IN THE DISPUTES TRIBUNAL **[2012] NZDT 32**

BETWEEN	**AAE**
	APPLICANT
AND	**ZZV**
	RESPONDENT

Date of Order:	18 May 2012
Referee:	Referee Edison

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZZV Towing Company Ltd shall pay AAE the sum of $250.00 by 4pm on 1 June 2012.

Facts

[1] In the evening of 26 November 2012, AAE had dinner in the food court of the XY Plaza. AAE parked his car at the Plaza sometime between 8–8.30pm. The parking is only for customers. The food court closed at 9 pm, but AAE spent the next 35–40 minutes chatting outside one of the entrances (it was the night of the General Election). At 9.40 pm he discovered his car was missing. It had been towed by the ZZV Towing Company Ltd ("the Company") at 9.32 pm. AAE called the Company and walked two kilometres to their compound, and paid the release fee of $250.00 at 10.13 pm. AAE was told by an employee of the Company that because the Plaza closes at 9 pm, and his car was still parked there at 9.30 pm, he was deemed not to be a customer.

[2] There were no signs warning drivers at the entrance to the Plaza's car park that their cars were liable to be towed away. There were no signs in front or behind the row of parking spaces in which AAE parked. The other row of parking spaces is immediately outside the food court. In front of those parking spaces there were six red and yellow signs on the wall of the food court, which state:

> Parking strictly 1 hour maximum only while shopping at XY Plaza. Otherwise vehicles will be towed away immediately at your expense by ZZV Towing Company.

[3] At the entrance to the Plaza/food court a sign states:

> Strictly XY Plaza Shopper's Parking. Tow Away.

[4] AAE did not read the sign at the entrance or the signs in front of the parking spaces on the wall of the food court. He now seeks a refund of the release fee. The Company disputes the claim.

Issues

[5] The issues in the case are:

(i) Whether the removal of AAE's car by the Company constituted a trespass against goods;

(ii) Whether AAE consented to the risk of his vehicle being towed, so that the removal of the car was not unlawful even if otherwise it would have been, and

(iii) Whether the Company was entitled to remove the vehicle by exercising a self-help remedy known as "distress damage feasant".

Law

[6] The relevant law is the law of tort. Trespass to goods consists of any unauthorised interference with the personal property of another, and includes an unauthorised removal of goods. In the English case of *Vine v Waltham Forest London Borough Council* [2000] 4 All ER 169 ("*Vine*"), it was said that the act of clamping the wheel of another person's car was an act of trespass to that other person's property, unless it can be shown that the owner has consented to, or willingly assumed, the risk of the car being clamped. I think the same rationale applies to towing. The defence of "*volenti non fit injuria*" applies to an action in trespass if it is proved that the owner of the vehicle knew of the risk of the car being towed and consented to the risk. If the defence applies, there is no trespass. In *Vine*, the English court said that:

> Normally the presence of notices which are posted where they are bound to be seen, for example at the entrance to a private car park, which are of a type which the car driver would be bound to have read, will lead to a finding that the car driver had knowledge of and appreciated the warning.

[7] The self-help remedy of distress damage feasant applies where a person or object trespasses on to land and causes damage. The owner is entitled to seize the trespassing property (here a vehicle) and keep it until the owner has offered compensation for the damage. The application of this remedy is to some extent unclear. Although damage must be proved, it seems that anticipated damage is sufficient. In *Jamieson's Tow & Salvage Ltd v*

Murray [1984] 2 NZLR 144, the High Court said that the cost of removing a vehicle could itself constitute damage, although this was criticised in the English case of *Arthur v Anker* [1996] 3 All ER 783.

[8] I have had regard to these cases in arriving at my findings.

Decision

[9] I find that the Company committed a trespass against goods when it towed AAE's car. That follows from the law of trespass to goods which I have set out above.

[10] I find that AAE did not consent to the risk of his car being towed or to the consequences of that action. I say that for the following reasons.

[11] Firstly, there was no sign warning that cars would be towed at the entrance to the car park, or indeed where AAE parked his car. I understood from Mr ZX, for the Company, that there used to be such a sign but it was being vandalised and was taken down. The point is that at or before the moment when AAE parked his car there was nothing to alert him to the basis on which permission was being given to park, or the risk that his car would be towed if he did not abide by the conditions on which the car park could be used.

[12] Secondly, AAE said he did not read the notices and I believe him. Once he had parked his car he went about his business in the Plaza. AAE had no reason after parking his car to look for any other notices, so that the notices warning of possible removal were not so prominent that he must be deemed to have read them and to have understood what they meant. The notices on the wall of the food court were not in his immediate line of vision as he entered the Plaza and could have been about other matters (for example, reserved parking) for all AAE knew.

[13] Finally, the notices were insufficient to warn AAE that he was not entitled to park and of the possible consequences if he did. AAE was not a trespasser when he parked his car – he intended to use the food court and was therefore a customer of the Plaza. As to the possible

consequences if AAE, albeit a customer of the Plaza, became a trespasser by staying more than an hour, the signs in my view do not sufficiently set out the risk which AAE was running. That is because the signs only warn of the possibility of being towed at the trespasser's expense. They do not set out the amount of the release fee that would be charged to secure the return of the trespasser's property. I consider that the signs needed to do that before AAE could be said to have consented to the risk of having to pay a certain sum of money for his car to be released. In short, AAE was not warned of the full extent of the risk.

[14] In the event that, contrary to my view, AAE did consent to the risk of being towed, for the reasons I give below I am also not persuaded that AAE was, at any time, a trespasser.

[15] I find that the Company is not entitled to rely on the self-help remedy of distress damage feasant for the following reasons. Firstly, it has not been proved that AAE was a trespasser when his car was towed. AAE had permission to park his car at the Plaza for an hour. Even if he parked at 8 pm, he was still within his permission when the Plaza closed at 9 pm. AAE told me that, in fact, drivers are given an hour and a half before their cars are removed. It has not been proved that AAE had been at the Plaza for that period of time when his vehicle was towed. However, whether or not that is the case, it seems to me that when the Plaza closed at 9pm, customers would have had an implied licence to stay there for a reasonable time to finish their business and return to their vehicles. I think it is reasonable that customers who had been using the car park for the legitimate purpose of being customers at the Plaza, and who were not trespassing when it closed, should be given a generous period of time to return to their vehicles. I have doubts whether 40 minutes after closing time is sufficient when customers are permitted to park for an hour, particularly as the sign stating when the car park would close was inaccurate (it said 6pm) and would not have been visible to AAE as he entered the Plaza.

[16] Further, it has not been proven that the presence of AAE's vehicle has caused the owners of the land any damage. Again, it is important to note that this incident took place at the end of the shopping day. Although Mr ZX told me of problems with people using the car park as free parking for the purpose of going, not to the Plaza, but to ZZ Road in the evening, I cannot see that AAE's car was occupying a space which, as a result, could not be used by

other customers of the Plaza: the day was over and the customers were leaving, and the Plaza was no longer open for business. There can be no suggestion that his vehicle was obstructing access or use by others with permission to be there, or preventing other customers from parking at the Plaza and being able to shop there.

[13] I should, finally, add that I agree with the view expressed in some of the case law that the expense of towing the car away cannot amount to damage. AE's car had to cause damage, whether physical or financial, actual or anticipated, before the remedy of distress could apply. Once it applied, the cost of towing was probably recoverable as part of the release fee, but not until then. I respectfully think it is incorrect to say the towing company can create the damage simply by deciding to tow the vehicle.