

BETWEEN

AAA

APPLICANT

AND

XY INSURANCE

APPLICANT'S INSURER

AND

ZZZ

RESPONDENT

AND

ZX INSURANCE

RESPONDENT'S INSURER

Date of Order:

8 May 2013

Referee:

Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZZZ is to pay to XY Insurance Limited the sum of \$3,680.05 on or before Friday, 31 May 2013.

Facts

[1] At approximately 11.30 p.m. on 2 September 2012, KA was driving his mother (AAA)'s car on a rural road just out of [town name]. It was a very foggy night. Unfortunately, some cows belonging to a local farmer, ZZZ, had escaped onto the road. KA collided with one of these cows, killing the cow, and writing off his mother's car.

[2] AAA and XY Insurance believe that ZZZ was at fault for allowing his cows to escape onto the road. They have made a claim against him for the pre-accident value of the car plus salvage and related costs, totalling \$3,680.05.

[3] By virtue of the general law, and the application of s 5(1) of the Animals Law Reform Act 1989 (the "Act"), stock owners owe a duty of care to road users to take reasonable care to ensure that their stock does not stray onto the road. To succeed in their claim, the Applicants have the onus of establishing that ZZZ failed to take reasonable care. By virtue of the Act, in determining whether a stock owner is liable for breach of this duty, the Tribunal is required to consider (amongst any other matters that are relevant):

- (i) The common practices for fencing in the locality of the accident;
- (ii) Any measures taken to prevent animals from straying onto the road in that locality; and
- (iii) Any measures taken to warn users of the road of the likely presence of animals on the road.

Issues

[4] It was established that the cows escaped from a 4.5ha paddock by lifting a closed gate off its hinges (referred to in the hearing as Gate 2). There were about 300 cows in the

paddock. The cows were calving and were being break-fed whilst this took place. After birth, calves were taken into a nearby shearing shed used for calf rearing, which understandably caused some degree of stress, unpredictability and fractiousness amongst the herd.

[5] After getting through Gate 2, the cows were able to push their way through a second gate (referred to in the hearing as Gate 1), which ZZZ acknowledged was not fit for retaining large cows. The gate was an ordinary large gate, but did not have a strong latch. Once through Gate 1, the cows were in the lane and were free to get onto the road.

[6] Given that Gate 2 was in all respects strong in appearance and had an appropriate latch for restraining cows in ordinary circumstances, the Applicants had the onus of establishing:

- (i) That Gates 1 and 2 were inadequate in these circumstances to restrain the cows;
- (ii) That this inadequacy caused the collision;
- (iii) That the costs claimed were established.

[7] Each is considered in turn.

Decision

Were Gates 1 and 2 inadequate in the circumstances to restrain the cows? (6(a))

[8] After considering all the evidence presented by the parties in this matter, I am satisfied that it was established that Gates 1 and 2 were probably not adequate to restrain the cows in the circumstances in which they were being held. I accept that this finding is open to debate, but I am satisfied that it is a reasonable conclusion on the balance of probabilities for the following reasons:

- (i) ZZZ accepted that Gate 1 was not intended for, nor suitable for restraining, the mob of cows. This gate either was left open (as ZX Insurance's assessor had

understood), or, as ZZZ recalls, had an inadequate latch that the cows were able to push through. A photograph of the latch on that gate provided further evidence of this fact.

- (ii) The more difficult question was whether Gate 2 was inadequate. Photographs of the gate showed it was a solid wooden gate with a cattle-safe latch, hinged to a strong strainer post. As pointed out by the ZX Insurance assessor, it was in all respects a gate commonly used, and usually suitable for, restraining cows.
- (iii) However, it is common for farmers to take extra measures to support normal gates that, for particular reasons, are under extra pressure from cattle. Extra pressure can come from the class of stock being grazed (e.g., bulls), the number of stock being grazed relative to the area or available feed (e.g., break-feeding winter crops), from stock that have an interest in relating to other stock nearby, or from stock under stress from separation or other causes (e.g., at calving). A cow is a large animal of considerable weight. Where it has an interest in escape, it can lift an ordinary gate off its hinges rendering an otherwise adequate gate and latch inadequate. To avoid this risk, a farmer can wire up the hinges and latch to prevent a gate being lifted, or can run an electric tape above or across the corner to keep stock away.
- (iv) In this case, I am satisfied that Gate 2 was under extra pressure from the cows because of their state at calving. ZZZ spoke of the stress surrounding the calving period, for staff and cows, and confirmed that some cows could be unpredictable and agitated at that time. At least 10-15 cows would have calved that day, and their calves would have been taken from them and housed in a woolshed close by used for calf rearing purposes. The cows were being checked regularly during the day, but it would not have been a surprise for a number of the cows to have an interest in escaping. In ZZZ's view, this state rendered the escape an accident rather than a failure to take care. This was an argument that deserved close consideration, particularly when the photographs of ZZZ's property give the impression of an experienced and careful farmer. However, I also cannot disregard the fact that the cows got out that night, which of itself provides an inference (although not proof on its own) of inadequacy. When this factor is

combined with the pressure on Gate 2, and the significant danger that a cow poses on the road, I am satisfied that ZZZ had a duty to provide extra support for Gate 2. After the event, ZZZ did make this decision and acknowledged he would do so in the future.

Causation and loss (6(b), (c))

[9] It was established that the collision was caused by the cows escaping onto the road.

[10] I have had regard to ZZZ's assertion that KA may have contributed to the collision by travelling too fast in the fog. However, there was insufficient evidence that this was the case. Both at the hearing and in his interview with the attending Police Officer, KA states that he was doing 60-70km/h, some 10km/h less than the speed the Police Officer felt was safe to travel at in the area that night. KA's caution in this regard may in fact have spared him serious injury.

[11] Costs of \$3,680.05 (being the pre-accident value plus salvage and related costs) were established.

Conclusion

[12] For these reasons, I find that ZZZ is liable to pay XY Insurance Limited the sum claimed as set out in the order.