

BETWEEN

AEN

APPLICANT

AEO

SECOND APPLICANT

AND

ZVJ Ltd

RESPONDENT

AND

ZVI

SECOND RESPONDENT

ZVH

THIRD RESPONDENT

Date of Order:

23 January 2013

Referee:

Referee Edwards

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZVJ Ltd is to pay AEN and AEO the sum of \$1,600.00 by no later than 7 February 2013. The claim against ZVI and ZVH personally is dismissed.

Facts

[1] AEN and AEO's property adjoins a property owned by ZVJ Ltd. In July 2012, AEN and AEO spoke with ZVI, Director of ZVJ Ltd, and discussed the possibility of building a fence on the boundary of the two properties. As ZVI stated he did not want to contribute to the cost of a fence, AEN and AEO issued a Fencing Notice under the Fencing Act 1978 on 7 August 2012. The notice was delivered to the registered office of ZVJ Ltd, but addressed to "ZVI, Owner of land at [Auckland address]".

[2] ZVI received the notice, however chose not to respond as he believed that service was not valid as the notice was addressed to him personally and not to the company.

[3] As AEN and AEO did not receive a cross notice, they proceeded to build a fence in accordance with their notice dated 7 August 2012. They now claim in the Disputes Tribunal for a half share of the cost of the fence.

Issues

[4] The issues to be considered are as follows:

- (i) Is service of a notice addressed to "ZVI, Owner of land at [Auckland address]", and delivered to the registered address of ZVJ Ltd, service of a notice under the Fencing Act 1978?
- (ii) If so, is ZVJ Ltd liable to contribute to the cost of a fence as built?

Decision

Is service of a notice addressed to “ZVI, Owner of land at [Auckland address]”, and delivered to the registered address of ZVJ Ltd, service of a notice under the Fencing Act 1978?

[5] Section 12 of the Fencing Act states:

12 Service of notices

(1) Any notice or cross-notice required or authorised by this Act to be served on any person shall be delivered to that person, and may be delivered to him either personally or by posting it by registered letter addressed to that person at his last known place of abode or business in New Zealand. A notice or cross-notice so posted shall be deemed to have been served at the time when the registered letter would in the ordinary course of post be delivered.

[6] I agree with ZVI that the company and the individuals are separate legal entities; however, the purpose of service in any case is to bring the documents concerned to the notice of the parties responsible for the company. In this case, the notice has fulfilled the purpose of service as it brought notice compelling contribution under the Fencing Act to the attention of the person responsible for the company – namely ZVI, the director of the company. Therefore, I find the mistake to be immaterial and that it does not invalidate the notice. ZVJ Ltd has received valid notice of an intention to build a fence issued under the Fencing Act.

Is ZVJ Ltd liable to contribute to the cost of a fence as built?

[7] Section 11(3) of the Fencing Act states:

11 Objections to proposed fence

...

(3) If the occupier receiving a notice fails to serve a cross-notice within the said period of 21 days, he shall be deemed to have agreed to the proposals set out in the notice served on him.

[8] As AEN and AEO have issued a valid notice under the Fencing Act, and as ZVJ Ltd chose not to respond and did not issue a cross notice, I find ZVJ Ltd shall be deemed to have accepted the proposals set out in the notice and that it is liable to pay a half share of the fence in accordance with s 11(3) of the Act.

[9] I have considered the issues raised by ZVI that the fence was over-height and that it does not meet the criteria of specimen fences in Schedule 2 of the Act; however, these issues should have been dealt with by way of a cross notice. As ZVJ Ltd did not issue a cross notice, AEN and AEO were entitled to build a fence in accordance with their original notice. ZVI has also stated that the company does not benefit from the fence. However, s 9 of the Act provides for equal contributions to a fence by the occupiers of adjoining lands not divided by an adequate fence. The perceived benefit or lack of benefit to be gained is not a factor that can be taken into consideration.

[10] I have also considered the issue that the fence is not on the true boundary. The exact deviation from the boundary is not clear; however, it does appear to be minimal, perhaps less than ten millimetres. Section 22 of the Act states:

22 Where fence to be built

Save as otherwise agreed or ordered by the Court, the middle of a fence shall be upon the boundary line: Provided that, where a fence is supported by or formed about posts, the posts shall be placed on the boundary line or as near thereto as practicable.

[11] It is agreed in this case that the fence is not on the boundary line. However, AEN and AEO claim it has been put in a line that enables it to meet the ends of two existing fences. Any benefit to be gained from the deviation from the boundary is in the favour of ZVJ Ltd. As the deviation is minimal and as the fence appears to have been placed as near to the boundary as practicable, considering the placement of exiting posts, I find the fence has been built in accordance with s 22 of the Fencing Act.

[12] In view of the above, I find ZVJ Ltd liable to pay a half share of the fence. AEN and AEO have proven that they paid the sum of \$3,400 for the fence. Any over-height issues have been dealt with by AEN and AEO by reducing the fence to an allowable height. The reduction was minimal; however, I have made an allowance for this in the price by deducting the sum of \$200. ZVJ Ltd is therefore liable to pay half of the sum of \$3,200, being \$1,600.

[13] The claim against ZVI and ZVH personally is dismissed as they personally are not the owners of the adjoining land.