(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2021] NZDT 1300**

APPLICANT **QI**

RESPONDENTS **PH and DN**

The Tribunal orders:

The claim is dismissed.

Reasons:

1. QI and EN own the property next to PH and DN. The two properties are both flats that share a common area under a cross lease title. QI does not live at the property and his flat is tenanted. QI is concerned that the common area of the property is being used for parking when it should only be used for access. He also says that the erection of a fence on the PH/DN boundary between their exclusive area and the common area impedes PH and DN from parking in their exclusive area, and that then exacerbates the use of the common area for parking.

2. EN attended the hearing as a support person to QI but was not a party to the claim.

3. QI claims $1,800.00 from PH and DN as compensation for part of the common area being used for carparking.

4. The issues to be determined are:
    a) Are PH and DN entitled to have a fence between the exclusive area and the common area?
    b) Are PH and DN entitled to park in the common area?
    c) If not, can a requirement not to park in the common area be enforced between the landowners?
    d) Is QI entitled to the sum claimed?

Are PH and DN entitled to have a fence between the exclusive area and the common area?

5. Under a cross lease title all owners are tenants in common in ownership of the head title and each collectively lease buildings or other improvements constructed on the land to individual proprietors. The nature of a two-flat cross lease development may be described as follows: A and B as tenants in common lease flat 1 to A and flat 2 to B.

6. The rights and obligations intended to bind cross lease owners are determined by provisions in the lease (and rights at general law or under statute).

7. In this case, the memorandum of lease registered on the cross lease title commenced on 1 December 1984 ("Lease"). It is understood that QI purchased his flat in or around 2017 and that DN and PH purchased in 2020 and moved into the property on 20 March 2020.

8. The fence between the PH/DN exclusive area and the common area was erected prior to DN and PH purchasing the property.

9. There is no term in the Lease that prevents either party erecting a fence on the boundary of the exclusive area and the common area.

10. There is guidance from the New Zealand Law Society that treats a fence for a cross lease as subject to the Fencing Act 1978, and it follows that a such a fence is able to be treated as any other fence to divide property (subject to the terms of the lease).

11. Therefore, absent any express term to the contrary, the parties are entitled to erect a fence between the exclusive area and the common area.

12. At the hearing, QI accepted that PH and DN were entitled to fence between the exclusive area and the common area. He nevertheless maintained that the fence contributed to the issue of PH and DN not having enough space for parking and therefore using the common area for that purpose. (QI also noted that he had raised his objections to the fence, and what he saw as the resultant parking on the common area, with the prior owners of the property.)

13. Due to there being no term in the Lease preventing the erection of such a fence, I find that PH and DN are entitled to have a fence between the exclusive area and the common area of the property.

Are PH and DN entitled to park in the common area?

14. Clause 11 of the lease states:

> "The lessee … shall quietly hold and enjoy the flat without any interruption by the lessors or any person claiming under them together with the use in common with the other lessees of flats in the said building of the drives, paths, and grounds on the said land … for access only to and from such flats."

15. The High Court has decided a case on the same issue of whether a cross lease owner could park on common property, where the wording of clause 11 was the same in that case as it is here (*Song v Chai* HC Auckland CIV-2011-404-422, 30 June 2011).

16. The Court concluded that the clause did not allow parking and stated:

> "I conclude that parking within the common area on anything other than a short temporary basis – for the purpose of arrival to or departure from the common area – is a prohibited activity..." (At paragraph [112].)

17. In that case, the Court nevertheless declined to grant the injunction sought prohibiting parking in the common area (partly as this was an application to have an order without a hearing of the arguments, and the Court decided the arguments should be heard).

18. Clause 11 of the Lease provides that the common area driveway is for access only. I therefore find that PH and DN are not entitled to park in the common area, except for short intervals.

Can a requirement not to park in the common area be enforced between the landowners?

19. The Disputes Tribunal does not have jurisdiction to grant an injunction to stop a party from doing a certain activity or carrying on a certain course of action.

20. Pursuant to clause 18 of the Lease, if either party wishes to take the matter further in order to enforce that the area is for access only, then the correct process is arbitration under the

Arbitration Act 1996. (The Courts may on occasion allow an application for an injunction to be heard without an arbitration process having been followed.)

21. It is also noted that the lessors would not be acting together in taking a claim, as there are only two parties that make up the lessor and the lessees, therefore there is no majority of lessors to pursue an action.

22. I am satisfied that the Disputes Tribunal is not able to make an order that would prevent long term parking in the common area.

Is QI entitled to the sum claimed?

23. QI claims $1,800.00 from DN and PH. He says this is an estimate for the use of 2 carparks in the common area for the duration of 1 year. During the hearing, QI agreed that only 1 carpark was being used in the common area, and it follows that QI's estimate would thereby be reduced to $900.00/year for the use of 1 carpark.

24. DN and PH gave evidence that they had only lived in the property for approximately 6 months at the time of the hearing because their flat had flooded in July 2020 and they had not moved back into the property until November 2020. (They had also moved in just prior to the Covid Level 4 lockdown and may have been away from the property during that period.)

25. As DN and PH have only been at the property for half of the period in which the parking is claimed, it follows that the claim would be commensurately reduced to $450.00.

26. DN and PH also gave evidence that the partner of QI's tenant had parked in the common area for 2 months when he was living at the premises, and that the tenant's mother also parks in the common area for approximately 1 week every 4 – 6 weeks. QI acknowledged that he could not always control the actions of his tenants in relation to parking in the common area. Once again, any sum payable would thus be commensurately offset.

27. PH and DN stated that they do not take issue with QI's tenant using the common area for parking, and both parties agreed that the tenant likewise had no objection to PH and DN using the common area for parking.

28. PH and DN stated that the use of their garage for carparking had been impeded since they purchased the property. First, it had been needed for other purposes during the Covid lockdown, and then it needed to be used for storage when their flat flooded. Since then, they had always parked a car in the garage.

29. PH and DN acknowledged that they had nevertheless continued to park a vehicle in a space that was half on the exclusive area and half on the common area. Due to the way the common area was designed, this left an area of exclusive space that was equal to the area of common space being parked upon, to be utilised for turning and access to both properties. In effect, there was no loss of turning or manoeuvring space. PH and DN said they had always tried to not impede access to the drive.

30. As I have found that there is no right to use the common area for carparking, it logically follows that there is no payment due as a charge for carparking. In any event, the sum claimed was not supported by any evidence and did not bear up to further scrutiny. If any sum was payable for the use of the common area for carparking, it would necessarily be offset by use of the exclusive area for access.

31. For these reasons, I find that QI's claim for compensation for the use of carparking in the common area does not succeed and therefore the claim is dismissed, notwithstanding the finding in his favour that the common area driveway is for access only.

Referee: **T Baker**
Date: **10 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 28 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 28 days of the decision having been made. There is a $200 filing fee for an appeal.
You can only appeal outside 28 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.