (9) folios, as follows –

1. Two (2) photos showing the Respondent's side of the fence in front of the gate which leads into the back yard. The *reverse* of folio 1 contains four (4) further photos, as follows –
  - (i) Space between the Respondent's shed, and the fence, looking towards back of shed (Respondent's side);
  - (ii) Same space as above, but looking towards the front of the property;
  - (iii) View along the fence, from a position near the Respondent's front gate, looking back along the fence towards the shed;
  - (iv) A view of the top of the fence, similar to the view in Applicant's photo 2 on his Folio 6.
2. Copy of a quotation from the Mesh Handyman, dated 16/07/2023, in the amount of **\$1,080.00**. This quotation was **only** in respect of "*fix 11 new post, digging, concreting, and rescrewing...labour with material*".

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<sup>29</sup> This post *might* be the post referred to in **Exhibit 8**, by the reference to the statement that "the structural integrity at the base of the post from lawn care has worn away the post". I am not satisfied, on the evidence before me, that wearing away the base of a post to the extent shown, by "lawn care" - which I assume would include weed-trimmer or "whipper-shipper" - would, in and of itself, compromise the "structural integrity" of such a post to any appreciable degree.

<sup>30</sup> I initially marked that Folder & contents as **Exhibit 2** on that day.

3. A further quote, dated 6/10/2023 (first day of hearing), for **\$5,127.00**, for, respectively –  
*“remove and dispose 32 meter fence; replace 32 meter new fence; remove and replace new post and concrete – only one side paling with no-gap 100 x 16; Labour with material and dispose”*
4. Copy Letter Blacks RE to Respondent 18/05/23;
5. Copy Applicant’s quote for \$6,552.00;
6. Copy Notice to Contribute – 3pp with Copy Inv for \$6,552.00.

[53] Further, on 3 November (the second day of hearing), the Respondent filed a Counter-Application to the Applicant’s original application. The document consists of ten (10) folios –

1-6. Counter-application (6 pp);

7. Further quotation from Mesh Handyman (although bearing the same date as the 6/07/23 quote), with the additional information –

*“add 21 pieces of rails 4.8x100x38 please add on the price we missed the item \$546.00. [Total] **\$5,673.00.***

8-10. B&W copies of ten (10) photos, which appear to be concerned with tree roots from the Applicant’s property. I have obtained no assistance from these copied photos.

[54] Some clarification in the evidence provided by the Respondent is necessary at this point. There are, in the end result, two quotes for fence replacement –

<b>Applicant</b>	-	<b>\$6,552.00</b> for <b>39</b> m of new fence (\$168.00 p/metre) <sup>31</sup> .
<b>Respondent</b>	-	<b>\$5,673.00</b> for <b>32</b> m of new fence (\$177.28 p/metre).

[55] The 7-metre difference between the parties arises out of the Respondent’s contention that the length of fence in front of the gates to the properties does not require replacement<sup>32</sup>; the Respondent’s contention is that only the fence from the gates through to the back fence should be considered for replacement. The “repair” quote (\$1,080) from the Respondent only referred to 32 metres. This would seem to be consistent with what the Respondent stated in her evidence:

*“They [ie Mesh Handyman] said the fence out the front in particular just looked like it needed pressure cleaning rather than full replacement because the fence is quite in healthy condition”<sup>33</sup>.*

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<sup>31</sup> These cost-per-metre calculations include the removal costs for the old fence.

<sup>32</sup> **Transcript, Day 1**, at page 1-6, line 6.

<sup>33</sup> **Transcript, Day 2**, page 1-4; see also **Exhibit 5**.

[56] Upon her tender of the quotes on the 6 October, I raised with the Respondent<sup>34</sup> the question of whether or not the quote from Mesh Handyman included the rails – they were not mentioned in either the \$1080.00 quote, or the \$5,127.00 quote. The Respondent, obviously, has sought further information from her proposed fencer as to the inclusion of the rails; that further response from the fencer included the rails on the \$5,673.00 quote (the replacement quote); it did *not* add the same cost to the \$1,080.00 quote (the repair quote).

[57] On the 18 January 2024<sup>35</sup>, the Registry received from the Respondent a short note, stating:

“Hi Miranda,

The 32 meter fence from the gate to the back fence is in need of replacing. The fence from the gate to the front road is in good condition and doesn’t need replacing.

Thanks, Mesh”

[58] I must admit to having some difficulty with the information obtained on behalf of the Respondent. The initial quote, for \$1,080.00, was to replace 11 posts. No indication was provided as to *why* that was seen as desirable. Firstly, the lack of any reference to rails, or palings, causes me to have some concern as to how closely this fence was inspected – some rotting rails, on my view, seem impossible to miss. And further, while Mesh suggest that 32 metres “needs replacing”, again there is no particularisation as to just what items are beyond repair, and why this replacement is thought to be necessary. From an initial statement that 11 posts need to be replaced, Mesh’s view has changed so as to include the rails and palings in that 32 metres of fence, without further elaboration.

*Consideration of the evidence:*

[59] The quotations and communications from the parties’ contractors are clearly important to my consideration.

[60] The letter tendered for the Applicant, from Dog Gone Fencing, contains the following statement:

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<sup>34</sup> **Transcript, Day 1**, at page 1-5, line 4.

<sup>35</sup> The Respondent was requested to provide any further material by c.o.b. on 17/11/2023. I have decided to accept this later tender of material, as the parties may well have had some difficulty in persuading their fencers to provide the further information which has been requested, by both sides. I have also accepted emails from Ms Knight, for the Applicant, received by the Registry on 11/04/2024, and on the 19/04/24.

“Any attempt to **repair** the fence **may prolong the fence’s longevity**, however the cost of replacement will undoubtedly outweigh the cost of a new fence due to the extra labour required to repair the fence.”

[emphasis added]

- [60] The first part of this statement seems to confirm that repair will extend the life of the present fence. If that is so, then it seems to me that repair, at this stage, will avoid eventual replacement of the fence for an unspecified period. Dog Gone does not give any particular timeframe as to how long the repaired fence may last if it is repaired now. But the fact that the fence, on Dog Gone’s view, does seem to have some further useful life causes me some difficulty in determining that the present dividing fence is *insufficient*.
- [61] The second part of Dog Gone’s statement (above) is potentially ambiguous. Does it mean that the labour (and, obviously, material) required to repair the fence now will exceed the cost of *immediate replacement*?; or does it mean that expenditure on repair now will still necessitate probable replacement of the fence in the foreseeable future – in which case the *combined* expenses of repair + later replacement will, of course, exceed replacement costs now.
- [62] I think the latter is the correct interpretation. Repair now is perceived by Dog Gone as an *interim* measure – the fence will still have to be replaced in the foreseeable future, although its remaining life, after repair, on the present evidence, is impossible to estimate.
- [63] I am of the opinion that a “sufficient” fence includes a fence which may need some repair. I draw some support for this approach from the recent observation of Member Lumb in *Wong v Arthur*<sup>36</sup>, 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.”

- [64] In *Wong’s Case*, one of the issues – as in the present case – was whether an existing fence was a “sufficient dividing fence”. Member Lumb continued<sup>37</sup> –

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<sup>36</sup> [2020] QCAT 89 at [8].

<sup>37</sup> *Ibid* at [30].



“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.**”

[emphasis added]

- [65] 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 not reached that point;

*or*, is the existing dividing fence in this case **“satisfactorily performing its function as a dividing fence”?**

I believe it is.

- [66] 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. I note that there is no evidence of any rot in the supporting posts. Dog Gone suggests that some rot in posts “is possible”.<sup>38</sup>

- [67] A “sufficient” fence, in my opinion, may be one which needs some repair; and a “sufficient” fence may be one which is, perhaps, not as aesthetically pleasing as a newer fence<sup>39</sup>. However the test, in my opinion, is whether or not the existing dividing fence, at the time of the Tribunal’s decision, is still **satisfactorily performing its function** as such?

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<sup>38</sup> See **Exhibit 8**. This communication may have been addressed to the front 7 metres, in response to the Respondent’s (and Mesh’s) contentions about that section; but Dog Gone, in the same communication, does refer to black mould “throughout the fence”. I am not sure whether the reference to the possibility of rot is confined to the front 7 metres, or to the whole 39 metres (*cf* photo 1 on Folio 18 of **Exhibit 1**, and compare photo 4 on Folio 5 of **Exhibit 4**). In any event, evidence as to some examination of the footings was well within the Applicant’s ability to provide, in the event that it could assist his case, and none has been provided. A “possibility” does not really assist in persuading me that any of the posts are rotting.

<sup>39</sup> A relevant comparison appears in photo 3 on folio 4 of **Exhibit 4**, showing the rear and subject fencing on the Applicant’s property. On the other hand, from the Respondent’s side of the existing fence, the fence appears wholly presentable, with just one visible defect where a rail may have come away from the top of a post.

[68] I must also take into account, when weighing up all of the circumstances, that the intention of the Act is that a “sufficient dividing fence” should be the ***minimum standard required*** to divide the adjoining land, so that the contribution required from each owner is *kept to a minimum*.<sup>40</sup>

[69] Upon a consideration of all of the evidence, I am of the opinion that the assertions in the claim, that the existing dividing fence “is falling apart and unstable, [and] is not able to be repaired” are not supported by the evidence.

[70] The Applicant carries the burden of making the case for a replacement fence. In my opinion, that burden has not been discharged. The Applicant has not satisfied me, to the relevant standard of proof<sup>41</sup>, that the existing dividing fence is ***not*** a “sufficient dividing fence”.

[71] I order **That the Application be dismissed**.

[72] As I indicated earlier, the Respondent, on the second day of hearing, raised an issue concerning tree roots, which may have spread from the Applicant’s property, and which, it seems to have been suggested, *may* have been responsible for causing some damage to the fence. Some copies of black & white photos were tendered in support<sup>42</sup>. I am unable to discern anything of probative value from the photos provided. Were such a claim to be seriously advanced, it would, in my opinion, need to be supported by arbourial evidence, at the very least. I can form no opinion whatsoever from the copied photos provided. Were there any arguable proposition as to tree roots, I would have allowed the Respondent to file an Amended Counter-application in order to properly acquaint the Applicant with the precise nature of her claim. However that was not the case, and any such claim is unsupported by probative evidence<sup>43</sup>.

[72] I publish my reasons.

**NOTE:** *This decision is delivered pursuant to Section 46 of the Magistrates Act 1991, and Section 194A of the Queensland Civil and Administrative Act 2009.*

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<sup>40</sup> See QLRC Report No 72 (2015) at [2.116].

<sup>41</sup> See *eg Leigh v Bruder Expedition Pty Ltd* (2020) 6 QR 475 at [23] (QCA).

<sup>42</sup> See Folios 8-10 of **Exhibit 3**.

<sup>43</sup> A large Poinciana tree appears in the photos in **Exhibit 6**, in photos B.2 and B.16. The foliage of that tree covers a substantial portion of the Applicant’s back yard, including the area close to the existing fence.

*J M Aberdeen*

Acting Magistrate

Member

23 April 2024