



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

[2023] NZDT 733

**APPLICANT**            **DS**

**RESPONDENT**        **XT**

**SECOND  
RESPONDENT**        **UT**

**COUNTER CLAIM**

**APPLICANT**            **S Ltd**

**RESPONDENT**        **DS**

**The Tribunal orders:**

In respect of the claim XT is to pay \$7,220.00 to DS by the 20<sup>th</sup> January 2024.  
The counterclaim by S Ltd is dismissed.

**Reasons**

1. DS and XT and UT own adjoining properties. While DS was overseas XT pruned, or caused to be pruned, a 6m high Pohutukawa tree on DS's property, destroyed a clematis growing on it and damaged a trellis situated on top of the fence. DS alleges this was done without her consent or request while XT states that DS requested the service which was provided through his company, S Ltd. DS now claims for damages being an arborist's report, 2/3 the value of the tree, remedial pruning, the value of the clematis, the broken trellis and for emotional stress. S Ltd counterclaims for payment of its invoice.
2. The issues to be decided then are whether DS contracted with S Ltd for its services and, if so, what amount should be paid. If not, then whether XT is liable for DS's loss.

**Findings**

**Contract with S Ltd or XT?**

3. I find no contract was formed between DS and S Ltd or, for that matter, XT for the pruning of the tree.
4. For a contract to be formed the law requires an intention by the parties to be legally bound by a promise whereby one party undertakes to do something for the other in return for consideration. A

binding contract comprises four elements being an offer, acceptance of that offer, consideration and an intention to create a legal relationship.

5. XT states that the contract was entered into to prune DS's tree by his company in trade. If that were found to be the case then, as tree pruning services are services ordinarily acquired for personal or domestic use or consumption then DS would be a consumer as defined in s.2 of the Consumer Guarantees Act 1993, the CGA. Then the guarantees of reasonable care and skill, fitness for purpose and reasonable price would apply to those services.
6. DS disputes knowing of the existence of S Ltd let alone entering into a contract with it. While the law of agency provides that a company may be bound by an agent, XT would first have to prove that a contract was formed.
7. XT states that he had a number of discussions with DS regarding the pruning of the tree. Firstly, it encroached over the fence line and secondly, it was causing problems with the guttering on DS's house. He believes he offered to prune the tree himself, discussing the need to use scaffolding to prune the higher portions of it. He'd had an injured shoulder but as that was healing or healed he felt he could do it himself. UT supports her husband stating that was her understanding of conversations between XT and DS although she had not been a party to them.
8. However, I find there was no contract because XT can point to no one conversation or series of conversations whereby there was clear agreement that XT would carry out the pruning of the tree. DS is adamant there wasn't even one and XT is vague about what was actually arranged. The pruning of a mature tree is an exercise that, in my experience, would be subject to agreement as to how much material should be removed and where from on the tree so that the tree would maintain its aesthetic appearance. Advice would be sought from a professional, if a professional was not going to do the work, as to how to ensure the survival of the tree. I would have expected there to have been agreement reached as to when the work would be carried out and how much it would likely cost. XT cannot with any degree of certainty point to any of those elements having been agreed on with the result that I cannot find a contract can into existence and the claim by S Ltd must be dismissed.

### **Liability of XT for DS's loss**

9. I find XT is liable to compensate DS for the damage he did to her tree, for the clematis and to the fence.
10. XT confirms it was he and people working under his direction who did the damage DS complains of. The onus is him then to prove on the balance of probabilities that he had legal authority to do so. Without such authority he will have committed an actionable trespass on to DS's property and committed a nuisance by causing damage there.
11. I do not consider it to be unreasonable that owners of real estate are well protected by the law in respect of incursions on to their land and the causing of damage there. So much so that a reasonable person would ensure they have the express consent of the owner to both enter and damage a tree by pruning it. XT is unable to provide any evidence of DS giving him express authority to do what he did. He points to vague details of discussions with DS about the tree which all could be described as amicable conversations with a neighbour. To extrapolate those into an express consent without strong evidence of the details does not hold water. I would have expected to see some form of written agreement or at least his ability to recall agreement as to how the tree was to be pruned, who by and what form of guarantees or warranties might come with the work. It must be borne in mind that such work carries with it the danger of damage to services for which the contractor should be carrying liability insurance. Further, if, as XT states, DS was to pay for it, the contract would be subject to the guarantees set out in the Consumer Guarantees Act 1993.
12. Without the kind of detail set out above, I find it cannot be the case that there was sufficient agreement between XT and DS that he could come on to her property and prune her tree and I find

DS's account of events leading up to the damage as being the more likely and that she did not give her consent to the pruning let alone agree to pay for it, let alone to XT's company.

13. XT then is liable to pay for the damage to the tree, the clematis and the fence.

### **DS's loss**

14. DS claim is set out below. As XT has not disputed any of the line items in her claim, only disputing liability, it only remains for me to find that the amounts are reasonable.

#### Value of tree

15. DS's evidence is that the tree is worth \$6000. Approximately 2/3 of it is now gone with her loss then being \$4000. This seems reasonable to me, and XT has submitted no other way of working out the value of what has been lost.

#### Broken fence

16. 2 trellis panels at the top of the fence erected there by DS have been destroyed. The cost of reinstating these is \$108 each or \$216. I find this to be reasonable.

17. XT submits the panels were flimsy and needed to be replaced. However, the Fencing Act is quite clear on the issue and if a neighbour damages a fence they are liable for the costs of reinstating it and not just the value of what might be there in the form of an obsolete structure. He has also provided photos of palings he has had erected along the fence to enhance privacy. DS states these have been fixed to the existing structure. If that is the case he should be sure the existing structure is strong enough to take the additional surcharge weight of the extra palings. In any event, that work makes no difference to his liability to replace the panels he damaged.

#### Clematis

18. DS has provided evidence of the cost of a new plant of \$60. I find this amount reasonable.

#### On-going arborist costs for remedial pruning

19. DS's evidence is that this will cost some \$1000 over the next few years. I find this reasonable if not a little light.

#### Loss of enjoyment of the tree

20. DS claims \$5000 being a nominal \$1000 for five years. This includes for loss of shade, loss of the beauty of the tree as it was, and re-traumatising her in relation to the death of her husband who had an affinity for the tree.

21. However, damages under this heading must be reasonably foreseeable. Accordingly, such issues such as the death of a spouse would not be reasonably foreseeable whereas compensation for actual damage is. On the other hand, there can be no doubt that the unconsented trespass onto ones property and the deliberate causing of damage has a very upsetting effect on all people and is an offence to the reasonable persons rights of ownership of their most important possession. A property owner is therefore entitled to compensation for the loss of amenity. I find that in this case an award of \$2000 is appropriate in view of the deliberateness of the actions and the lack of consent.

22. I make no award against UT as she did not trespass on to DS's lane or damage any of her property.

23. I am unable to award the \$180 costs claimed by DS under the Disputes Tribunal Act.

24. The amount awarded above is made up as follows:

Value of tree	\$4,000.00
Arborist costs	1,000.00
Fence panels	160.00

Clematis	60.00
Loss of amenity	2,000.00
<b>Total award</b>	<b>\$7,220.00</b>

**Referee: G R Meyer**

**Date: 17<sup>th</sup> December 2023**



## Information for Parties

### Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

### Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.

Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

### Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

### Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.