



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 302

APPLICANT QS

RESPONDENT DG

The Tribunal orders:

1. The claim is dismissed.
2. OS is removed as an applicant party.

Reasons:

1. The object of this dispute is a large seventy year old golden Elm tree that grew on a property that was owned by DG until May of this year when she sold her house. The tree grows close to the boundary and on the other side is a cross leased title that has three owners. QS is one of those owners. QS claimed that the tree roots damaged the driveway she shares with the other two owners. She claimed for the cost of a new driveway.
2. The issues to resolve the claim are:
 - (a) Did DG unreasonably interfere with QS's right to use and enjoy her land?
 - (b) If so, what loss has QS incurred as a result of the interference that she is entitled to be compensated for?
3. OS was erroneously noted as an applicant. OS is QS's son and is not an owner of the driveway that is the subject of this claim. OS attended as a support person and he was removed as an applicant party.

Did DG unreasonably interfere with QS's right to use and enjoy her land?

4. DG said that although the tree grew on land that was formerly owned by her, at all times the tree was protected, and she was not at liberty to do what she wanted with it. As a protected tree, she could prune and maintain it, but she could not fell it or harm it in any way.
5. QS said that the tree roots have damaged her driveway and it has been an on-going issue over many years. In her view, it was a simple issue of her neighbour causing damage to her driveway and she simply wanted it to be fixed. She wanted the tree roots to be pruned back and a root barrier placed along the boundary. If DG was unable to do that, then DG should have applied to the Council to have the protected status of the tree removed.

6. The Council have contributed to the costs to maintain the tree. It wrote that the tree does not require much work as it is a good specimen with no significant faults. It concluded that the tree was a "local iconic specimen tree".
7. DG, although the owner of the tree and responsible for its general maintenance, is bound by the subdivision consent requirement that protected the tree. She provided evidence that she had engaged an arborist over many years to prune and trim the tree. However, she said she had done all she could to a tree that is protected. DG said that if the roots were cut in the way QS suggested, then its anchoring system would be compromised, and it could fall over. Alternately, it could die. She provided some evidence that stated, although some experts argued for a further distance, a realistic compromise was to not prune roots closer to the trunk than three times the diameter of the tree. DG said the diameter of the Elm was 1.5 meters and so the roots should not be pruned closer than the furthest side of QS's driveway, so any root pruning would be pointless as the asphalt is laid within 4.5 meters of the trunk.
8. QS considered DG ought to have applied to the Council to have the protected status of the tree removed. DG was not the person who requested for the tree to be protected. There was no obligation on DG to have the protected status of the tree removed so that the tree could be removed. From the Council emails DG provided it appears unlikely that the Council would agree to revoking the protected status of a healthy tree that had no structural defects. In an email from the Council in April of this year, Mr U wrote that the fee for an arborist report to accompany an application for a resource consent to alter land use itself was normally \$1,800 alone.
9. I therefore find that it was not an unreasonable use of DG's land to leave the Elm tree where it was and to regularly have it inspected and pruned by an arborist. The tree created some interference with QS's land, however, I find that the interference was not unreasonable. The properties that exist in the vicinity of the tree do incur additional work and some small scale damage as a result of living in close proximity to the tree, however, that must be offset against the greater neighbourhood good of maintaining specimen mature trees.
10. In arriving at this finding, I note that in June 2013 the Council found that the driveway needed to be resealed mainly due to earthquake damage rather than from damage caused by the tree roots. There is some debate whether the damage to the asphalt driveway was exacerbated by the earthquakes or not, however, the Council concluded that the tree roots had only caused minor cracking in places at the surface of the driveway and that the 'minor cracking could not be seen as a physical/trip hazard as the raising of the surface is very slight'. I therefore find that the interference created by the Elm for QS is not sufficient to justify a finding that the level of interference was unreasonable.
11. QS briefly referred to tree roots under her house, but she did to provide any evidence to support that finding. The Council arborist team responded to that claim and wrote:

"at one stage in 2013 there were claims that the roots had gone under the unit of [QS's address] and possibly caused damage to the stormwater drain or sewer but it turned out this was not due to the tree roots from what I believe, more likely earthquake related damage. I'm not sure how it was determined the roots were under the house and might be causing damage. As they were built in 1980, with what I presume are concrete reinforced foundations, it's unlikely that the roots of the Elm would be causing damage to the house foundations at a distance of around 10 - 11 metres away, as roots taper as they get further from the base normally. At that setback they are not usually large enough to exert much pressure on foundations in my experience".

12. I therefore find that QS has failed to show that DG unreasonably interfered with her use and enjoyment of her land and so therefore her claim must be dismissed.

What loss has QS incurred as a result of the interference that she is entitled to be compensated for?

13. If QS had been successful on her claim, then I would have considered the loss that she claimed to be compensated for. Although I do not need to consider this issue as I have not found that DG created a nuisance, nevertheless, I will briefly touch on a couple of points that are raised on this issue.
14. QS is not the only owner of the driveway and each of the persons who has an interest in the driveway would have needed to be added as applicants as they would have been jointly entitled to receive the repair costs.
15. There was much evidence provided that the driveway was well beyond its expected lifespan of up to 25 years. Ten years ago the Council attended a meeting at the site and noted that the driveway needed to be re-laid and offered to pay for an arborist to be present to ensure that when it was re-laid the tree was not damaged and to minimise the chance of the roots causing damage to the new surface.
16. Mr G, from [asphalt company], provided a list of his observations, and noted that the “drive appears to be very old...I noted considerable wear and tear other than the damage caused by the roots of the protected tree. This damage included crocodile cracking, splits/cracks in the seal, slumping in areas and rotten timber batten edging. I noted that the area in front of the garage at [address] may never have been constructed correctly with insufficient metal base under the drive”. He concluded that “this drive is well past its end of life and most of the damage has not been caused by roots from the protected tree, but by old age and wear and tear”.
17. If I had to make a finding on this issue, I would have found that the loss QS claimed was predominantly due to the use of the driveway over time and not due to the much lesser damage caused by the tree roots. As the asphalt is past its reasonable lifespan and is extensively damaged, QS has not suffered any greater loss due to the presence of the tree.

Conclusion

18. As QS has not shown that the interference was unreasonable, her claim is dismissed.

Referee: K Cowie DTR
Date: 2 August 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>.