



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

**District Court**

**[2023] NZDT 97**

**APPLICANT**            **TS**

**FIRST  
RESPONDENTS**        **BO and TO**

**SECOND  
RESPONDENT**        **WU**

**THIRD  
RESPONDENT**        **CX**

**The Tribunal orders:**

1. BO and TO are to be removed as Respondents.
2. WU is to be removed as Respondent.
3. The claim against CX is dismissed.

**Reasons**

1. The above parties are the owners of a cross lease title at [Address]:
  - a. TS is a trustee of the S Trust which owns Flat 3.
  - b. BO and TO are former owners of 1.
  - c. WU is a former owner of Flat 1.
  - d. CX is the current owner of Flat 1.
2. WU did not attend the hearing or offer any defence to the claim. The absence of a party does not prevent a hearing from going ahead.
3. TS claims that a fence has been built around Flat 1 that breaches the cross-lease agreement. At the first hearing TS suggested that as they knew of his claim, there had been an agreement between previous sellers and purchasers of Flat 1 regarding the fence being in breach of the cross-lease. However during the hearing today it became clear that no buyer or seller had entered into any such agreement. TS accordingly asked that BO, TO and WU be removed as Respondents in the claim.
4. The issues to be resolved are as follows:
  - a. Has the western fence been built on common land?
  - b. If so, how much does it need to be moved back by to comply with the provisions of [Plan] (DP) ? What is reasonable?

## Has the western fence been built on common land?

5. The relevant law is the law of contract. When parties make promises to each other they must keep those promises. If they do not, they may have to compensate the other party to restore them to the position they would have been in had the promise been kept.
6. I find, on the balance of probabilities, that the western fence has not been built on common land. Rather I find it more likely than not it has been built on the boundary between common land and land that Flat 1 has exclusive use of. This is for the following reasons:
  - a. The DP shows two common driveways, one to the eastern side of the property and one to the western side. While the DP does not show specific measurements, I find that these common driveways appear to be broadly equal in their initial width. Neither party disputed this during the hearing.
  - b. Clause 27 of the Memorandum of Lease dated 3 October 1972 (Lease) provides that Flat 1 has exclusive use of the land coloured light blue on (DP).
  - c. While there is a 'gap' showing on the eastern side between the buildings and the common driveway on that side, I find that there is no such gap on the western side between the land that Flat 1 has exclusive use of and the common driveway on that side. This is because the DP does not show any such gap. Flat 1 is therefore entitled to erect a fence on that boundary as per section 9 of the Fencing Act 1978.
7. In making this finding I have had regard to TS's opinion that Flat 1 required the consent of all owners before building a fence. In support of his opinion he referred to clause 10 of the Memorandum of Lease which provides that *'The lessee shall not make any structural alterations to the said building without the written consent of...'* . However a fence is not a structural alteration to a building. 'Structural' means the stability of the way that parts of a system are arranged, and the fence does not affect the stability of the building. TS was not able to refer me to any other clause in the Lease which required the owner of Flat 1 gain consent to build a fence.
8. I have also had regard to TS's opinion that the lease allows the owners of Flats 2, 3 and 4 to use the area that has been fenced off. This is because prior to the fence being put up part of the area within it may have been walked on/driven over by other owners. However clause 27 of the Lease clearly provides that the owner of Flat 1 has exclusive use of this land (as per paragraph 6(b) above).
9. I have considered TS's view that the common driveway, at 2.4 metres wide, is too narrow to safely drive a wide vehicle on and that its width is not practical. This argument goes to the nature of the title. It may be that the owners of [Address] may wish to change their bundle of rights in this land, and they have the option of taking independent advice regarding how they may do this. However that is not the dispute that has been placed before me. I note that if it had been, I would not have the jurisdiction to make such an order as it is outside of the jurisdiction of the Disputes Tribunal as per section 11(5) of the Disputes Tribunal Act 1988.
10. As I have not found that the western fence was built on common land, I do not need to consider the second issue. For the above reasons, the claim is dismissed.

**Referee: L Thompson**  
**Date: 22 February 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>.