49/90

SUPREME COURT OF VICTORIA

AUSTIN v ATKINSON

O'Bryan J

19, 21 June 1990

FENCES – FENCE CONSTRUCTED ON BOUNDARY – OBJECTION BY ONE OCCUPIER AS TO KIND OF FENCE – FENCE FOUND TO BE SUFFICIENT FOR PURPOSES OF BOTH OCCUPIERS – "SUFFICIENT" – ORDER THAT FENCE BE REPLACED WITH DIFFERENT KIND OF FENCE – WHETHER SUCH ORDER APPROPRIATE: *FENCES ACT* 1968, SS4, 7.

Section 4 of *Fences Act* 1968 has application where adjoining lands are not divided by a fence or where the fence is not sufficient for the purposes of both occupiers. Where no fence exists or the fence is not adequate or sufficient, a magistrate has jurisdiction to determine the kind of fence which should be constructed. Where, however, a magistrate found that an existing fence was sufficient for the purposes of both occupiers, the magistrate was in error in ordering that the fence be pulled down and replaced with another kind of fence.

O'BRYAN J: [1] This Order Nisi concerns orders made in the Magistrates' Court at Lilydale on 9 October 1989 whereby the magistrate presiding made the following orders:

> (1) That the present paling fence be pulled down within 28 days at Mr Austin's cost. In default, Mr Atkinson be at liberty to arrange for the pulling down of the said fence at a cost to be borne by Mr Austin.
>
> (2) That a post and wire fence be erected within 28 days on the boundary between the two properties, such fence to be 60 metres in length, to be of the same construction as the existing post and wire fence and positioned in place of the present paling fence; such fence to be constructed by Whites Fencing. The cost of this to be borne equally by the parties in the sum of $685.

On 3 November 1989 Beach J ordered that the respondents show cause why the above orders should not be reviewed on a number of grounds, two of which were argued in this court. The remaining grounds were abandoned. The grounds argued are:

> (f) the determination of the evidence should have been that the complaint be **[2]** dismissed, and;
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> (g) the magistrate erred in making the orders as he did notwithstanding that he found, as findings of fact, that he accepted what the first-named respondent had said about the existing paling fence and found that he accepted everything that he said and found that he did not tell one untruth, and, further, that the existing paling fence was sufficient for both parties and accordingly the orders made by the magistrate were perverse.

At all material times, the applicants were the owners and occupiers of Lot 35, a rectangular shaped piece of land comprising approximately 3.5 acres with a frontage to Edinburgh Road, Lilydale. The northern boundary of the applicants' land is approximately 163 metres in length. It is contiguous with the southern boundary of a similar shaped piece of land owned and occupied by the respondents, also comprising approximately 3.5 acres. The respondents' land also has a frontage to Edinburgh Road. The applicants and the respondents reside in homes built upon their respective lands.

In late May 1989 a portion of the common boundary, namely about 60 metres almost equi-distance from the eastern and western boundaries, was unfenced. At the time relations between the parties **[3]** were not cordial for a number of reasons and, with a view to reducing the tension existing between neighbours, the applicants determined to fence the unfenced portion of the common boundary. For this purpose they brought on to their land timber for a paling fence. The respondents, who did not desire a fence for aesthetic and other reasons, sought to avoid a paling fence by causing a Fencing Notice to be served upon the applicants.

This notice stated:

> "We wish to have constructed a post and wire fence on our mutual boundary, that is that section which is presently unfenced and approximately 60 metres in length. Please note the following:
> (1) The fence as stated above, as with practically all other fences in the area, is to be post and wire of the same construction as the existing fence which already covers most of our mutual boundary.
>
> (2) We wish the fence to be constructed by an experienced contractor and we are presently obtaining a quotation which will be forwarded to you shortly".

The applicants proceeded to erect a paling fence two metres in height "virtually on the boundary" of the two pieces of land. The words in parenthesis were used by the learned magistrate in his reasons for decision and his finding in this regard is not disputed or relevant to the issue before this court. **[4]** The respondents, being dissatisfied with the new paling fence, caused a summons to issue under the *Fences Act* 1968 seeking orders pursuant to s7(1).

The matter came on for hearing in the Magistrates' Court on 9 October 1989. After hearing oral evidence and viewing the subject land the learned magistrate delivered reasons for decision and made the orders to which I have referred. Before turning to those reasons, I shall refer briefly to the *Fences Act*. Section 4 of the Act imposes a liability upon:

> "the occupiers of adjoining lands not divided by a fence sufficient for the purposes of both occupiers ... to construct or join in or contribute to the construction of a dividing fence sufficient for the purposes of both occupiers between the adjoining lands". (The underlining is for emphasis).

The key words which found jurisdiction under the Act are the words underlined. No liability to construct or join in or contribute to the construction of a dividing fence is created by s7 or elsewhere in the Act, if adjoining lands are divided by a fence sufficient for the purposes of both occupiers. Section 4 thus imposes a liability in circumstances:

> (1) when adjoining lands are not divided by a fence or;
>
> (2) when adjoining lands are not divided by a fence sufficient for the purposes **[5]** of both occupiers.

It will be a question of fact for the court whether adjoining lands are divided by a fence and, if so, whether the fence is sufficient for the purposes of both occupiers. The word "sufficient" bears the natural meaning "enough or adequate" (*Macquarie Dictionary*). The learned magistrate addressed the question of jurisdiction in his reasons for decision. He said:

> Is the fence sufficient for the purposes of both occupiers? Mr Atkinson's prime view is that no fence is necessary but he does not object to a post and wire fence. He said "There had been no fence there for 35 years and that there was quite dense vegetation". He said "It is virtually impossible to see any part of either house from the other and there are two banks of trees". He said "There were virtually no paling fences in the immediate vicinity and not many round, usually on side street boundaries". It is his opinion that the paling fence has diminished the value of his property and the aesthetics are greatly diminished. He said "The fence is ugly, inappropriate and out of character. It is clearly visible" – he said – "when he drives in and out and is quite visible from areas in the garden". Mr Austin said his reasons for wanting the paling fence were (1) privacy and (2) to avoid hassle. He said "He does not want Mr Atkinson staring into his property". He said "Mr Atkinson is very emotional about his tractor". He said "I saw him looking when I was on the tractor. He shouted 'Noise, noise". He said "He avoided using the north side and the barbecue area". He said "he can now use the barbecue and the entire area". He said "Mr Atkinson had looked straight through glass windows at his wife and himself having breakfast in their dressing gowns". And he said "Mr Atkinson looked in to the jacuzzi at his wife and daughter". I have had the **[6]** advantage of observing each of the parties in the witness box. I am satisfied that they do not get on well together. They have been involved in arguments. Mr Atkinson impressed me as being a dominant type of person, he appears very emotional about the situation. He accused Mr Radford of trespass – which he retracted when told the question resulted from the view. Mr Austin on the other hand impressed me as being more of a meek and mild type of person who prefers as he said "To live and let live".
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> I accept Mr Austin's evidence about Mr Atkinson's behaviour. I am satisfied that for Mr Austin a paling fence would be more sufficient for his purposes than no fence or a post and wire fence. I am not satisfied that Mr Atkinson's property has been diminished in value by the paling fence or that the aesthetics of the area are affected to any great extent by the paling fence. I am satisfied that it

> blends in quite well with the surroundings in relation to s4(1), therefore I am satisfied that the paling fence is the one most suitable.

It is clear, therefore, the learned magistrate found that the subject land was divided by a fence sufficient for the purposes of both occupiers on the day of the hearing. Although in the closing words of the passage cited, the learned magistrate departed from the words of the section when he said: "I am satisfied that the paling fence is the one most suitable", I regard this departure as of no significance because the magistrate clearly had in mind the requirements of s4. Further, the words "most suitable" in their natural meaning of "most appropriate" possibly imposed a more stringent test than s4 required. The finding of the learned magistrate that the **[7]** paling fence was sufficient for the purposes of both occupiers was not challenged, nor could it have been challenged, as it was founded upon acceptance of the male applicant's evidence against the evidence of the male respondent, and a view of the subject land by the learned magistrate. When this finding was made, the learned magistrate ought to have dismissed the complaint because the jurisdictional basis for imposing liability to fence upon an occupier did not exist.

The learned magistrate proceeded to consider s7(6) of the Act. Sub-section 6 provides:

> In making the order or award the court—
> shall be guided as to the kind of fence to be constructed in the place where it is proposed to construct the fence.

The learned magistrate then held that sub-section 6 "Overrides any finding in relation to s4(1)". He determined "That the kind of fence usually constructed in the place where it is proposed to construct the fence is post and wire". Orders earlier announced, were then made. I am clearly of the opinion that once having determined the threshold question pertaining to jurisdiction, the learned magistrate fell into error in proceeding to consider sub-section 6. Had the court found the adjoining lands were not divided by a fence, or by a fence sufficient for the purposes of both occupiers, it would have been necessary for the court to determine the kind of fence to be **[8]** constructed. In determining this question "The kind of fence usually constructed in the place where it was proposed to construct the fence" should have been considered.

In the result I consider that grounds (f) and (g) of the Order Nisi have been made out and the Order Nisi will be made absolute. The orders made in the Magistrates' Court at Lilydale on 9 October 1989 between the parties will be set aside. The court directs there be entered in the register – in the Magistrates' Court at Lilydale the following orders. 'Summons dismissed'. The respondents are ordered to pay the costs of the applicants of this hearing. A certificate under the *Appeal Costs Fund* will be granted to the respondents.

APPEARANCES: For the applicants Austin: Mr AE Radford, counsel. Mackinnon, Jacobs, Horton & Irvine Pty, solicitors. For the respondents Atkinson: Mr CWR Harrison, counsel. Ken Smith & Associates, solicitors.
