



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

District Court

[2023] NZDT 468

**APPLICANT**     TN

**RESPONDENT**   HD

**The Tribunal orders:**

1. The claim is dismissed.
2. The counter-claim is dismissed.

**Background**

1. The parties own neighbouring properties on [Road].
2. Each has a claim against the other in terms of damage to a shared driveway.
3. TN also seeks compensation in respect of:
  - a. Loss of use of a strip of land.
  - b. Loss of the trees on that strip of land.
  - c. Damage to a “common area” at the hands of another neighbour, Mr E.
4. The hearing took place by phone on 10 August 2023. Both parties participated in the hearing.

**The shared driveway**

5. The properties share the use of a steep, metalled driveway. The driveway has two narrow concreted driving strips.
6. TN holds HD liable for the cost of remedial work on the driveway on the grounds that:
  - a. It was damaged by heavy vehicle traffic that used the driveway when HD had building works done on his property.
  - b. It was damaged by visitors to HD using the driveway “carelessly”.
  - c. It was damaged by stormwater runoff from HD’s property

7. HD holds TN liable for the cost of remedial work on the driveway on the grounds that TN laid a novacoil drain for stormwater that terminates part way down the driveway. HD submitted that the concentrated flow of water from the end of the pipe has scoured out the driveway.
8. In support of his submission, TN provided photographs showing “rut” damage and cracks on the concrete strips on the driveway. TN submitted that this pattern of damage is symptomatic of excessively heavy vehicles using the driveway. TN submitted that HD “had numerous heavy trucks deliver stuff” and that “he had diggers delivered by heavy truck on about 10 occasions”.
9. HD submitted that the trucks that brought diggers to his property did not use the driveway. He submitted that the diggers were dropped off at the roadside. HD submitted that TN also takes heavy vehicles (motorhomes) onto the driveway. In HD’s view, all of the damage to the driveway is due to water scouring.
10. HD provided some photographs showing scouring on the driveway from the end of the novacoil drain, down one side of the driveway. After the involvement of the [Council], TN dug a shallow channel across the driveway to direct the flow of water to the other side of the driveway and down towards the road. HD described this channel as “woefully inadequate”.

11. My findings are:

- a. Persons who have shared use of a right of way must contribute equally to the cost of maintaining the right of way.<sup>1</sup>
- b. If the act or omission of one user causes damage to the right of way, then that person is responsible for repair costs directly associated with that damage.<sup>2</sup>
- c. Even if it was proven that the driveway was damaged by contractors driving heavy vehicles on it when accessing HD’s site, that is not an “act or omission” by HD.
- d. In any event, it is not proven that the driveway has been damaged by those vehicles. The only evidence that TN has provided for this is the photographs showing a pattern of damage on some parts of the driveway.
- e. TN has provided no evidence of damage to the driveway caused by additional stormwater flow resulting from earthworks and building on HD’s property.
- f. HD has provided some evidence of damage to the driveway resulting from stormwater from TN’s property concentrated and directed via the novacoil pipe. Solving this problem would be a relatively straightforward matter of extending the pipe to a lower point beyond the driveway. The current, inadequate, arrangement is an “act or omission” by TN that is causing damage to the driveway.

However, HD’s counter-claim seeks the cost of digging out, re-shaping, and re-metalling the driveway (\$5,037.00 per a quote from [Contractors]).

This may well be necessary and appropriate work, but it does not reflect the cost of repairing the damage that is exclusively attributable to TN’s novacoil drain.

- g. There is no proven basis for either party to hold the other solely liable for the cost of remedial work on the driveway.

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<sup>1</sup> Land Transfer Regulations 2018, Schedule 5, s 12(2)

<sup>2</sup> As above, s 12(6)

*The strip of land, and the trees on that land*

12. A previous owner of HD's property built a fence between the two properties that was 1.5m inside the boundary on HD's side.
13. TN had a small garden on his side of the fence.
14. TN submitted that after HD bought the property and became aware of the legal boundary, he told him on three occasions that he was not concerned about that strip of land, and that so far as he (HD) was concerned, that land belonged to TN.
15. HD subsequently built a new fence closer to the boundary, effectively re-claiming this strip of land. HD removed the trees that were on the land.
16. HD denied telling TN that he could keep this strip of land. HD submitted that when he became aware of the location of the boundary, he gave TN an opportunity to remove his plants.
17. TN seeks compensation for the loss of use of this land, and the loss of his trees.
18. My findings are:
  - a. HD is the owner of this land, and everything that is on or under it.
  - b. The fact that TN used this strip of land does not give him any continuing right to use it.
  - c. It is disputed, and not proven, that HD gave TN permission to continue to use it.
  - d. HD was legally entitled to move the fence, re-claim this land, and do what he wanted with the plants.

*Damage to "common area"*

19. A mutual neighbour, Mr E, carried out earthworks that caused damage to part of the right of way.
20. Both Mr E and TN hold HD liable for this damage on the grounds that:
  - a. HD removed several survey pegs that identified the boundary of Mr E's property.
  - b. HD built a fence but made an error, locating the last fence post beyond the edge of his legal boundary.
  - c. In the absence of the pegs, Mr E used this incorrectly located part of the fence as a boundary marker when he carried out the work on (what he thought was) his own property.
21. HD denied removing any survey pegs.
22. My findings are:
  - a. In the law of negligence, every person is responsible for his or her own actions.
  - b. A person can only be liable for another person's negligence in certain limited circumstances.
  - c. It was Mr E's responsibility to ascertain the legal boundaries before carrying out earthworks.

- d. TN has no civil liability for the damage that Mr E caused.
- e. Removal of a survey mark is an unlawful act, subject to a fine of up to \$2,000.00 per section 55(1) of the Cadastral Survey Act 2002. The Disputes Tribunal has no jurisdiction under that Act.

Outcome

23. The claim and counter-claim are dismissed.

**Referee: Nicholas Blake**

**Date: 16 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>.