

BETWEEN

AAV

FIRST APPLICANT

AND

AAW

SECOND APPLICANT

AND

ZZG

RESPONDENT

Date of Order:

28 June 2012

Referee:

Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZZM is to pay to KS Ltd the sum of \$6,901.26 within 28 days.

Facts

[1] At approximately 5.00 a.m. on Tuesday, 20 September 2011, AAP collided with a cattle beast of ZZM's that was running loose on the road. The cattle beast did not survive. The collision also caused extensive damage to AAP's RAV4. As the repair costs exceeded its value, the vehicle was written off.

[2] AAP's insurer, KS Ltd, has made a claim against ZZM for \$7,062.26, made up of \$7,000.00, being the lesser of pre-accident valuation (\$7,000) and repair costs (\$8,434.65), plus salvage (\$359.38), less the net wreck value (\$297.12).

[3] Most of the facts are undisputed. ZZM has a lifestyle block. At the time of the incident, ZZM was wintering some sheep, and a mixed mob of seven steers and heifers. The steers and heifers were in a wintering paddock that was about 50m². They had been in this paddock for about three months, and during that time they had been fed one large bale of hay every three days. The paddock has a gate with a stock-proof latch. ZZM last fed the cattle in this paddock on Sunday, 18 September 2011. At some time on the evening of Monday, 19 September 2011 or early on Tuesday, 20 September 2011, the cattle got out through this gate and escaped down ZZM's driveway onto the road. The gate was neither damaged, pushed over nor raised off its hinges. It was simply found hanging open towards the driveway, with the cattle gone.

[4] ZZM owns a panelbeating business, and stores up to 300 cars and parts at his property. Some of these cars and parts were in the wintering paddock. Most were in an adjoining paddock. ZZM has confirmed that he allows a few people access to the property for them to take car parts. His neighbour has reported to him that others attend the property from time to time for the same purpose.

Law

[5] 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. 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

[6] It was established that the cattle escaped out of an open gate from a paddock in which car wrecks were stored. The gate and surrounding fences were tidy and secure, and the cattle had not lifted the gate or pushed through it. The escape therefore did not occur as a result of poor fences but as a result of human error. That error was made either by ZZM or by a visitor to his property who was looking at the wrecks in the paddock. If ZZM had left the gate open, he would be liable. If a third party did so, ZZM disputes that he should be liable.

[7] Part of the salvage costs relating to storage were also disputed.

[8] The two issues for consideration were therefore:

- (i) Whether it was established that ZZM had failed to take reasonable care if it was a third party who had left the gate open; and
- (ii) Whether storage costs were established.

Decision

[9] Having considered the evidence of both parties in this matter, I find that ZZM is liable to pay KS Ltd the sum of \$6,901.26 for the following reasons.

[10] Firstly, I find that ZZM failed to take reasonable care to ensure his stock did not stray onto the road, either by leaving the gate open himself, or, alternatively, by housing the cattle in the same paddock through which people could get access to his cars without taking secondary precautions. Having been wintered in the paddock on hay every three days for about three months, the cattle had a special interest in the gate. They escaped on day two of a three-day feeding cycle. It is reasonably foreseeable that inexperienced members of the public could fail to latch the gate properly, leave it open or inadvertently let the cattle out. ZZM knew people came to see his cars (whether authorised or not), and this entry and exit of members of the public created a risk that needed secondary precautions. Such precautions might have been signs denying access, a padlock on the gate, putting the cars or cattle in separate areas, shutting the gate onto the road, or installing a cattle stop or second gate. ZZM acknowledges that he now has a second gate as another line of defence on the driveway. This would have been a prudent step to take to avoid this event.

[11] Secondly, KS Ltd made much of the fact that ZZM had allegedly admitted liability at the time. However, it was not established that ZZM had done so. The insurance investigator who interviewed ZZM recalled an admission. However, I put this to one side and did not put any weight on this evidence. The contents of that conversation were disputed and not proved. I also put to one side the Police record of an admission, as it did not tend to prove one way or another the key issue in dispute. On the other hand, I have had regard to the fact that the Police did not prosecute ZZM. As explained in the hearing, this does not mean that he cannot be liable in a civil action, noting that the standard of proof is different in this forum. Given the findings in paragraph 9(a) above, the claim is established without reliance on these alleged admissions.

[12] Finally, ZZM disputed storage costs being claimed whilst the Applicant's wreck was sold. I agree that 52 days of storage was not reasonably foreseeable and is most likely to have been caused by factors for which ZZM is not responsible. Storage costs should therefore be reduced to a more reasonable period of 14 days. The sum awarded has been reduced accordingly by \$218.50. The balance of the costs was not disputed.

[13] For these reasons, an order has been made for ZZM to pay KS Ltd the sum of \$6,901.26 within 28 days.