

BETWEEN

ABU

APPLICANT

AND

ZYI

RESPONDENT

Date of Order:

8 May 2012

Referee:

Referee A Davidson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the Applicant's claim is dismissed.

Facts

[1] The Applicant, ABU, and the Respondent, ZYI, occupy adjacent homes on [a place].

[2] In January 2012, repairs were commenced on ABU's home. On 20 February 2012, ABU's builder, VO, discovered dog faeces on the south side of ABU's roof near ZYI's deck.

[3] ABU arranged to have the roof cleaned on 5 March 2012.

Issue

[4] The issue is whether ZYI threw dog faeces onto ABU's roof.

Decision

[5] The relevant law is the tort of trespass to land. My findings are as follows.

[6] Paragraph 9.2.01 of Stephen Todd (ed) *Law of Torts in New Zealand* (5th ed, Thomson Reuters, Wellington, 2009) states:

“An unjustified direct interference with land in the possession of another is a trespass, and is actionable per se without proof of actual damage. The purpose of the tort is not simply to compensate for actual harm suffered; the action also serves to mark out and vindicate the right of citizens to be free from direct interference with their possession of land, and to punish and deter wilful acts of interference.”

[7] Paragraph 8.2.05(2) goes on to say:

“A trespass is committed where the defendant, while not personally crossing the boundary of the plaintiff's land, instead causes some other person or thing directly to intrude upon the land. So it is a trespass to throw a person on to land in the possession of the plaintiff; to fire a bullet or a canister into the plaintiff's soil or airspace; to place a ladder against the plaintiff's wall; to drive nails into the plaintiff's walls; or to build a wall on the plaintiff's land.”

[8] ABU claims that ZYI threw dog faeces onto her roof. ZYI denies throwing the faeces and questions whether there ever were any faeces in the first place. ABU produced a signed statement from her builder, VO, in which he states:

After I had finished installing the new roof, I went up the next day, Tuesday 20th February 2012 to find dog faeces had been thrown onto the South side of the roof... In my opinion, there is no other way dog faeces could have got onto such a high roof, which has no direct access from the street, or any other property, but from being thrown from the deck of number 10.

[9] VO could not be contacted during the hearing to expand upon his statement and answer questions. ABU also produced photographs of the two properties and the proximity of ZYI's deck to ABU's roof.

[10] I accept VO's statement that he discovered dog faeces on ABU's roof.

[11] ABU did not see ZYI throw faeces onto her roof. ABU instead invites the Tribunal to infer that ZYI threw the faeces due to the proximity of ZYI's deck and the applicable part of ABU's roof. On the balance of probabilities I am prepared to infer that the faeces were thrown from ZYI's deck. I make this inference based upon VO's statement and the photographic evidence, which shows that it is very unlikely that faeces could be thrown onto ABU's roof from either the road or any other adjacent property.

[12] Trespass to land is a claim against a specific person, in this case ZYI. The tort of trespass to property is not one of collective responsibility and as such it is not sufficient to show merely that the trespass arose from a certain property but also that it arose from a specific person. ZYI resides at the property with her partner, ZA, and presumably ZYI entertains guests from time to time. So although it appears likely that the faeces originated from ZYI's property, there are at least two individuals that could have thrown it. ABU argued that it was ZYI that threw it in response to gossip that ZYI believed that ABU had herself thrown dog faeces into ZYI's garden. ABU denied having done so and there was conflicting evidence in relation to the gossip.

[13] It is the applicant's burden to prove their claim on the balance of probabilities. It is not sufficient for the applicant to show that what they say happened is possible or even the most likely scenario to have occurred. Rather, an applicant must show that what they say happened is more likely than not what happened, and most likely is not equivalent to more likely than not. In this case I am not prepared to draw the inference that it was more likely than not ZYI that threw the faeces. ABU provided a possible motivation, but even if it was

shown that ZYI did believe that ABU had thrown dog faeces into her garden, it still only amounts to a potential motivator which would not provide sufficient basis for inferring that from amongst those that could have thrown the faeces that it was in fact ZYI that did so.

[14] On the basis of the foregoing, I find that while it is likely that the faeces originated from ZYI's property, ABU has not proven on the balance of probabilities that it was ZYI that threw it and as such ABU's claim must be dismissed.