

BETWEEN

AP
APPLICANT

AND

ZK
RESPONDENT

AND

ZKZ INSURANCE LTD
RESPONDENT'S INSURER

Date of Order:

28 May 2014

Referee:

Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal orders that ZK, the respondents, are to pay AP, the applicants, the sum of \$4,660.00 on or before 20 June 2014.

Facts

[1] On or about 9 December 2010, ZK had a scrub burn-off on their farm at Z town. Unfortunately, the fire burnt part of a boundary fence of AP, who were neighbours of ZK.

[2] AP brought a claim against ZK for the loss of 14 pregnant hinds (and their fawns). AP state that these deer escaped through the gap in the fence caused by the fire. The claim was made up of \$12,320 for lost deer, and \$400 in labour costs, totalling \$12,720.

Issues

[3] An occupier of land is generally strictly liable, even in the absence of negligence, for loss occasioned from the escape of a fire. In these circumstances, particularly given the dangers inherent in burn-offs in December on peat ground, there is no doubt that strict liability would apply.

[4] The three issues to be resolved are:

- (a) Did any deer escape?
- (b) If so, how many?
- (c) What value should be attributed to each deer lost?
- (d) Each is considered in turn.

Did any deer escape?

[5] Having considered all the evidence presented, I find it likely that deer escaped through the hole in the fence. There were 55 deer in the paddock affected, and the fence was sufficiently compromised for at least one night following the fire for one or more to escape. The hole in the fence covered numerous posts and was many metres long. There was a dispute over how long the hole remained. It was fixed by AA (the applicant) as soon as he found it, but ZK recalled this being the next day, and AP the next week. I could not make findings about that, but even if the hole remained for one to two days, the breach in the fence would have been obvious to the stock, and in all likelihood, I find that some deer probably escaped.

[6] I have had regard to the evidence of ZK, and letters from others, that no deer have been seen since roaming the area. However, this is an insufficient defence given the expanse of open country adjacent to the property.

[7] I have also had regard to the suggestion by ZK in correspondence about the claim that the loss never happened, and that the delay of three years in bringing the claim is evidence that it has no foundation, and is simply being brought because AP were upset about the loss of a lease. I do not accept this for two reasons. First, AP were credible people who gave consistent and thorough evidence about what occurred, and the suggestion that the claim was baseless, particularly given the established facts of the damage done by the fire, could not be sustained. Secondly, the delay in making the claim makes the extent of the loss difficult to prove, but AP were concerned about repercussions from making the claim, and wanted to wait until they were no longer neighbours to do so. Whilst the delay creates some challenges for AP on the evidence, their right to bring the claim still exists, and neither the delay on its own, nor the ending of a lease, negates the likelihood that deer were lost.

How many deer escaped?

[8] It is probable deer escaped. The more difficult finding is to decide how many escaped.

[9] AP were adamant that 14 hinds escaped, of which they assess about 60 per cent would have had a fawn at foot. AA is an experienced farmer who recalled the events with clarity and gave evidence in a credible and reliable manner. I accept it is his genuine recollection that he lost 14 hinds and associated fawns.

[10] However, I am not entitled on this evidence alone to make a finding against ZK that 14 were lost. AP had the onus of establishing that the extent of the loss claimed was probable. Whilst this is easier than having to establish that the loss claimed is certain, there are many events that actually occur in real life that can never be transported into a hearing room years later and legally proved as probable, and this is simply one of those events. AP may well be correct about their loss, but to issue an order against ZK for 14 deer (and fawns), I needed more than just the applicants' recollection. As a matter of law, to issue a court order saying that a disputed event is probable requires some corroborating facts, such as independent witnesses, other evidence from which I can make inferences, or reliable evidence of stock loss from records or accounts. The evidence from the applicant alone is a useful starting point, but to take the matter into sufficient likelihood for a court order, this

needs to be supported by something else. In the absence of adequate confirmation from other sources, the fact of a loss is proved, but the number of deer claimed would need to be discounted for uncertainty to a level that, having regard to the nature and quality of all the evidence, can be independently established as probable. This is a difficult judgment to make.

[11] In this case, there were no independent witnesses to the event, and no other evidence available to me from which I could make inferences. The only corroborating evidence that existed were accounts produced by AP. These were supported by a statement from their accountant estimating that 11 pregnant hinds were lost. His stock reconciliation showed that up to 16 were missing, but with estimated natural deaths at 5, this left potentially 11 missing from the fire.

[12] This evidence immediately limits the maximum finding of numbers lost to 11. Even if in fact 14 went missing that night, I could not make a finding in law that more were lost than AP's own accountant calculated as likely. However, this evidence also was insufficient to establish likelihood that 11 were lost. The accountant's method of calculation is reasonable, but he had no choice but to make his assessment based on the opening stock number supplied by AP, an estimated number of natural deaths that could not now be established, and confirmation from AP that no mixed age hinds had been sold during the year. Given the time that has elapsed since the loss, and the lack of any other records, these figures were assessments only.

[13] In addition, the limitations of and anomalies in the accounts provided did not assist. In particular:

- (a) The accounts (from 2006-2012) contain no record of the number of natural deaths per year against which the assessment of 5 can be compared, other than a record of 21 "deaths and killed" in 2007. The accountant confirmed that he could not say the number of deaths at "5" was known or could be established in any way;
- (b) There are differences between the closing stock for 2009 as at 31 March 2010 (140) and the opening stock for 2010 as at 1 April 2010 (120), and the closing stock for 2010 as at 31 March 2011 (190) and the opening stock for 2011 as at 1 April 2011 (170). The closing stock for one year should be the opening stock for the next. The accountant stated that in his copies these figures were accurate,

and I accept that the opening stock he used in his assessment was the correct figure, albeit supplied by AP;

- (c) There is no breakdown in sales or purchases between age groups of stock, making reconciliation of stock numbers in each group from year to year an unhelpful way of trying to determine the loss in this case.

[14] It is common in farming operations for there to be anomalies in the stock numbers and a lack of breakdown on sales and purchases. This does not mean that the end result for each year is wrong, or that there is anything amiss with the records kept or practices adopted. However, having spent much time considering the accounts, and the ZKZ Insurance Limited analysis of them, I appreciate the limitations the accountant was working under when he made his assessment and also understand ZKZ Insurance Limited's concern about the potential for unfairness in relying on the accounts to provide a true picture of the loss in this case. The result is that, without more detailed records, none of which are now available, I must discount the accountant's assessment for some further degree of uncertainty, having regard to the nature and quality of all the other evidence about the loss.

[15] Returning to the known facts of the case, I am satisfied that there was a significant breach in a fence for one to two nights. I am satisfied there were 55 deer in the paddock, and that they were in the middle of fawning. Given the extent of the gap in the fence, it is most likely some escaped. AP gave consistent evidence of their loss at 14. The accountant used a reasonable method to calculate 11, but this was based on assumptions none of us can confirm are correct. The accounts provide no other assistance to independently establish the facts. No other records are available.

[16] I must therefore discount the alleged loss for uncertainties.

The opening and closing stock

[17] The opening and closing stock figures were provided to the accountant by AP and it is possible they contain inaccuracies. However, I am satisfied that whilst errors are possible, they are likely to be more or less correct. Any anomaly between opening and closing stock in 2010/2011 is to ZKZ Insurance Limited's favour, as if the opening stock in 2011 was the same as the closing in 2010, the loss would have looked greater (by 20 hinds).

Number of natural deaths

[18] However, I accept there could have been more (or less) than 5 natural deaths and in the absence of further evidence this is a primary uncertainty. I have had regard to the

calculations ZKZ Insurance Limited has undertaken that the loss may be as low as one hind. This is possible but if one hind escaped, common sense suggests it is likely more went with it. Also, given the limitations of the information in the accounts, ZKZ Insurance Limited's assessment is equally open to conjecture. I also note that AA is an experienced farmer, and I would consider it unlikely that his stock losses year to year could appear to be as high as 16 without some external reason. Five deaths is plausible, even if it cannot be proved as probable, and is a reasonable starting point from which to discount. ZKZ Insurance Limited suggested it could be as high as 10, or more. A fair assessment probably lies somewhere in between.

Lack of information about sales

[19] ZKZ Insurance Limited undertook a thorough analysis of the accounts and noted that 52 more hinds were sold in the 2010/2011 year (the year of the fire) than the previous year, suggesting mixed age hinds could have been sold. However, I note there is no record that any of these were mixed age. AP were claiming the loss of breeding hinds, not their offspring, and whilst it is possible they sold the deer that they are claiming were lost, they were capital stock for breeding. I accept this information creates some uncertainty in the sense that it cannot be independently tested, but this is not a significant uncertainty for me. I know some hinds were lost in the fire, and for all the reasons set out above, I consider it unlikely that the missing hinds went on the market.

Assessment of loss

[20] In the end, I must make a determination only on the balance of probabilities. We cannot be certain, but deer are likely to find a large hole in a fence, and I consider it probable that a number took the opportunity to escape. Taking all of these factors into account, I find that the accountant's assessment of 11 should be discounted by 33 per cent for the uncertainties in the assumptions he had to make (rounded to 7 hinds). The major, but not sole, factor in this discount is in the number of natural deaths, which remains unable to be established, and for which there is no record, nor annual guide, in the accounts. This finding effectively alters the estimate of five natural deaths to nine. This leaves some uncertainty, but looking at all the evidence, I am confident it was probable that at least this number escaped. It could have been more, but I cannot make that finding.

[21] I have had regard to AA's concern that he had attempted to retrieve the lost deer after the fire but had been abused and ordered off the Frost's property, denying him that opportunity. ZK had no recollection of that event, and I was unable to make any finding

about it. If it occurred, this event might have prevented recovery of deer, but it did not alter the numbers that originally went missing, and thus the amount in issue in these proceedings.

[22] I note that during the proceedings, AA claimed that ZK had retained and sold other deer belonging to him. This had not been part of his claim, and the allegation was not able to be substantiated on the evidence. This claim relates only to those lost in the fire.

What value should be attributed to the lost deer?

[23] AP sought \$600 per deer, and \$280 per fawn. The stock agent that valued the deer confirmed that \$600 was for a pregnant hind, and \$280 was for a weaned fawn, about 4-6 months after birth. The agent considered that the hinds that had given birth would have been worth less - \$450 to \$500 (the midpoint being \$475). AP did not know exactly how many of the 14 that were missing had given birth, but I accept their assessment that on the date of the fire, about 60 per cent of the herd had fawned.

[24] Accordingly, of the 7 hinds awarded, four would be at \$475 (\$1,900), and three would be at \$600 (\$1,800). Also, four fawns would be treated as lost, but at a discount on their eventual value of \$280. The compensation awarded for the fawns must be their value at the date of the loss, which is somewhat notional given that they could not have been sold on that date. I have set their value at a discount of 50% on their eventual sale price, and thus at \$140 (\$560).

[25] The parties also agreed that ZK would pay \$400 for fence repairs that were undertaken by AA.

Conclusion

[26] This has been a most difficult case to determine given the likelihood of loss, but the lack of evidence about the extent of it. Had AP brought their case earlier, some of the uncertainties may have been able to be resolved. However, in the circumstances, all that can be achieved is a significantly discounted contribution towards AP's claim.

[27] In summary, the sum awarded to AA is:

4 hinds	@\$475.00	\$1,900.00
3 pregnant hinds	@\$600.00	\$1,800.00
4 fawns	@\$140.00	\$ 560.00
Labour	@\$400.00	<u>\$ 400.00</u>
		\$ 4,660.00

