IN THE DISPUTES TRIBUNAL **[2014] NZDT 559**

BETWEEN	**AE** APPLICANT
AND	**ZV** RESPONDENT
Date of Order:	9 June 2014
Referee:	Referee Paton-Simpson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZV, the respondent, is to pay the sum of $2,000.00 to AE, the applicant, on or before 23 June 2014.

Facts

[1] The respondent (ZV) and the applicant (AE) are the cross-lease owners of a property at Z town. At all relevant times, AE's sister (AA) was acting for him under a general Power of Attorney due to his absences overseas, and she represented him in the hearing.

[2] ZV was planning a major extension to his house. In August 2013, he approached AA to seek a waiver of AE's right to object to a proposed height-to-boundary infringement. He also informed her that survey plans showed the boundary fence was not on the correct boundary line. The fence encroached on AE's land by up to 50cm at the widest point, although there was some more minor encroachment on ZV's land at the other end.

[3] After some negotiation, ZV and AE signed an agreement under which, in return for the waiver, ZV agreed to rebuild the fence on the correct boundary at his own expense. The agreement stipulated:

> In the event ZV has not completed the Work in full by 1 March 2014, ZV agrees to pay to AE the sum of $2000 as damages on 2 March 2014 in addition to carrying out the Work in accordance with this agreement as soon as possible after this date, time being of the essence for completion of the Work.

[4] The fence was not completed by 1 March 2014, and AE now claims $2,000 in damages. Originally he also sought a work order for completion of the fence, but AA did not pursue the claim for a work order at the hearing because ZV provided a photograph showing that the fence had been completed shortly before the hearing.

Issues

[5] The issues to be decided are:

(a) Was the contract frustrated?

(b) Was the contract unconscionable or obtained through undue influence?

(c) Should the Tribunal enforce the payment of $2,000 as agreed damages, or did it constitute a penalty?

Law and Decision

Was the contract frustrated?

[6] ZV gave evidence that the building work, and therefore the fence, was delayed by factors beyond his control, and that it turned out to be impractical and unreasonable to expect him to complete the fence by 1 March. He submitted a written extract that appeared to relate to American law discussing a doctrine of "impracticability". There is no such doctrine in New Zealand law, which is based on the English common law.

[7] The closest equivalent in New Zealand law would be the doctrine of frustration, which applies when further performance of a contract is brought to an abrupt stop by some irresistible and extraneous cause for which neither party is responsible, resulting in the contract being terminated forthwith and the parties being discharged from any further performance.

[8] However, the types of practical difficulties experienced in this case (Council consents taking a couple of months longer than expected, a builder taking other short-term work and being unavailable over the Christmas period, scaffolding delaying access to the fence area) fall well short of the requirements for a contract to be frustrated.

Was the contract unconscionable or obtained through undue influence?

[9] Undue influence involves obtaining an unfair advantage through an unconscientious use of power by a stronger party against a weaker party. ZV argued that AE had exercised undue influence by taking advantage of his bargaining position to pressure him into signing the agreement with the damages clause.

[10] However, the parties were neighbouring landowners on a fairly equal footing, and I am unable to find any improper conduct by AE or his sister. ZV had the option of altering the roofline to comply with the height-to-boundary restrictions, but freely agreed to AE's terms in order to obtain the waiver. Far from being victimised, he obtained a valuable opportunity to enhance his own property while potentially diminishing the value or amenity of AE's property. The cost of rebuilding the fence and even adding another $2,000 in damages was relatively low compared to the value of the waiver. There was nothing harsh or unconscionable about the bargain that the parties freely negotiated between themselves.

Should the Tribunal enforce the payment of $2,000 as agreed damages, or did it constitute a penalty?

[11] A more difficult issue was whether the clause requiring payment of $2,000 in damages was a penalty clause or a genuine pre-estimate of the loss that would be caused to AE by a delay in completion of the fence work.

[12] According to law, ZV bears the onus of showing that the specified sum is a penalty, since he is the party who is being sued for its recovery. Also, the fact that the agreement described the sum as “damages”, while not decisive, raises a strong inference that the sum is not a penalty.

[13] Whether the parties intended to form a genuine pre-estimate of the damage must be judged as at the time of making the agreement, not at the time of the breach. It is the potential loss rather than the actual loss that is relevant. At the time of the contract, there were at least three ways in which delay in completion of the fence work might potentially have caused loss to AE: disruption to the tenancy, continued encroachment on land, and the cost and inconvenience of legal proceedings.

Disruption to tenancy

[14] AA said she was worried that AE’s tenants might give notice due to noise from ZV’s building work. The tenants were going overseas from the end of December until mid February. Since ZV had said the building work would be completed before he did the fence, AA was able to inform the tenants that the noise and disruption should end very shortly after their return, if not sooner.

[15] ZV pointed out that the tenants did in fact stay despite the building work going on longer than expected. Also, he had given the tenants a Countdown voucher and allowed them to use his rubbish skip as a courtesy to compensate for the noise and sawdust. However, these points cannot affect the status of the agreed sum, since they relate to matters not known at the time of the contract.

[16] ZV also argued that since the agreed date for completion related only to the fence work, not the building work, continued noise from the building work would not result from the breach. However, both parties contemplated that the fence would only be rebuilt after the renovation work was complete and the scaffolding was taken down. Although the agreement did not refer explicitly to completion of the building work, both parties knew that

the practical effect of the 1 March deadline for the fence work was to limit how long substantial building work could continue.

Continued encroachment on land

[17] Delay in rebuilding the fence would also mean continued encroachment on AE's land. ZV pointed out that the encroachment had existed for around twenty years, and suggested that the loss of use of such a small area of land would be worth very little. However, continued encroachment could potentially have caused problems for AE if he had decided to sell his property or plant or build on it. Although there is no evidence he intended such actions at the time of the contract, he may have wished to provide for the possibility of problems arising if his intentions changed. Any potential sale price could be affected by an ongoing issue with the boundary fence.

Cost and inconvenience of legal proceedings

[18] Loss could also be caused by the need to take legal proceedings if the fence work was not done by the agreed time. Although costs are not generally awarded in Tribunal proceedings (Disputes Tribunals Act 1988 s 43), parties to a contract can agree to include provision for costs in their contract. Costs could include the cost of seeking legal advice and taking time off work as well as the filing fee.

Comparison of agreed damages with potential loss

[19] The agreed sum would be a penalty if it were extravagant and unconscionable in amount in comparison with the greatest loss that could possibly follow from the breach. However, potential difficulties in tenanting or selling his property could have caused AE a lot more than $2,000 worth of damages. The fact that these difficulties did not eventuate is not relevant to deciding whether the sum was a penalty.

[20] ZV pointed out that the clause stipulated the $2,000.00 became payable the very next day after 1 March, and suggested that there could not possibly be that much loss from a delay of one day.

[21] However, it is possible that a delay of even one day could have caused difficulties with the tenants or a potential buyer. AA had informed her tenants of the deadline and may have lost some goodwill as a result of the deadline being breached. Potentially she could

have lost their tenancy. Also, she might have wished to seek legal advice immediately on 2 March, and could potentially have incurred substantial legal expenses as a result.

[22] I therefore find that ZV has not discharged the onus of proving that the sum was a penalty. Accordingly, he must pay $2,000.00 to AE as agreed.