

IN THE MATTER OF DISPUTE CONCERNING FENCES ERECTED BY
THE OWNERS AND OCCUPIERS OF ADJOINING PARCELS OF LAND;

AND IN THE MATTER OF AN ARBITRATION OF THE DISPUTE
PURSUANT TO THE PROVISIONS OF *THE LINE FENCE ACT*, R.S.S. 1978,
c. L-17, s. 3;

BETWEEN:

JUDITH BENARD,

COMPLAINANT,

- and -

CARLA SKIFTUN,

RESPONDENT.

APPEARANCES:

For Judith Benard: **Self Represented**
For Carla Skmiftun: **Self Represented**

BEFORE: **T. F. (Ted) Koskie, B.Sc., LL.B. (Acting as a Single Arbitrator)**

Case Heard: April 27, 2010, at Saskatoon, SK
Award Dated: May 25, 2010

AWARD

I. BACKGROUND AND DISPUTE

[1] I heard this case on April 27, 2010, in a meeting room at the Delta Bessborough Hotel in Saskatoon, Saskatchewan.

[2] Judith Benard, after this called the “Benard,” and Carla Skiftun, after this called “Skiftun,” agreed the Board was properly constituted and had jurisdiction to hear and decide this

matter.

[3] In her letter dated March 2, 2010,¹ after this called the “Complaint,” Benard claims that Skiftun:

- a) damaged her chain link fence, after this called the “Benard Fence”;
- b) constructed a fence, after this called the “Skiftun Fence,” on her property that was in contravention of the Bylaws of the City of Saskatoon in that it was:
 - i) higher than two (2) metres; and
 - ii) less than one (1) metre from the property line; and
- c) failed to “maintain” the grass and weeds between the original property line fence—the Benard Fence—and the Skiftun Fence.

[4] The Complaint asks that I:

- a) award damages of \$1,678.00 against Skiftun for costs of repairing the Benard Fence;
- b) award damages of \$676.92 per annum for increased electrical costs required for lighting because sunlight is blocked to the Benard home by the Skiftun Fence;
- c) award unspecified damages against Skiftun for basement water damage;
- d) order that Skiftun move the Skiftun Fence at least one (1) metre from the property line;

¹Complaint dated March 2, 2010

- e) order that Skiftun reduce the height of the Skiftun Fence to two (2) meters or less;
- f) order that Skiftun remove the build up of soil where the Skiftun Fence was originally erected;
- g) order Skiftun to “maintain” the grass and weeds between the Benard Fence and the Skiftun Fence, relocated or otherwise;
- h) interest; and
- i) costs.

II. RELEVANT STATUTES AND BYLAWS

[5] The pertinent provisions of *The Line Fence Act*,² are as follows:

3(1) If adjoining owners or occupiers of land disagree as to what is a lawful fence or as to the proper location of a proposed or existing line or boundary fence or as to the necessity of repairs to or the manner of repairing a line fence or as to the just proportion of a line fence that each such owner or occupier shall erect or put in repair or as to the amount of compensation that one owner or occupier shall pay to the other for erecting or keeping in repair a line fence or as to any other matter in connection with the erection or repair of a line fence, they shall each appoint an arbitrator to determine and settle the matter in dispute.

...

(5) The direction herein contained for the appointment of arbitrators shall be deemed an arbitration agreement under The Arbitration Act, 1992.

[6] In deciding this matter, I have had regard for the entire City of Saskatoon Zoning Bylaw,³ after this called the “Bylaw.” However, in particular, I considered the following provisions:

²R.S.S. 1978, c. L-17, s. 3

³Bylaw 8770

...

2.0 Definitions

In this Bylaw,

...

"grade level" means the average level of the finished surface of the ground adjacent to the exterior walls of the building or structure. . . .

...

5.13 Fences

(1) No . . . fence, or other structure not otherwise permitted shall be erected in a required front yard or on a site line adjacent to a required front yard, to a height of more than 1.0 metres above grade level.

(2) No . . . fence . . . or similar structure . . . shall be erected in a required side or rear yard, or on a site line adjacent to a required side or rear yard, to a height more than 2.0 metres above grade level.

...

(6) Notwithstanding Section 5.13 (1), . . . fences, or other permitted structures may be erected in the required front yard of a dwelling group to a height of up to 2.0 metres above grade level provided that the . . . fence or other permitted structure is located at least 3.0 metres from the property line, that no site lines are obstructed at corners or adjacent to driveways, and that landscaping has been provided on both sides of the wall, fence, or structure to the satisfaction of the Development Officer.

III. EVIDENCE AND POSITION OF THE PARTIES

A. Benard

[7] The first witness called by Benard was Gord Kreutzwieser, after this called "Kreutzwieser." Kreutzwieser is employed by Rite-Way Fencing Inc., after this called "Rite-Way." He has ten (10) years' experience with installation of fencing and two (2) years of experience in fencing sales. Though he admits he has more experience with chain link fences, Kreutzwieser testified that he also has experience with wooden fences. Benard tendered Kreutzwieser as an expert witness for purposes of providing opinion evidence concerning the

cause of damage to the Benard Fence. I allowed him to be so tendered.

[8] Kreutzwieser testified he built the Benard Fence and he built it according to the Bylaw and at grade level.

[9] Kreutzwieser testified that, at the request of Benard, he attended at her property and inspected the Benard Fence. He testified that he observed the Benard Fence was damaged from material placed against it. He testified it appeared as though the “debris” came from holes that had been dug for posts inserted in the ground for the Skiftun Fence. He referenced:

- a) one picture⁴ that showed debris up against the Benard Fence, causing it to stretch;
- b) another picture⁵ showing debris that would damage the Benard Fence;
- c) another picture⁶ that showed rocks that would stretch the Benard Fence; and
- d) other pictures⁷ showing bowing of the Benard Fence.

[10] Though specifically asked by Benard, Kreutzwieser could not be definitive in his opinion concerning the height of the Skiftun Fence. At best, he could say it appeared to be higher than two (2) metres.

[11] Kreutzwieser testified that in his opinion “grade level” is the level of the earth at the base

⁴Exhibit J-2

⁵Exhibit J-3

⁶Exhibit J-4

⁷Exhibits J-5, J-11 & J-12

of the fence. He testified that, to determine grade level, you look at the inside of the fence. However, he testified common sense must prevail. One cannot use such levels if one has deliberately built up the yard to get a higher fence.

[12] Kreutzwieser referred to a Rite-Way Quotation dated September 24, 2009.⁸ He testified that he prepared it. He said the amount stated therein—\$1,678.00—reflected the cost of repair for all of the damage to the Benard Fence.

[13] Benard was the next witness to testify. She testified that it was her view that “grade level” was the lowest level before any excavation of a piece of property. She referenced a picture that showed a garden area in the Skiftun property.⁹ She then referenced another picture showing soil to have been taken from that garden area.¹⁰ She then referenced other pictures where she said the dirt had been placed.¹¹ She testified this brought up the grade by nine inches (9"). She testified this brought up the Skiftun fence to a height of eighty-six inches (86")—a height she says is beyond that allowed by the Bylaw. Benard tendered pictures showing the height of the Skiftun Fence.¹² Benard also testifies as to her worry that the build up of soil would cause water drainage that would damage her home. In addition, she said that the height of the Skiftun Fence was obstructing the light that would normally come in through her windows. She tendered photographs showing same.¹³

[14] Benard also testified that, in high winds, the Skiftun Fence hits against her fence. She

⁸Exhibit J-1

⁹Exhibit J-13

¹⁰Exhibit J-14

¹¹Exhibits J-15 & J-20

¹²Exhibits J-7, J-8, J-9, J-25 & J-26

¹³Exhibits J-21, J-22, J-23 & J-24

tendered several photographs that she says show a post from the Skiftun Fence moving as much as two inches (2")¹⁴ and the Skiftun Fence to be only four inches (4") from her fence.¹⁵

[15] Benard also testified that Skiftun caused damage to her fence. She said same was caused by soil, rocks and wood placed against her fence. She tendered photographs that she said evidenced same.¹⁶

[16] Benard's third and final witness was Dan Benard. He is Benard's husband. Mr. Benard testified that:

- a) Skiftun was using the Benard Fence as a retaining wall and referenced several photographs¹⁷ as evidencing same;
- b) corroborated Benard's testimony that:
 - i) Skiftun caused damage to the Benard Fence;
 - ii) Skiftun moved soil from her garden area to build up the grade around her fence;
 - iii) the build up of soil would cause water drainage that would damage their home;
 - iv) the Skiftun Fence was a height beyond that allowed by the Bylaw;

¹⁴Exhibits J-16 and J-17

¹⁵Exhibits J-18 & J-19

¹⁶Exhibits J-2, J-3, J-4, J-5, J-6, J-10, J-11 & J-12

¹⁷Exhibits J-2, J-3 & J-4

- v) the height of the Skiftun Fence was obstructing the light that would normally come in through their windows; and
- vi) the Skiftun Fence was moving with the wind.

[17] Mr. Benard testified that he asked Skiftun to stop damaging their fence, but she declined to do so in a rude manner.

B. Skiftun

[18] Skiftun testified as her only witness. She denied that any wood pile ever touched the Benard Fence. She said it could not have damaged same.

[19] Skiftun testified that the Skiftun Fence was built in October 2009. She said that when building the fence, she moved the base gravel around the Benard Fence. However, she says she removed the gravel. She tendered a photograph¹⁸ to evidence that.

[20] Skiftun also denied that she placed dirt up against the Benard Fence. She tendered a photograph¹⁹ to evidence same. She testified that she did place dirt up against her fence. She tendered a photograph²⁰ to evidence how she did it. She said it was placed against a board and she designed this to keep her dog from getting under the fence.

[21] Skiftun did not deny that she built up the ground level at the fence. She said she did this because her yard was so “unlevel.” She said the way her fence was constructed would not allow

¹⁸Exhibit C-1

¹⁹Exhibit C-2

²⁰Exhibit C-3

water to run from her yard to Benard's yard. Skiftun did admit that she put dirt on the other side of her fence. However, she testified that she removed it one day after.

[22] Skiftun said her fence was seventy-six inches (76") from the dirt and maintained same was within the two (2) metre limit prescribed by the Bylaw.

[23] Skiftun denied that her fence blocked light to Benard's home. She tendered a photograph²¹ that she says evidences that Benard has plenty of light.

IV. POSITION OF THE PARTIES

A. Benard

[24] Benard maintains she has proven Skiftun:

- a) damaged her fence and therefore Benard is entitled to the \$1,678.00 cost of repair; and
- b) constructed a fence that it was higher than two (2) metres and less than one (1) metre from the property linen and, hence, same must not only be moved, but made lower in height.

[25] Skiftun also maintains she is entitled to interest and costs. She asks for \$37.74 for the cost of the pictures used at this hearing. She also asks for a \$30.00 witness fee for her husband. However, at this hearing, she admitted she had not paid such a fee to Mr. Benard. She took the position he was entitled to it and would pay it to him if it were awarded.

[26] Skiftun did not address her original claim for damages for:

²¹Exhibit C-4

- a) increased electrical costs
- b) damages for basement water damage; and
- c) maintaining the grass and weeds between the fences.

B. Skiftun

[27] Skiftun says she built the fence for not only privacy, but to keep her dog from escaping.

[28] Skiftun takes the position that the wood pile and dirt did not damage the Benard Fence. She says she is unaware of any damage at all. She says Benard only first complained of damage last year.

[29] Skiftun says her fence is strong and long lasting and a sufficient distance from the Benard Fence to avoid causing damage to it.

V. ANALYSIS

[30] I look first at the issue of Benard's allegation of damage to her fence. All three of Benard's witnesses testified to damage. The testimony of Mr. and Mrs. Benard say there is damage from debris piled adjacent to their fence and from the Skiftun Fence blowing in the wind. The testimony of Kreutzwieser corroborates the former, but not the latter. As well, the photographs tendered by Benard evidence the former, but not the latter.

[31] Skiftun denied causing any damage to the Benard Fence. However, Skiftun did admit placing soil and rocks in the vicinity of the Benard Fence. Kreutzwieser testified that he saw evidence of such debris. I find as a fact this debris caused damage to the Benard Fence.

[32] I turn my attention now to the location of the Skiftun Fence. I find nothing within the Bylaw that prohibits Skiftun from building the fence where it currently exists. Though Nmr. and Mrs. Benard testified damage was caused by the wind blowing the Skiftun Fence into theirs, the photographs do not show same. In addition, Benard tendered Kreutzwieser as an expert. She had every opportunity to have him inspect any damage being caused by wind blowing the fence. She did not. As a consequence, I draw an inference adverse to the Benard position on this point. Indeed, it is my view Benard ought not to be allowed to impeach Kreutzwieser's evidence and the photographs. I find as a fact the Skiftun Fence is not causing damage to the Benard Fence.

[33] I turn my attention now to the height of the Skiftun Fence. I first look at the wording of section 2 of the Bylaw. It defines "grade level" to mean the average level of the finished surface of the ground adjacent to the exterior walls of the building or structure.

[34] Benard testified that the ground had been built up at the base of the Skiftun Fence. She argued that if one discounts that build up, the fence is too high. Kreutzwieser testified that to determine grade level, you look at the inside of the fence. He did say that one must use common sense to ensure one was not just building up the fence to allow something higher than allowed. However, Kreutzwieser also testified that he could not say for certain the fence was too high. He could only say that, from the pictures, it looked like it might.

[35] Benard tendered Kreutzwieser as an expert. She had every opportunity to have him inspect the grade level of the Skiftun property and the height of the Skiftun Fence. She did not. As a consequence, I draw an inference adverse to the Benard position on this point. Indeed, it is my view Benard ought not to be allowed to impeach Kreutzwieser's evidence. I find as a fact the Skiftun Fence is within the height limits prescribed by the Bylaw. This is fortified by Skiftun's testimony that she placed dirt by the fence not only because her yard was not level, but to ensure she complied with an Order of a Justice of the Peace to secure her dog.²²

²²Exhibit J-27

[36] I now turn my attention to Benard's claim for damages for increased electrical costs. Benard tendered no evidence at the hearing providing any particulars on that subject. However, in light of my ruling regarding the height of the Skiftun Fence, I dismiss this claim. It bears noting that I also find such a claim to be speculative and find it would be inappropriate to award damages in such a circumstance.

[37] I now turn my attention to Benard's claim for damages for basement water damage. Benard tendered no evidence at the hearing providing any particulars on that subject. I find such a claim to be speculative and find it would be inappropriate to award damages in such a circumstance.

[38] I now turn my attention to Benard's claim for an order requiring Skiftun to maintain the grass and weeds between the fences. Benard tendered no evidence at the hearing providing any particulars on that subject. I find such a claim to be speculative and find it would be inappropriate to award damages in such a circumstance.

[39] I now turn my attention to Benard's claim for interest. I find that, besides the costs of the photographs, she has not yet paid anything as a consequence of the matters raised in this arbitration. Because of the divided success in this matter, I decline to award interest to either Benard or Skiftun.

[40] I now turn my attention to Benard's claim for costs. Because of the divided success in this matter, I decline to award costs to either Benard or Skiftun.


VI. AWARD

[41] Accordingly, it is the Award of this Board that:

- a) Skiftun shall pay Benard damages of \$1,678.00, payable as follows:
 - i) \$419.50 on July 1, 2010;
 - ii) \$419.50 on August 1, 2010;
 - iii) \$419.50 on September 1, 2010; and
 - iv) \$419.50 on October 1, 2010;
- b) Benard's claim for damages against Skiftun for increased electrical costs is hereby dismissed;
- c) Benard's claim for damages against Skiftun for basement water damage is hereby dismissed;
- d) Benard's claim for an order that Skiftun move the Skiftun Fence at least one (1) metre from the property line is hereby dismissed;
- e) Benard's claim for an order that Skiftun reduce the height of the Skiftun Fence to two (2) meters or less is hereby dismissed;
- f) Benard's claim for an order that Skiftun remove the build up of soil where the Skiftun Fence was originally erected is hereby dismissed;
- g) Benard's claim for an order that Skiftun maintain the grass and weeds between the Benard Fence and the Skiftun Fence is hereby dismissed;

- h) Benard's claim for interest is hereby dismissed; and
- i) neither party shall be entitled to costs.

Dated on May 25, 2010.



T. F. (Ted) Koskie, B.Sc., LL.B.,
Acting as a Single Arbitrator