

CLE TELECONFERENCE

# Dividing Fences



CLE Teleconference  
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## Neighbourhood Fencing Disputes Containing Troubles

**Merran Lawler**  
**Director, Caxton Legal Centre Inc**

Two neighbouring families in Sydney's western suburbs fought for 30 years over who should fix a loose paling on the backyard fence.

The feud slowly escalated until it became a way of life for those involved. Young children grew up being force-fed their parents' bellicose zeal over the dinner table. Trees and flower beds were poisoned, tyres were deflated, lawns were sown with weeds and garbage was dumped over fences.

A "fictitious" advertisement placed in a local newspaper offered the entire contents of one household at a weekend garage sale. The unfortunate family was besieged by 200 bargain hunters.

The dispute could have ended tragically when someone drained the brake fluid from a car.

Neighbours in Dispute

Michael Robotham

Disputes about dividing fences are the most common basis for neighbourhood disputes. The *Dividing Fences Act (Qld) 1953* operates to provide a framework for the construction of dividing fences between properties and the resolution of disputes between neighbours when problems arise.

### What is a Dividing Fence?

The Act defines a dividing fence (s 6(1)) as

*a fence separating the adjoining lands of different owners, whether the adjoining lands are wholly or only partly separated thereby and whether the fence is on the line of or, in an appropriate case, on a line on the common boundary of the adjoining lands or on a line other than the line of or a line on the common boundary, or partly on any one of those lines and partly on the other or others*

A fence is defined in the Act (s 6 (1)) as

*a structure of posts and boards, palings, rails, galvanised iron, metal, or wire, or a wall, ditch, or embankment, or a combination of any of these, enclosing or bounding land, and includes any foundation, foundation wall, or support reasonably necessary for the support and maintenance of the fence, but does not include a wall which is part of a house or other building.*

Significantly, a dividing fence is a means of separating the adjoining lands of different owners. Pursuant to the Act, adjoining lands can include land separated by a watercourse, lake or other natural or artificial feature which is insufficient to stop the passage of stock at all times and includes the bed and banks of the watercourse, lake or other feature separating the lands (s 6(1)).

Conceivably therefore, owners of adjoining properties separated by a river could seek to use the provisions of the *Dividing Fences Act*, if the river is tidal and stock are able to cross it at low tide.

A dividing fence need not be confined to the typical notion of a suburban post and plank fence. The Act specifically includes walls, ditches and embankments. Conceivably it extends to retaining walls where these form an effective barrier between adjoining properties., particularly where a retaining wall creates a sharp drop from one property to another.

In circumstances where it is impracticable to build a fence wholly on the common boundary line because of physical features or where adjoining lands are separated by a watercourse, lake or other natural feature insufficient to stop the passage of stock at all times, it is possible to propose that the fence be constructed on a line other than the common boundary (s 8(3)).

## Who is covered by the Act?

The Act applies to all **owners** of land including every person who is entitled to the land for any estate of freehold in possession or is entitled to the receipt of rents/profits whether as beneficial owner, trustee, mortgagee in possession or otherwise.

In addition, owner includes any person who in making application under various provisions of the Act is a holder of a lease where the unexpired term is not less than five years at the time application is made including the holder of a lease of land set aside for public purposes under the *Land Act 1962*.

However, the Act does not apply to unalienated Crown land (s 4(1)) and neither the State nor an authority vested with or having administration, management or control of Crown land may be made liable to join in or contribute to the construction or repair of a dividing fence.

Where a tenant's interest in land is less than for a term of five years the landlord is responsible for any contribution to be paid in relation to dividing fences affecting that property (s 20(1)(a)). Where a tenant's interest exceeds a term of five years, a sliding scale is applied to allow for the landlord to seek some input from the tenant for the landlord's contribution to the cost of dividing fences (s 20(1)(b - d)).

## A fence between properties

The Act makes owners of adjoining land liable to share the cost of the construction of a dividing fence equally between them (s 7). Significantly, owners of adjoining lands are liable to contribute to the construction of a fence even when that fence will only partially separate the properties.

The Act requires the person who wants to seek a contribution from the adjoining land holder (hereafter "neighbour") to the construction of a fence must first give their neighbour notice in writing or **notice to fence** (s 8(1)).

## Notice to Fence

The notice to fence must clearly state (s 8(2)):

- where the fence will be erected (ie., the common boundary line or part thereof to be fenced and, if not the common boundary, details of the proposed fencing line)
- what sort of fence is planned;
- a proposal for the construction of the fence (which should include who will undertake the construction, the proposed dates, the expected cost and suggested contributions).

The notice does not have to be in any particular form, as long as it contains these three points.

The method of service of the notice is described in section 23 of the Act. Notice can be given to the neighbour personally, or left at their usual place of business or residence with somebody over the age of 14 who works or lives there, or it can be sent to the neighbour's residence by prepaid post. A copy of the notice should be retained.

If notice is not given, the owner who builds the fence cannot seek to claim any contribution from the neighbour.

Once a person receives a notice to fence, they have one month in which to reach an agreement about the construction of the fence (s 9(1)).

## Reaching an agreement to fence

If the parties are able to reach an agreement within one month of the service of the notice to fence, no further action is required. The parties will be bound by such agreement.

While it is not required by the Act, it is wise to reduce any agreement to writing. If a party refuses to honour the agreement after the fence is built, a written agreement provides some evidence that a mutually acceptable arrangement had been reached.

Section 10 provides that where an agreement to fence has been reached but one party fails to carry out their obligations within three months of the date of the agreement, the other party may proceed to build the agreed fence and recover from the defaulting party the costs previously agreed.

## Proceedings where no agreement is reached

Jurisdiction to deal with disputes relating to dividing fences is conferred on the Magistrates Court and the Small Claims Tribunal pursuant to section 18 of the Act.

Where no agreement is reached by the parties within one month of service of the notice to fence, either party may make application to the Small Claims Tribunal (if the cost of the fence is under \$5,000) or the Magistrates Court (where the cost of the fence is over \$5,000) for an *order to fence* (s 9).

It is important to note that the right to commence action is not limited to the party serving the notice to fence. Indeed, the person served with the notice may commence action if no agreement is reached within one month.

An application for an order to fence seeks that the Court or Tribunal determine (s 9(1)) -

- the kind of fence to be constructed; and
- the contribution to be made by each party to the construction; and
- the time within which the fence is to be built; and

- if necessary, the fencing line, any compensation by way of annual payment to be paid to an owner for the loss of occupation of any land, and such other orders as the Court or Tribunal considers just.

Whereas the Act confers a liability pursuant to section 7 on both parties to contribute equally to the cost of construction of a fence, it is open to a referee or magistrate in determining an application for an order to fence to apportion contributions between the parties on some other basis as determined by the merits of the case (s 9 (1)(b)).

This readjustment of contributions may for example, be used in circumstances where the parties are in dispute about the kind of fence to be constructed with one option being much more expensive than the other.

In making an order to fence, the magistrate or referee shall take into consideration the usual kind of fence in the locality and the particular use/purpose of the adjoining lands to be fenced (s 9 (4)).

## **Taking action in the Magistrates Court**

Action should only be commenced in the Magistrates Court where the proposed fence is likely to cost in excess of \$5,000. Where there are two conflicting proposals to fence, one of which is in excess of \$5,000 and the other below that amount, it is advisable to commence the action in the Magistrates Court rather than the Small Claims Tribunal.

An application to the Magistrates Court is made by way of a Claim. The Claim need not be supported by affidavit.

Once completed, Claim must be filed at the court. Care should be taken to ensure that it is filed at Magistrates Court closest to the client's property the subject of the claim.

It is advisable (although not essential) to prepare a brief affidavit prior to hearing. This obviates the need for extensive examination in chief and allows for the presentation of key points in a clear and concise format. Any affidavit should outline the steps taken to resolve the fencing dispute, the clients proposal for the construction and contribution to a fence and if the proposal is for a fence which is unusual, reasons which support that proposal. A copy of any notice to fence should be exhibited.

The magistrate has the power to order costs against either party in the dispute.

## **Taking action in the Small Claims Tribunal**

If the fence to be constructed will cost not more than \$5,000, action should be commenced in the Small Claims Tribunal.

Action is commenced by completion and filing of a Claim. No affidavit is required although it is advisable to assist client's to prepare one as legal representation is not permissible before the Tribunal.

A Small Claims Referee will hear and determine the dispute and may make the same orders as a magistrate.

The tribunal cannot order either party to pay the other party's court costs.

## Enforcement

If a party doesn't comply with any of the orders made by the magistrate or the referee within any time specified in the order, then the person who applied for the order may still build the fence and sue to recover the cost at a later time (s 10).

## Repairs to existing fence

The procedures for repairs to existing fences are detailed in Part 3 of the Act.

If an existing fence needs repair, neighbours must go through similar procedures to those required for the construction of a new dividing fence.

A *notice to repair* must be served requiring the party to help, physically or financially, to repair the fence. If the neighbour does not help repair the fence within one month, the person serving the notice may repair the fence and recover half the cost from the neighbour (s 16).

However, specific provisions apply in the following circumstances:

- where the fence has been partly constructed by one owner and partly by the other, each shall bear the cost of repairing the own part (s 16(2A)(a));
- where the fence is wholly or partially destroyed by flood, fire, storm or accident either party may repair the fence without first serving a notice to repair but shall be entitled to recover half the cost of repair from the other owner S 16(2A)(b));
- where a fence is damaged or destroyed by the removal of supports, or falling trees or fire, the party whose act or neglect caused the removal of support, falling trees or fire shall be obliged to repair the fence. If this does not occur, the adjoining owner may repair the fence and recover the whole cost from the other party.

A neighbour who is served with a notice to help repair a fence may apply to the Magistrates Court or the Small Claims Tribunal to settle any dispute which arises over the intended work. Such an application must be made within 14 days of the service of the notice. Alternatively, the person may serve a notice to fence in reply to a notice to repair where they believe it appropriate to replace the entire boundary fence.

The Magistrates Court and the Small Claims Tribunal have similar powers in dealing with applications for orders to repair as exist under applications for orders to fence. Both the court and the Tribunal have additional powers in dealing with orders to repair to determine periods of time within which no further notice to fence can be served (s 9 (1))

## Damage to a fence

Any person who damages a common fence must repair the damage.

If the person responsible for the damage does not repair the fence, his or her neighbour may repair the fence and sue to recover the cost.

## Demolishing a fence

When a person wants to demolish an old fence and replace it with a new one, the procedure is the same as for building a completely new fence.

## Right to enter a neighbour's land

Pursuant to section 22 a person who is building or repairing a fence in accordance with the rules laid down by the Dividing Fences Act may go onto the adjoining land of a neighbour at reasonable times for the purpose of building or repairing the fence. Any other entry without actual consent will be a trespass.

Thus, a party who erects a fence on a common boundary in the absence of any agreement may be liable in trespass, even where that person was prepared to cover the entire cost of the construction of the fence.

## Disputes about boundaries

If neighbours cannot agree on the boundary line between their properties for the purposes of constructing a fence, one may give notice to the other that he or she intends to have a survey done.

The type of notice which must be given is specified in section 13 of the Dividing Fences Act. The survey must be conducted by a registered surveyor.

A person who receives a notice that a survey is to be done to determine a boundary may tell the neighbour giving the notice where they think the boundary is by the placement of pegs on the line. If the boundary is in fact in that place, then that person shall not be liable for any of the cost of the survey. If the line is not where the person who received the notice thought it was, the Act requires the neighbours to contribute equally to the cost of the survey (s 13(4)).

The Surveyors Act (Qld) allows a surveyor to open up fences and enter private land in order to carry out a survey. This is significant because the protection afforded under section 22 of the *dividing Fences Act* extends only to people engaged in constructing or repairing a fence, not to those undertaking surveys to determine where a fence should be placed.

Once a boundary is surveyed, any person who deliberately pulls out or moves the survey pegs commits an offence under the Surveyors Act (Qld). Pegs may only be moved in order to construct a fence or some other permanent improvement.

## Words of Caution

In the absence of an agreement to fence between the two adjoining land owners, it is advisable to suggest mediation before proceeding to litigation. Care should be taken by a legal adviser to ensure that every opportunity is provided to the client to resolve neighbourhood problems without litigation. It is important to remember that the two parties may need to continue living in close proximity for many years to come.

Invariably, the outcome of a disputed hearing regarding dividing fences is a win/lose one. In the experience of staff at Caxton Legal Centre this often leads to the losing party feeling that their neighbour has triumphed over them or damaged their pride. This is certainly not the most conducive environment in which to re-establish neighbourly relations.

Our Centre would encourage legal practitioners to carefully consider their involvement in any type of neighbourhood dispute on behalf of clients. The involvement of solicitors during the very early stages of a dispute may simply escalate the animosity between the parties or destroy any foundation which has existed whereby the parties could have resolved their own problems (with some legal guidance rather than legal involvement).

Where appropriate, we encourage you to suggest mediation as a possible means of resolving neighbourhood disputes and to litigate those disputes as a last resort.