



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1308

APPLICANT IS & JS

RESPONDENT KC

The Tribunal orders:

1. KC and LC are to pay to IS and JS the sum of \$19,950.00 in the following manner:
 - (a) They are to make three annual payments of \$5,000.00, and one of \$4,950.00;
 - (b) The payments are due on 31 January 2022, 31 January 2023, 31 January 2024 and 31 January 2025.
 - (c) If any payment required by this Order is not made, then the full sum owing at that time is to become due and payable immediately.

Reasons

1. For many decades, in some cases predating WWII, [location redacted] has been home to a number of “baches”. These baches are nestled into the land surrounding the bay and used as weekend and holiday retreats. As access to the bay is on foot, and this is some distance from the nearest road at [location redacted], the baches are simple in their construction and small in size. However, over the years, they have developed a sought after charm, and from all accounts, the bay is a delightful place to swim, fish, see the sun go down, and generally enjoy all that the [location redacted] has to offer.
2. The Cs own the farm upon which the baches are constructed, as the title to their land extends to the shoreline.
3. When the Cs bought the farm in the 1980s, the bach users became concerned that they might lose their informal rights that the previous landowner had respected. However, the Cs were happy to agree that the bach users had rights of access and occupation. They formalised this in a written “Licence to Occupy”. Under the Licence, the bach users were able to use their bach at any time, and could sell their licence when they wished to approved recipients. The Cs charged a small fee each year (which has increased over the years to approximately \$2,000.00 per bach) to help them cover rates. The bach owners (of which there are 10) also formed a group to set rules between themselves about use and development of the baches.
4. The Ss purchased a Licence for one of the baches in June 1998 for \$30,000.00. The arrangements worked well for the Ss, and other bach owners. Years passed, with very little change in ownership of the Licences.

5. Eventually, in early 2019, the Ss decided to sell. Approved purchasers were found, and an agreement was reached between the Ss and the purchasers that the Licence for the bach would be sold for \$50,000.00.
6. During the sale process, the Cs approved the new purchasers, but made it clear that they would only allow the sale to take place if they took the profit on the sale of the Licence made by the Ss (being \$20,000.00). The sale proceeded on that basis, but under dispute with the Ss.
7. The Ss have now filed a claim seeking the return of the \$20,000.00, less a \$50.00 fee for legal costs. The claim is therefore for \$19,950.00.
8. The issues to be resolved are:
 - (a) Did the Ss have an entitlement to sell the Licence to the purchasers?
 - (b) Under the Licence to Occupy, did the Ss owe any sum to the Cs out of the proceeds?
 - (c) If not, how much is due to the Ss?

Did the Ss have an entitlement to sell the Licence to the purchasers for \$50,000.00?

9. I find that the Ss were entitled to sell their Licence to the purchasers for \$50,000.00.
10. Under clause 4(c) of the Licence, the Cs agree to grant a new Licence to any approved purchaser provided the existing owners are not in breach. Approval cannot be unreasonably withheld.
11. There was no dispute that the purchasers to whom the Ss were selling were suitable licensees.

Under the Licence to Occupy, did the Ss owe any sum to the Cs out of the proceeds?

12. There is no restriction in the Licence on the price for which the baches can be sold, and no express provision requiring the Ss to pay any part of the sum they receive to the Cs.
13. In the absence of an express term, I have been unable to find a basis for implying such a term. This is so for the following reasons:
 - (a) A term can only be implied where it is so obvious it goes without saying, is necessary to make the arrangement work, and is not contrary to any express term. The Licence gives the freedom to owners to sell the baches, without restriction on price, or sharing of the proceeds. Whilst there might be good reason to have included this, such an outcome does not meet the test of being "so obvious it goes without saying". The Ss invested in their bach on the strength of what was presented to them in the Licence. An obligation to account in some circumstances for proceeds on sale is an unexpected obligation.
 - (b) I have had regard to the Cs' submission that they have kept the annual fees low to encourage retention and use, to their own detriment. There is no question that the Cs have shown generosity in how they have preserved the licencees' rights, formalising them when they bought the farm, and preserving the same values for the future that had been expressed in the past. This included a reference in the annual fees to keeping them in line with costs (i.e., acknowledging the fees would not be set by reference to market values, but by reference to recovery of costs, such as rates, and the CPI). The Cs have remained true to their word in this regard. To have access to baches such as these for \$40.00 per week is generous and resonates with the community spirit that must have been at play when they were first erected. The Cs asked me to infer from the low annual costs that they had by implication retained a right to any profit. This is not the deal that was written in the Licence, and it is not so obvious that it would be the deal that I can infer it.
 - (c) The Licences provide for 5-yearly renewals, up to a maximum of 40 years. The Cs spoke of the informality with which they have managed the licences, overlooking failures to renew at the 5-

year mark. This has been the case with all bach owners. Consequently, this may well have created an estoppel, and is unlikely to provide grounds to evict bach owners who did not complete the necessary formalities. The Cs never sought to end the S's occupation based on their lack of formal renewal. However, the licences can only be passed on for the balance of their overall term. If the new Licence was restricted in this way, that licence only has approximately 17 years to run. As the licences age, the likelihood of making a profit on their sale diminishes, and the time will arrive when all licences can be renegotiated.

14. The Cs asked me to view the \$20,000.00 as an entry fee, negotiated with the purchasers, for a new Licence. However, the emails and sale agreement produced by the Ss established that the sale price agreed with the purchasers had always been \$50,000.00. The Ss only received \$30,000.00. The fee of \$20,000.00 was therefore not an entry fee charged to the purchasers, but an exit fee charged to the Ss. The Licence did not allow the Cs to impose a fee as a condition of their consent. The Licence stipulated that consent to a sale could only be withheld if the proposed purchaser was unsuitable, or the Ss were themselves in breach of their Licence conditions.
15. In making a decision on this matter, I am required to have regard not only to the law, but to the substantial merits and justice of the case (s18(6)). I have considered whether this entitles me to imply a right for the Cs to take or share the profit on sale. The Cs have subsidised and encouraged a valued common amenity, and there is some merit in their argument that this should be reflected in how profits are shared. On the other hand, the Ss have invested money and time in the bach for 20 years, and have done so on the basis that one day, they would have a right to sell to a suitable purchaser. Whilst I have great respect for what the Cs have done, I cannot seek to reward their motives by re-interpreting what was agreed. Contracting parties are entitled to certainty about their rights. This is not a case where the merits of the Cs' intentions should dilute the Ss' objectively determined contractual rights.

How much is due to the Ss?

16. It follows from the above discussion that the Cs were not entitled to demand \$20,000.00 of the proceeds from the sale of the Licence.
17. Under clause 11 of the Licence, the Ss agreed to pay \$50.00 in legal fees for the cost of preparing their Licence. In the spirit of this requirement, they were happy to deduct \$50.00 from the sum owed for any cost of preparing the new licence for the purchasers. They therefore only sought \$19,950.00. This \$50.00 deduction was technically unnecessary, as the Licence was silent on the payment of fees in the case of a sale, and the Cs did not present any costs they had incurred. However, the award is limited to the sum claimed, being \$19,950.00.
18. The Cs spoke of the impact of such a decision on their personal finances, particularly given the manner in which COVID has affected their business. The Ss stated that if they were successful, they had no issue with being paid over four years out of the proceeds of future income from the baches.

19. In light of the underlying equities, and the offer made by the Ss, this payment structure has been adopted.

Referee:

J Robertshawe

Date:

9 April 2021



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 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 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 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>.