



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 547

APPLICANT **XU**

RESPONDENT **NP**

SECOND **HP**
RESPONDENT

THIRD OR **DH Ltd**
SUBSEQUENT
RESPONDENT

The Tribunal orders:

1. HP and DH Ltd are to deliver to XU the six gates and support poles previously removed by HP or DH Ltd from a barn at the racecourse.
2. These are to be delivered on or before 20 October 2023 to [Applicant's address] between the hours of 9 a.m. – 5 p.m. Monday – Friday, unless by other mutually agreed place, date and time.
3. If the gates and support poles are not delivered on or before the due date, XU may enforce this Order against HP and or DH Ltd for either the immediate return of the gates and support poles, or payment of \$2,000.00.

REASONS

Brief Details of Claim

4. In May 2020, XU ("the Trust") purchased a property at [location] from [vendors]. There were a number of buildings on the property, one of which was an old barn in which there were six gates affixed to support poles.
5. In May 2023, the Trust became aware that the gates and support poles had been removed. It transpires that HP (Director, DH Ltd) arranged for staff of DH Ltd to remove the gates and poles.
6. The gates had been supplied by DH Ltd to HP's brother, NP, in February 2006, and installed in the old barn at [the property] which was at the time being used by NP as part of his horse training operation.
7. DH Ltd's Invoice to NP for \$2,250.00 for the supply of the gates was not paid. It contained a clause "the goods remain the property of DH Ltd and title shall not pass until full payment is made" (the Romalpa clause"). The gates were not paid for.

8. NP used the barn in which the gates were installed during the period 2006 to 2017 by way of an informal arrangement with the T Club who, according to NP had erected the barn some years previously and used it to store the jumps in. NP said that it was agreed he could use the barn in return for NP's help to obtain funds for the T Club to build a new barn on the other side of the racetrack, and funds were successfully obtained.
9. When NP vacated the barn in 2017 he had an agreement with the T Club that he would leave some improvements he had made to the barn (the floor) but could remove the gates and poles. However, NP did not remove the gate and poles because a Mr X, who took over the use of the barn after NP had vacated, arranged with HP for the gates to remain to give security for Mr X's hay stored in the barn.
10. HP was happy for the gates to remain in the barn while the barn was being used by people involved in harness racing.
11. However, in 2023, NP became aware that the Trust was intending to lease the barn to a company not involved with harness racing and he advised HP. It is at this point that HP arranged for the removal of the gates
12. HP considers he was entitled to remove the gates because they still belonged to DH Ltd because they had not been paid for, and because after NP stopped using the barn, the gates had been on loan to the following barn users.
13. The Trust was represented at the hearing by two of the five Trustees, QT and TI. The Trust seeks the return of the gates and support poles. The Trust provided a quote from [engineering company] for \$12,943.22 to manufacture and supply six replacement gates and support poles.

Issues

14. The issues for the Tribunal to determine are:
 - (a) Whether the Romalpa Clause on the Invoice dated February 2006 is still effective;
 - (b) Whether the Trust took ownership of the gates and support poles as part of its purchase of [the property];
 - (c) Whether the Trust is entitled to the return of the gates.

Is the Romalpa clause still effective?

15. The Romalpa clause was a term of the contract between DH Ltd and NP. The Invoice is dated 20 February 2006 and the date by which payment was due was 6 March 2006.
16. The Limitation Act 1950 applies to the transaction, because the right of DH Ltd to take action for non-payment of its Invoice arose on 7 March 2006, when the Invoice had not been paid by the due date (refer S. 59 Limitation Act 2010). There is a 6 year limitation period for claims founded on a breach of contract. The time period commences on the date the right to take action arose.
17. In this case, the 6 year time period commenced on 7 March 2006 (the date NP breached the term of the contract to pay by the due date) and expired on 6 March 2012. I find that the Romalpa Clause in the contract between DH Ltd and NP is no longer effective. That means that neither HP nor DH Ltd cannot rely on it to take back the gates and support poles.

Did the Trust take ownership of the gates and support poles when it purchased [the property]?

18. I find that the Trust did take ownership of the gates and support poles when it purchased the property for the following reasons:
 - (a) The Agreement for Sale and Purchase between [the vendors] (as vendors each in half share) and XU (as Purchaser) contains a Property Description which says:

The property the subject of this Agreement (Property)c is the land, buildings and improvements known as [redacted] including:

Land

An estate in fee simple in 31.1400 hectares more or less being Lot [redacted] and being all of the land in Record of Title [redacted], a copy of which is annexed together with and subject to all of the interests referred to in such Record of Title.

Improvements

All buildings, plantings, tracks, fences, pavings and other improvements whatsoever”.

The final clause is all encompassing, and the vendors have agreed to it.

- (b) NP said that the barn had been built by, and belonged to, the T Club. NP said that neither the barn nor the gates would appear in a list of assets of either [vendors]. However, if the Vendor Clubs do have asset lists, and if the Vendors had intended the property sold to the Trust to be limited to the assets in those lists, it seems to me, the vendors would have said so in the Agreement for Sale and Purchase and attached such lists to the Agreement, and they did not. Instead they agreed to the all encompassing clause set out above.
- (c) I have considered NP’s oral evidence that he had an agreement with the T Club that he could remove the gates and posts at the end of his use of the barn. However, NP did not remove them when he left. I am satisfied that NP had an arrangement akin to an oral lease for the use of the barn, because he had the use of the barn in return for his help obtaining funds to build another barn. It seems that NP thinks similarly, because he has referred me to Part 3 of Schedule 3 of the Property Law Act (PLA), in particular Clause 13(1) which places an obligation on a lessee to keep the leased premises in the same condition that they were in when the term of the lease began and at the termination of the lease, to yield the premises in that condition. NP says he did leave the premises in the same condition as they had been at the start of his use of the barn, save for the improvements he agreed with the T Club to leave. However, NP did not remove the gates or poles.

I have taken guidance from S. 266 of the PLA which provides a right for a lessee to remove any trade, ornamental, or agricultural fixtures (except a lessor’s fixture) that the lessee has affixed to any leased premises within a reasonable time after the lessee ceases to be in possession of the leased premises. A lessor’s fixture means a chattel that has been affixed to the premises (for example, a fence erected on the land), in such a manner that it becomes part of the structure of a building or otherwise becomes integral to the land. I am satisfied that the gate support poles have become a lessor’s fixture as they have been affixed to the land by concreting them in. I have considered the case involving rock anchors to which I have been referred (Lakes Edge Developments Ltd v Kawarau Village Holdings Ltd). However I consider the description of a fence erected on land (S.266(5) PLA) is a more appropriate comparison.

In respect of the gates themselves, it appears from HP’s evidence that the gates could quite simply be removed from the support pole by tapping out the gudgeons. The gates can quite reasonably be considered chattels. Even if NP could have removed the gates when he left but did not do so, it is not reasonable for HP or DH Ltd (who removed the gates) to be able to rely on any possible right NP may have had at the end of his occupation of the barn around 6 years earlier.

- (d) I am satisfied that NP lost any right to the gates that he purchased from DH Ltd in 2006 and did not pay for, when did not remove them at the end of his lease of the barn in 2017.
- (e) I am satisfied that neither HP nor DH Ltd had any legal right to repossess the gates on the expiration of the 6 year limitation period.
- (f) I find that the Trust has taken ownership of the gates and support poles as part of the purchase from the Vendors, because there is insufficient evidence to satisfy me that the Vendors did not have the right to title of these items.

Is the Trust entitled to the return of the gates?

19. Because I have found that the Trust purchased the gates and support poles from the Vendors, the Trust is entitled to have the gates and support poles.

20. HP and/or DH Ltd has the gates and poles in their possession. Therefore, I have made an Order for each of those parties to return the gates.
21. I have directed that the gates be returned to the Trust at its address, [redacted], on a week day, between the hours of 9 a.m. to 5 p.m. unless by other mutually agreed place, date and time. I have done this to try and ensure security of the gates. Acrimony between parties was obvious at the hearing, although less so between the Trust and HP. However, I am trying to protect the Trust, HP and DH Ltd from any accusations about whether the gates have been returned or not.
22. When the Tribunal makes an Order for the return of property, it must also make an alternative monetary Order in the event that the property is not returned by the due date. I have decided to make an Order for payment of \$2,000, rather than the \$12,943.22 the Trust claims is the cost to have replacement gates made. That is because the gates purchased by the Trust were not new, rather they were 17 years old and had been in use for most if not all of that time. In addition, it appears to be reasonably likely that the gates will not be re-erected in the barn, but kept for a possible future use. I am satisfied that \$2,000 is sufficient compensation for the loss of the gates if they are not returned.

Referee: J.F. Tunnicliffe

Date: 3 October 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>.