IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

846

M.1856

BETWEEN CECIL EDWIN WALTER THOMPSON, DAVID MARK THOMPSON and GARY NORTON THOMPSON all of Spring Grove, Farmers

Appellants

A N D ROSS LESLIE HIGGINS of Spring Grove, Farmer

Respondent

Hearing: 17 June 1981

Judgment: 9th. November 1981

Counsel: B.J.M.Nelson for Appellants
G.W.Allan for Respondent

JUDGMENT OF HARDIE BOYS J.

This is an appeal against a decision given in a dispute under the Fencing Act 1978. The boundary in question divides two farm properties and runs from the highway to the Wai-iti River. Along that part of the boundary closest to the river there is a satisfactory post and wire fence. That is not in dispute. At the other end, adjacent to the road there is a four-barred gate. For most of the rest of the boundary there is a hedge of barberry and hawthorn. This is not continuous. Not far from the gate, the line of the hedge is interrupted by another post and wire fence. At the time of the lower Court hearing three strands of this were buried at one end as the result of development work done on the appellants' land, which is a little higher than the respondent's. At the hearing the appellants undertook to clear this immediately and I was told that they have since done so, so that this part of the boundary is not in dispute either.

The disputed parts are those where the gate is, and where the hedge has been planted. The gate is said to be of a kind that will not keep sheep out. The hedge is very many years old, and portions of it have died out. In two or three places, where there are

quite large gaps, new cuttings have been planted, and partly for their protection the gaps have been filled with rough and ready post and railing fences. The total length of the railings is about 50 yards: the total length of the hedge about 500. In a number of other places, where the gaps are smaller or are only in the base of the hedge, they have been filled with pieces of wood or wire netting or a combination of both.

Several years ago the hedge had grown straggly and as a result stock was able to get through without difficulty. It was agreed between the parties that the hedge would be topped and kept trimmed in order to encourage growth closer to the ground, and that in the meantime the gaps would be filled with wood and netting. The topping that was done must have been a little drastic, for further plants died. The respondent claims that the steps that were thus taken were inadequate: he has had to go on blocking gaps that have come into being, and even so stock continues to get through. He says there is no way in which the situation can be rectified by further repair.

Having been unable to resolve the matter amicably with the appellants, the respondent issued a fencing notice proposing that the whole boundary except the post and wire fences be cleared of all existing material and that a further post and wire fence be constructed in place of the hedge, at a total cost of $2,340, to be shared equally.

The appellants run dairying beef. They are substantial town milk suppliers. They value the hedge, for it gives shelter and protection to their stock particularly at calving time. They served a cross-notice, claiming that "there is already a close and sufficient live hedge on the boundary..." They considered that any recurring gaps can continue to be closed up with pieces of wire netting. However as a compromise they proposed that a post and wire fence be built on one side of the hedge. The respondent in turn proposed that he pay half the cost of a new fast-growing shelter belt to be planted alongside the new fence

he proposed. He was not prepared to allow the hedge to remain, as he regards it as an eyesore and indicative of poor farming practice.

The evidence centred on whether or not the existing hedge is stock proof. The respondent alleged that until he leased his land out for potato growing, his sheep frequently got into the appellants' property, and indeed that that was why he leased it. He also suggested that at times the appellants' cows got into his property, but that was flatly denied by the appellants. Their contention was that to the extent that sheep did get through, it was at the post and wire fence at the river end. It was only there that there was any evidence of adhering wool. The respondent called two independent witnesses. One was chief civil engineer for the Forest Service, with personal farming experience but none of live fences. The other was a retired farmer, who had had such experience. Both said the hedge was not stock-proof. In the opinion of the retired farmer, not even the railing portions would prevent new shorn lambs getting through. The appellants had three independent witnesses. One, a fencing contractor and farmer, said the fence was as stockproof as a live fence can be, and certainly as stock-proof as the post and wire fence at the river end. He had had little experience with live fences. Another was a retired sheep-farmer, who said it was a "dense a vigorous sheep-proof fence". The third was the current lessee of the respondent's land who said he had seen no sign of animals coming through from the appellants' side. He thought it was a "sufficient fence", but he had not really had any experience of live fences.

The first point with which the learned District Court Judge had to deal, and which was raised again on this appeal, was whether the agreement the parties made some years ago at the time the hedge was topped was of the kind contemplated by s 4 of the Act, so as to deprive the respondent from seeking relief inconsistent with it. Whatever the exact content of the agreement was, it was certainly not that the hedge would

be accepted as an "adequate fence" in terms of the Act for ever thereafter, irrespective of how successful the steps taken to improve it proved to be. If those steps have over the intervening years proved ineffective, the agreement must in my view be regarded as at an end. I therefore do not consider that s 4 is relevant to this case.

Leaving aside s 4, the basis of jurisdiction under the Act is that the adjoining lands are not divided by an adequate fence (s 9). The expression "adequate fence" is defined in s 2 as "a fence that, as to its nature, condition, and state of repair, is reasonably satisfactory for the purpose that it serves and is intended to serve." It is to be noted that the Second Schedule which sets out descriptions of various kinds of fence, amongst which is "a close and sufficient live fence", has a rather different purpose from the Second Schedule in the 1908 Act. In the latter its purpose was one of definition, for s 2 of that Act defined "fence" as "a sufficient fence of any of the kinds mentioned in the Second Schedule...." Now, the Second Schedule is descriptive only. It is not brought into the definition of an "adequate fence" but is referred to in s 10(2) as a means of assisting one who wishe to serve a fencing notice to describe the kind of fence he proposes.

In this case, therefore, the question for the learned District Court Judge was not essentially whether this hedge is "a close and sufficient live fence" but rather whether it is "reasonably satisfactor for the purpose that it serves or is intended to serve". There can be no doubt that the prime purpose of this hedge is to contain stock. The word "reasonably" has I think a twofold significance. Primarily, it makes a contrast with what would be "entirely" satisfactory. Secondarily, although aesthetic considerations cannot be to the fore, it introduces a qualitative element. For although a fence can no doubt be shored and patched up for a long time to postpone its ultimate and inevitable collapse, there comes

an earlier stage at which no reasonable person will be prepared to endure it any longer. It becomes an eyesore. It then ceases to be "reasonably satisfactory" for its purpose. The point at which that stage is reached will depend on the locality, both general and particular, where the fence is situated.

Faced with conflict between the witnesses as to these matters, the learned District Court Judge chose to accept the evidence of the civil engineer called by the plaintiff that the fence was not stock proof and was not able to be repaired. He also had regard to the fact that parts of the hedge had died and that the gaps had been filled up. "It can hardly be said", he concluded, "that if the hedge requires this sort of attention that it is reasonably satisfactory for the purpose."

These are findings of fact. This appeal is by way of rehearing but nonetheless I must consider it within the constraints referred to by Lord Thankerton in Watt (or Thomas) v Thomas [1947] AC 484, 487-8:

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion ...
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> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

Although the evidence suggested quite clearly that the main incursions of the respondent's sheep onto the appellants' property had taken place through the post and wire fence at the river end of the boundary, there was evidence that sheep or lambs could get through at other points too. The District Court Judge chose to accept that evidence and I am not persuaded that he was not entitled to do so. It is clear that he also had regard to the other consideration which, as I have explained, is raised by the expression "reasonably satisfactory". On the material before me, I think that was entirely proper. The blocking up of gaps with netting and boards indicates both the inadequacy of the hedge to contain stock, and the unreasonableness of continuing to maintain it by such makeshift and unsightly means. Mr Nelson pointed out that in every hedge plants die and are replaced and submitted that if a live fence were declared inadequate every time a section died, or gaps appeared, there would be few live fences left. It must of course be a matter of degree in each case. Here, relevant factors are the extent of the dying out and of the patching measures, and the length of time over which the problem has been experienced. It can I think be said that these go beyond the limit of reasonableness.

Mr Nelson further submitted that if the hedge were found to be inadequate, all that was called for was replacement by a post and wire fence of the relatively short portions where the railings have been put. I do not regard such a measure as creating an adequate fence. There would be difficulties where the new fence meets the hedge. Other gaps where there has been dying out close to the ground would remain. The whole thing would look patchy and, to use the respondent's phrase in another context, it would be an unsightly mess. I think the learned District Court Judge was right in accepting, as he obviously did, the opinion of the respondent's witness that the only practicable course was to remove the whole of the hedge.

Mr Nelson raised some other matters which I think were well-founded, but I do not need to canvass them because they do not affect my conclusion that the learned District Court Judge was right in upholding the respondent's claim, and also in the orders which he made. The appeal is therefore dismissed, with costs to the respondent of $75 together with any disbursements as approved by the Registrar.

Solicitors:

Glasgow, Son & Tidswell, NELSON, for Appellants.
Pitt & Moore, NELSON, for Respondent.