



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1319

APPLICANT L Family Trust Limited

RESPONDENT KM

The Tribunal orders:

1. KM is to:
 - (a) repair the roof over his unit within 6 weeks;
 - (b) repaint the small area on the exterior walls of [redacted] back to its original colour within 6 weeks; and
 - (c) pay half the reasonable cost of painting the roof of both units.
2. If either Order 1(a) or (b) is not fulfilled, then L Family Trust Limited is entitled to undertake or arrange for the work and charge a reasonable cost to Mr M.
3. If there is any dispute about how these obligations are fulfilled, then L Family Trust Limited has leave to seek a further hearing as part of this application.

Reasons

1. Mr L (of L Family Trust Limited) and Mr M are adjoining neighbours in a cross-lease property.
2. Mr L considers that Mr M has not kept to his responsibilities under the cross-lease arrangements. He seeks an order that the roof be repaired and repainted, that the walls of Mr M's flat be returned to their original colour, that a fence be painted and that he be reimbursed for costs associated with the proceedings.
3. Mr M defends the claim on the basis that the work on the property is unnecessary.
4. The issues to be resolved are: (a) What are the relevant terms of the cross-lease arrangement? (b) Do those terms require the roof to be repaired and repainted? (c) Do those terms require the exterior walls or fence to be repainted? (d) Are costs recoverable?

What are the relevant terms of the cross-lease arrangement?

5. The property at [redacted] is made up of one building divided into two flats: A and B. The flats therefore share the same roof.
6. The terms of the cross-lease arrangement are common for a property of this type, and are set out in the Memorandum of Lease registered on the titles to the property which was drafted at the time the property was developed.
7. The terms of the cross lease require each unit owner to pay half the cost of repairs and maintenance of the building, including the roof (clause 2(ii)(c)). The usual terms have been amended in clause 2 to specify that if work is necessary for one flat only, then only that flat owner should pay.
8. Clause 14 of the Memorandum of Lease requires each flat owner to keep the exterior walls and roof of the flat in a good state of repair, to duly and punctually pay all sums due under clause 2, and to cause the building at all times to be maintained to a high standard.
9. Clause 3 prohibits either flat owner from doing anything which “shall or may be or grow to the annoyance, nuisance, grievance, damage or disturbance” of the other flat owner.

Do those terms require the roof to be repaired and repainted?

10. I find that these terms require the roof to be repaired and repainted. This is so for the following reasons:
 - (a) A roof report obtained from an independent and building inspection company established that the roof over Mr M’s flat needs repair. This requires at least one sheet to be replaced, rust treatment in other areas, and popping nails to be repaired. As a result of the provision in clause 2 regarding work done for one flat only, Mr M should attend to this.
 - (b) I am also satisfied that the roof needs to be repainted. This is so given that the roof has been painted in the past, and this has now faded. A coat of paint will improve the look of the property and will also provide an additional degree of protection from the elements. Clause 14 requires the property to be maintained to a high standard. In this case, it is established that the roof needs to be repaired and painted to meet this test of a “high standard”.
 - (c) The cost of painting must be shared equally as both units share the roof (clause 2(ii)(c)). This will require a discussion as to colour, contractor and cost.

Do those terms require the exterior walls or fence to be repainted?

11. Mr M has painted his flat. Mr L would like to see the colour of this changed back to the original, to match his flat.
12. The Memorandum of Lease is silent on whether a flat owner can paint their own exterior walls. In the absence of an express restriction in this, I find that a flat owner can do so, but subject to clause 3 (the prohibition in impinging on the other flat owner’s quiet enjoyment).
13. Mr M was therefore entitled to paint his flat. The colour is a neutral tone in keeping with other properties in the area. I am unable to make a finding that this work was a breach of clause 3. Whilst Mr L was in fact annoyed or aggrieved by this work, there must be an objective test for any alleged breach of clause 3. The paint work on Mr M’s flat is tastefully done and may well have been required to maintain the exterior walls. There is no requirement of prior consultation, and, subject to one issue raised below, the end result is not harmful to Mr L.
14. However, Mr M did paint a portion of an exterior wall that is on Mr L’s side of the building. The flats adjoin at an internal firewall that is not at the end of an external wall. Mr M painted up to the edge of the external wall. This has made Mr L’s property look smaller. Leaving aside any actual prejudice, there is nonetheless a breach of quiet enjoyment, or an impingement of Mr L’s tenure,

from painting his flat without his consent. By any objective measure, he could also claim annoyance or nuisance from this event.

15. Mr M has agreed at the hearing to return this short piece of wall to its original colour.
16. However, I am unable to make a finding that Mr M must contribute to the painting of the fence. It is common to leave a timber fence unpainted. The building report notes that "*the treated timber fence will perform its purpose without a paint coat, however, the paint cost will aid in preventing the timber from twisting and splitting from UV exposure*".
17. The fence has a build up of some moss and lichen. However, this can be waterblasted or sprayed. I could see insufficient evidence of twisting or splitting to make a finding that the fence needed to be painted. The requirement of a "high standard" in clause 14 applies only to the building. For work on a fence to be recovered from the other party, there must therefore be some reasonable necessity about it. I am unable to make a finding this exists in this case.

Are costs recoverable?

18. As explained in the hearing, the costs sought by Mr L, which included the cost of his building report, and the filing fee, were not able to be recovered (s43 Disputes Tribunal Act 1988). Except in limited circumstances which do not apply in this case, each party must bear their own cost of the proceedings.

Conclusion

19. Mr M should now proceed to attend to the roof repairs, and after that, arrange with Mr L for the painting of the roof.
20. Mr M has also confirmed he will repaint the small area of the walls that covers Mr L's flat which was painted by him last year.
21. However, there is no obligation on Mr M to repaint his whole flat, or to contribute to the painting of the fence.

Referee:

J Robertshawe

Date: 24 February 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>.