THE FENCING ACT 1978 AND RELATED MATTERS

Increasing criticism of the Fencing Act 1908 prompted the Minister of Justice to ask the Property Law and Equity Reform Committee[1] (herein called "the Committee") to review the statute. In June 1972 the Committee reported and submitted a draft Bill. Now, fully six years later, we have at last a new Act, the Fencing Act 1978, which comes into force on 1 April 1979.

The Fencing Act has been, if not the source of, at least the fuel for many bitter legal wrangles over the years. Fences have always been a focal point of unneighbourly conduct, and anachronistic or just plain bad provisions in the 1908 Act had often exacerbated disputes. A former Minister of Justice, Dr A. M. Finlay, was deeply critical of the 1908 Act in the debate at the first reading of the 1978 Act:[2]

> [T]here is no instrument more calculated to aid venomous and mischievous neighbours in their suits against each other than the existing provisions of the Act. Unfortunately, sometimes they are assisted by counsel, or other advisers, who lend themselves to the venom that enters a dispute between neighbours. Everyone knows that there is no dispute more unpleasant than one between neighbours, and that if one wants to aggravate a neighbourhood dispute one can resort to the Fencing Act with a great deal of facility, if only by invoking the provisions of the second schedule.

The 1908 Act had, despite several amendments, fallen further and further into disharmony, particularly with urban needs. On the superficial level it seemed out of date: it still spoke of rabbit-proof and non-rabbit-proof fences, of ditch and bank fences, and of actually planting gorse. But the weaknesses of the Act ran deeper than this. To cull anachronistic provisions was one of the Committee's main tasks — the new Act records its success. In quantitative terms the Legislature trimmed the statute from forty-seven to twenty-eight sections, and from twenty-six to seventeen pages of the statute books. The incisive and logical simplification of the law on fencing is one of the strengths of the 1978 Fencing Act.

Main Provisions and Principal Reforms

It is hardly surprising that, in the absence of agreements between neighbours to the contrary, the principle of equal contribution by neighbours to the costs of erection and repair of fences remains.[3] Neighbours must contribute "in equal proportions to work on a fence." The "occupier" is responsible for the cost, and he is defined in section 2 as the owner or, should he occupy under a term of not less than ten years certain, the tenant.[4]

Under the 1908 Act the "occupier" included persons "in the actual

1 The members of the Committee were: Mr C. P. Hutchinson, M.B.E., Q.C. (Chairman), Professor G. P. Barton, Mr G. Cain, Mr J. G. Hamilton, Professor G. W. Hinde, Mr L. McClelland, Mr K. U. McKay, Professor P. B. A. Sim, Mr E. J. Somers, Mr R. G. F. Barker (Secretary).

2 14 Dec. 1978 N.Z.P.D. 5341-5342.

3 Fencing Act 1978, s.9.

occupation" of the property. In theory, then, *any* tenant was liable to contribute to the cost of fencing. Although rarely imposed in practice, this liability was potentially prohibitive. In 1972 the Committee suggested that a tenant holding under a term of not less than twelve months be treated as the "occupier" for contribution purposes. This too is difficult to justify, especially when one considers the inflated cost even of urban fences. One might even argue that tenants should be exempt entirely from fencing costs, as a fence enhances the value of the realty for the owner. The ten-year rule is a compromise. It seems, though, that where a long-term tenancy is nearing its end the tenant may still be called on to bear a full contribution. There is merit in the South Australia, New South Wales and Queensland solution.[5] These states demand a contribution from the tenant proportional to the remaining term of his lease. In New South Wales and Queensland, if the tenant's interest at the time of construction or repair is less than five years, the landlord pays the full contribution; when there is a five to seven-year term remaining, the tenant pays twenty-five per cent; with a seven to twelve-year term remaining, the tenant pays half; and if the tenancy has twelve years or more to run, the tenant pays the full contribution.[6] This is a subtler, more equitable formula than the New Zealand "all or nothing" rule.

In the 1978 Act the new phrase "work on a fence" embraces both erection and repair of a fence. The 1908 Act, like the equivalent Australian state fencing statutes, carried dual sets of provisions to cope with each and the Second Schedule set out separate notice forms for each type of work. Now, in welcome simplicity, there is only one set of provisions and one form of notice for all types of work on fences, whether it be "erection, replacement, repair, [or] maintenance of a fence in whole or in part."[7]

Like its predecessor the new statute makes no distinction between rural and urban fencing, except in the Second Schedule where, for obvious reasons, the types of fence differ to meet the different needs of town and country. In silent tribute to the nation's rabbit boards, the classification of fences into rabbit-proof and non-rabbit-proof varieties has gone. Fence types are now grouped under the headings "urban" and "rural", terms that are not defined in the Act. Technology apparently

4 The "occupier" is defined in s.2 as follows:
"Occupier"—
(a) In relation to any land, other than a public reserve, means the owner thereof, except that,—
(i) Where another person is in occupation of the land under a tenancy granted for a term of not less than 10 years certain or continues to be in occupation of the land after having been in occupation thereof under such a tenancy, that other person shall be the occupier of the land; or
(ii) Where no person is an occupier of the land by virtue of subparagraph (i) of this paragraph, but a person is in occupation of the land as mortgagee in possession, that last-mentioned person shall be the occupier of the land:
(b) In relation to any public reserve, means the local authority, trustees, or persons in which or whom control of the reserve is vested.

5 See the Fences Act 1975 (S.A.), the Dividing Fences Act 1951 (N.S.W.) and the Dividing Fences Act 1953 (Qd.). The Queensland statute closely follows the New South Wales Act.

6 Ibid., s.18 (N.S.W.) and s.20 (Qd.). For a slightly different proposal see Fences Act 1975 (S.A.), s.14.

has not revolutionised fencing practices, and only the panel fence and the masonry wall have joined the standard list of "adequate" fences in the Schedule.

To give flexibility as methods of fencing change over time, the Act no longer suggests that only the types of fencing listed in the Second Schedule are sufficient or adequate under the Act.[8] There seems no obvious reason for the change from "sufficient" fence (in the 1908 Act) to "adequate" fence (in the new Act). A sufficient or "adequate" fence is now defined as one that "as to its nature, condition, and state of repair, is reasonably satisfactory for the purpose that it serves or is intended to serve."[9] It seems clumsy and even potentially troublesome to qualify "satisfactory" with "reasonably". Apparently a fence may be less than satisfactory and yet still satisfy the Act. It may have been more appropriate to adopt the formula "reasonably fit for its purpose" in this context. But, that aside, the thrust of the definition is clear — what is important is that fences, whatever they are made of, do their job satisfactorily. The Second Schedule now merely gives a guide to neighbours, to courts, and to conveyancers on what is an "adequate" fence.

The notice requirements generally remain the same. The recipient of a fencing notice, if he objects to the proposal, must act within twenty-one days from the date of service and serve a cross-notice. Failure to cross-notify within that time means the recipient is deemed to agree with the proposals.[10] Work must then be commenced by the applicant within a further twenty-eight days. If he fails to do so, either party can then "proceed to do the work" within a further ninety days.[11] If nothing is done in that time then, subject to agreement by the parties or to court order, all notices lapse and the parties are back to square one. The procedure must start again. This three-month limit and lapsing procedure is new. It should encourage the parties to get the work done promptly and thus perhaps bring quicker resolution to lingering fencing disputes.

The Fencing Act now applies to all Maori lands. Under the original 1881 statute some Maori lands were exempt, the distinction between Maori and European lands existing in part out of benevolence, and in part because Maori lands were often held in communal ownership under Maori customary title. The European concept of individual ownership of blocks of land was suited to the equal contribution rule. The "occupier" could be easily identified and traced. But, it was successfully argued, Maori owners should not be compelled to contribute to fencing

7 Fencing Act 1978, s.2. In *Stacey* v *Meagher* [1978] A.C.L.D. 246, the Supreme Court of Tasmania defined the words "erection of a sufficient fence" widely to include constructon of the whole or reconstruction so as to make sufficient a fence that is not sufficient. See s.8(1) of the Boundary Fences Act 1908 (Tas.). The Fences Act 1975 (S.A.) s.4 carries a similar definition to s. 2 (N.Z.) for the term "fencing work": " '[F]encing work' means the erection of a new dividing fence, or replacement, repair or maintenance work in relation to an existing dividing fence."

8 In the 1978 Act there is no provision equivalent to s.8 of the 1908 Act which read: "A fence of any of the kinds mentioned in the Second Schedule hereto is a sufficient fence within the meaning of this Act."

9 Fencing Act 1978, s.2.

10 Ibid., s.11(3).

11 Ibid., s.14.

costs as the difficulties of tracing and dealing with perhaps scores of owners of one piece of land would make the law impossible to administer.[12] Over the years much Maori land was removed from customary ownership, and from 1895 owners of Maori lands to which the titles had been determined and of lands that yielded profits through leasing became liable for contribution to fencing costs. Now, from 1 April 1979, European and Maori lands will be treated in the same manner.

In this context *Attorney-General (Maori Affairs Department)* v *Ward*[13] is relevant. There it was held that where adjoining land is owned by several co-owners and the neighbour is only able to serve fencing notices on some but not all of the co-owners, he, the neighbour, can recover the whole contribution from those co-owners so served who did not object to the notice.[14] The reasoning is that every tenant in common has an estate in the whole of the undivided tenement. Thus, just as he is responsible for the full amount of any damages due for breach of a covenant, he is also liable for the whole of fencing charges, not merely for his due proportion. The liability of co-owners inter se is, of course, another matter, but so far as the neighbour seeking contribution to fencing costs is concerned, his task is made easier.[15]

The trend in current legislation to insert a provision expressly binding the Crown continues in the 1978 Act. Subject to four exceptions, the Crown is now bound by the equal contribution rule.[16] Conversely, it can demand contributions to fencing costs. The four exceptions occur, broadly speaking, when the proponent neighbour's land adjoins roads, national parks, railways, the coastline and inland waterways. Rural dwellers, in particular, will welcome the change, a change the 1972 Committee did not recommend. It seems fitting that the biggest landholder of them all should pay its way, especially as fences enhance the value of Crown lands just as they do neighbouring private holdings.

Fencing covenants[17] are now, especially with the increase in subdivisions, quite common on certificates of title. While it can be ascertained from a search of the titles which covenants are no longer operative, the fact remains that titles become littered with spent covenants. The reason for this is that fencing covenants almost invariably provide that the benefit of the covenants does not enure to successors in title of the dominant tenements.[18] Despite the existence of machinery under section 71 of the Land Transfer Act 1952 for removal of covenants

12 In an 1895 Parliamentary debate on fencing legislation ((1895) 89 N.Z.P.D. 428-429) Mr Heke, the M.P. for Northern Maori, also argued that as Maoris could not, at that time, deal freely with their own lands (e g. lease or sell them) then Parliament could not expect them to pay fencing costs.

13 (1968) 12 M.C.D. 202.

14 Donne S.M. relied on *United Dairies, Ltd.* v *Public Trustee* [1923] 1 K.B. 469; [1922] All E.R. Rep. 444.

15 In *Ward's* case (supra n.13) notices were served on two of the three co-owners. The third owner was deceased at the time of notification and no transmissions had been registered.

16 Fencing Act 1978, s.3.

17 The 1978 Act introduces definitions for both fencing agreements and fencing covenants. "Fencing agreement" is defined in s.2 as follows: "[A] covenant, agreement, or proviso, not being a fencing covenant, that relates in any way whatever to work on a fence between adjoining lands; and includes an agreement not to erect a fence." Both agreements and covenants are registrable: see s.5.

18 However, the burden of registered fencing covenants or fencing agreements does run with the servient land: s.5(2).

from titles, it is very rarely used. Now section 6 of the new Act states that the registration of fencing covenants shall expire after twelve years from the date of registration. The registration of existing covenants shall expire after twelve years from 1 April 1979. Note that the registration of the covenant expires, not the covenant itself. Adjoining owners still have the power to contract. They can still enter fencing agreements and covenants, which are enforceable as contracts at common law.[19]

The new section 10 ensures that the neighbour being served with a fencing notice receives adequate details of the proposal. The provision even stipulates that an estimate of cost of work be included in the notice. An accurate estimate will undoubtedly be useful to the neighbour, but if it proves wildly inaccurate there could be problems. Will the initiator be able to compel his neighbour to pay a full half share if the final cost of the fence greatly exceeds the estimate? Under section 9 a neighbour is liable for half the cost of work on the fence. While that section does not suggest that he is liable for only half the cost of a sufficient or adequate fence, under section 24(1)(d) the Magistrate has jurisdiction to determine the "reasonable and proper cost of work on a fence", and under paragraph (e) he can decide the proportion of the cost each neighbour shall bear.[20] It seems though that any neighbour who thinks the estimated cost of the fence is too high should not delay in sending a cross-notice to that effect and, if necessary, in seeking the Court's adjudication.

A new provision — section 21 — deals with "give and take" fences. The Court has jurisdiction to step in where, for some reason (usually concerning the terrain), a fence cannot be placed on the true boundary. The Court can settle the fence line and order compensation for any resulting loss of occupation of land. This provision should be useful in, and in practice probably applicable only to, rural areas.

Discarded from the Act is section 26 which prohibited the planting of trees "on or alongside" any boundary line or fence without the previous written consent of the occupier of the adjoining land. Such decisions as *Spargo* v *Levesque*[21] and *Gilbert* v *Sampson*[22] had so undermined this ill-conceived section that its omission from the 1978 Act was merely the *coup de grâce.*

Trees, Structures and the Right to a View

Like its predecessor the 1978 Act applies only to fences erected on

19 See *Gaynor* v *Lacy* [1920] N.Z.L.R. 235; [1920] G.L.R. 205 for an example of an oral contract, made independently of the Fencing Act, enforceable at common law.

20 The Western Australian case of *Cooper* v *Hassell* (1908) 10 W.A.R. 100 is of interest here. The adioining landowner was, under s.25 of the Cattle Trespass, Fencing and Impounding Act 1882 (W.A.), to pay "half the then value of . . . the dividing fence". In a dictum, the Full Court of Western Australia stated that, to quote the summary provided in the Report: "[T]he defendant is liable only for half the fair value of a 'sufficient' fence under Section 30, and not for half the cost or value of a more expensive fence which may have been erected." The South Australian Fences Act 1975, s.12(7) offers a specific solution to this problem of the more-than-adequate fence: "If fencing work consists in the erection of an adequate fence or a fence of better quality than an adequate fence, or the conversion of an existing fence into an adequate fence or a fence of better quality than an adequate fence, then, in the absence of agreement between the adjoining owners, the contribution for which an adjoining owner is liable shall be one-half of the minimum cost of erecting an adequate fence, or converting the existing fence into an adequate fence."

21 [1921] N.Z.L.R. 1019 (S.C.); [1922] N.Z.L.R. 122 (C.A.).

22 [1934] N.Z.L.R. 137; [1934] G.L.R. 160.

the true boundary. It does not apply to fences or other structures erected inside the boundary.[23] In 1955, section 26A had been added to the Fencing Act. It was to apply where trees injuriously affected a neighbour's land which was used for residential purposes. While applying only to trees, this provision extended some control over the use to which a neighbour's property could be put, and apparently the Legislature intended the section to apply when trees caused an obstruction to a view.[24] However, the wording of section 26A was found to be inadequate for the task. In the controversial decision, *Williams* v *Murdoch,*[25] Henry J. held that the section could not be read widely enough to protect a view affected by trees.[26]

In 1972 the Committee suggested this decision should remain the law — it was felt that there was already enough interference with a landholder's freedom of action.[27] But the Legislature disregarded the advice and, in a 1975 amendment, made interference with a view a specific ground for action.

The new provision, section 129C of the Property Law Act 1952, gives the Magistrate's Court power to order the removal or trimming of trees, or the alteration of structures, which injuriously affect a neighbour's land. The application of the section is narrowed somewhat, in deference to local body control, as "structures" under the provision includes only walls and fences that have been erected without a building permit. In its deliberation the Court may, in what must necessarily be a subjective judgment, make such order as it thinks fit, providing the applicant meets the somewhat confused and overlapping criteria listed in the section.[28] In summary, the applicant must satisfy two questions:

(1) Is there actual or potential danger to health or property, *or* is there undue obstruction of a view, *or* some diminution in the value of the property, *or* is there undue interference with the reasonable enjoyment of the land for residential purposes? *And*

(2) Would refusal of a remedy cause greater hardship to the applicant than that the defendant would suffer if a remedy were granted?[29]

23 See *Ahearn* v *Havler* [1967] N.Z.L.R. 245. There it was affirmed that a fence must be on the boundary, or as near as practicable to the boundary, before an occupier could compel the adjoining occupier to contribute under rights conferred by the Fencing Act 1908, or before the Magistrate's Court had jurisdiction under s.36 of that statute.

24 See (1974) 393 N.Z.P.D. 3770 and 3772 per Dr Finlay (Minister of Justice). Also see (1955) 307 N.Z P.D. 3359-3366 for a discussion of the Fencing Amendment Bill which introduced s.26A.

25 [1968] N.Z.L.R. 1191.

26 Ibid., 1192: Henry J. explains: "The only fact proved is that the property has been deprived of a prospect or view which it formerly had. For residential purposes, that is for its purpose or use as a dwellingplace, it remains as suitable as before." The magisterial decision overturned on this appeal was widely considered to be a better decision on the interpretation of s.26A. See supra n.24 and comment on *Williams* v *Murdoch* in the 1972 *Report of the Property Law and Equity Reform Committee — the Fencing Act 1908,* 6-7.

27 An interesting debate on the rights and responsibilities of urban neighbours ensued in the House of Representatives on the second reading of the 1955 Fencing Amendment Bill: (1953) 300 N.Z.P.D. 1837-1850.

28 See Eagles, "A Vandal's Charter" [1976] N.Z.L.J. 103 for a provocative analysis of s.129C of the Property Law Act 1952.

29 Section 129C(8) must be read alongside s.129C(5).

In exercising his discretion the Magistrate is required to consider a variety of environmental factors. For example: has the tree historical, cultural or scientific significance? Will ground stability or the water table be affected by its removal? Does the tree contribute to an aesthetically pleasing environment? And, rather exotically, has the tree value as a "public amenity"?[30] The Magistrate must weigh up the competing interests carefully for, as one Member of Parliament put it, "one man's view may be another man's shelter, or his much-prized tree."[31]

Section 129C featured in *Morrow* v *Norgrove,*[32] presently the only reported decision on this provision. The Magistrate was asked to order the trimming of a Norfolk pine and a pohutukawa tree, both of which stretched to thirty feet in height. They interfered with the applicant's harbour view, blocking some two degrees of the 120 degree vista. Environmental factors carried the day, Richardson S.M. explaining with some panache:[33]

> [T]he trees in question are obviously a delight to behold. They adorn the surrounding landscape and rise majestically to provide a picture of symmetry, grace and beauty in the eyes of the beholder. To many whilst causing an obstruction to the distant seascape they would enhance the view greatly by their presence in the near or mid-foreground, most particularly when the pohutukawa was in bloom with its umbrella of red etched against a back-drop of green foliage from the Norfolk tree and the distant seascape.

He found the obstruction by the trees was not "undue". It was neither excessive nor unreasonable.

One would imagine that section 129C might be resorted to frequently in day-to-day legal practice, particularly in hilly urban neighbourhoods where views are treasured for both aesthetic and economic reasons. It is noteworthy that the offending tree or structure need not be on the property adjoining that of the applicant. In *Morrow's* case, for example, an intervening lot separated the applicant's property from the defendant's land.

Spite Fences

A spite fence is one erected solely or principally to annoy or disadvantage a neighbour. In *Buckleigh* v *Brown,*[34] to take one example, while a large concrete wall on the boundary was erected ostensibly to ensure the defendant's privacy, the Court found that the prime motive was to block the plaintiff's view of a lake. Normally spite fences are erected on the boundary and the neighbour, for obvious reasons, is not usually called on to contribute to the cost of the fence.

Now, under the 1978 Act, even if not seeking contribution to the cost of fencing, one must get the consent of the neighbour or a court order if the fence "to any degree" encroaches upon the neighbour's land.[35] Fences erected right on the boundary must to some degree encroach on the neighbour's land, the middle of the fence being on the boundary

30 Section 129C(6).
31 (1975) 399 N.Z.P.D. 3201 per Mr O'Flynn (M.P. for Kapiti).
32 (1978) 14 M.C.D. 219.
33 Ibid., 221.
34 [1968] N.Z.L.R. 647.
35 See s.8.

line.[36] The Legislature was concerned that especially in urban areas the adjoining owner should have some control over boundary fences, whether or not he is paying a proportion of the costs.[37]

This provision, however, does not apply to existing boundary fences or to fences erected inside the boundary. Restrictive covenants have been used to control the use of a neighbour's land, the covenantor agreeing to restrict the use of his land — for example in respect to height, size, proximity or use of fences or structures — for the benefit of the covenantee's adjoining land.[38] But restrictive covenants are rare, even in urban areas. A remedy for spite fences is now provided in section 129C of the Property Law Act 1952. Should a fence or a structure, erected without a building permit, unduly obstruct a view or cause injury or loss to the applicant "by diminishing the value of the property or reducing the enjoyment of it for residential purposes" then the section applies.[39] Any fence erected to block a view or to produce a disagreeable outlook for a neighbour should easily meet this test.

Conclusion

The Fencing Act 1978 was almost guaranteed to be a vast improvement on the 1908 Act, so confused and obsolete had its provisions become. The draftsmen seem to have succeeded in putting together a coherent piece of legislation that should better serve the needs of all New Zealanders, and of urban dwellers in particular. No legislation can prevent friction rising between neighbours over fencing matters, but the new Act should do the next best thing. It should provide machinery for the speedy and equitable resolution of fencing disputes.

J. F. CORKERY.

36 Section 22 reads: "Save as otherwise agreed or ordered by the Court, the middle of a fence shall be upon the boundary line: Provided that, where a fence is supported by or formed by posts, the posts shall be placed on the boundary line or as near thereto as practicable."

37 See 26 Sept. 1978 N.Z.P.D. 3810.

38 For an example of a restrictive covenant (a building line restriction) see *Buckleigh* v *Brown*, supra n.34.

39 See s.129C(5) and s.129C(8).