

BETWEEN

AGJ

FIRST APPLICANT

AND

AGK

SECOND APPLICANT

AND

ZVL

RESPONDENT

Date of Order:

18 December 2013

Referee:

Referee Costigan

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the claim by AGJ and AGK is dismissed. AGJ and AGK are jointly and severally liable to pay ZVL the sum of \$793.20 on or before 31 December 2013.

Facts

[1] AGJ and AGK live at 34 [place name street]. They say ZVL, their neighbour at 36 [place name street], is responsible for excess water flows on their property which has caused them \$4,150.60 of damage. They seek that sum from him. ZVL counterclaims \$1,718.20 for costs he says he has unnecessarily incurred in defending this claim.

Issues

[2] The issues to be decided are:

- (i) Is it more probable than not that ZVL is responsible for concentrating, by artificial collection and/or drainage, natural water that has caused damage to the AGJ and AGKs' property?
- (ii) If yes, did that damage occur in the last 6 years?
- (iii) If yes, is the amount of the cost to repair the damage \$4150.60?
- (iv) Does ZVL have grounds to claim costs and are the costs claimed actual and reasonable?

Decision

Is it more probable than not that ZVL is responsible for concentrating, by artificial collection and/or drainage, natural water that has caused damage to the AGJ and AGKs' property?

[3] I find it is not more probable than not the ZVL is responsible for concentrating, by artificial collection and/or drainage, natural water that has caused damage to the AGJ and AGKs' property.

[4] The relevant law is the law of nuisance. A claim of nuisance may be made at law where one property occupier alleges another is creating a situation which causes damage to

the first's property. In a situation of water run-off, occupiers of land have to accept water flowing naturally on to their land from higher ground. That of itself is not sufficient to create a nuisance.

[5] In essence, AGJ and AGK claim that a combination of insufficient drainage and spouting on ZVL's property, a trench and the excessive washing of his vehicles has created localised and significant damage to their garden paths. This has caused dampness to their property and to their foundations, which has in turn, caused a damp house with consequential damage including to the blinds within the house. AGJ and AGK have produced in support of their claim a vast amount of photographic evidence and have also engaged Mr EM to provide a building report and commentary in support.

[6] However, having considered all of the evidence, I am not persuaded that AGJ and AGK have proven ZVL is responsible for this damage. I say this for the following reasons:

- (i) AGJ and AGK clearly occupy lower land and will be subject to natural run-off from ZVL's higher land;
- (ii) It is clear that the local authority, WQ Council, have investigated this matter a number of times over many years as a result of complaints from AGJ and AGK. WQ Council does not consider ZVL can do anything else and has not taken any enforcement action against ZVL, other than to request what was described as minor works to attend to building compliance rather than run-off. WQ Council's letter of 12 July 2013 is clear that the Council is satisfied with the surface water control at ZVL's property;
- (iii) The report of HP Ltd concludes storm water controls are appropriate;
- (iv) Although Mr EM was able to describe in detail the localised damage he has discovered at number 34, I found he was unable to explain how that damage was actually caused by ZVL such that there was a clear causative link between water coming from ZVL's property and then causing localised damage in the areas complained of;

- (v) I do not accept the level and extent of water run-off from the washing of vehicles has caused this damage in circumstances where ZVL has given evidence denying excessive car washing and contradicting AGJ and AGKs' claims.

If yes, did that damage occur in the last 6 years?

[7] I have found it is not proved ZVL is responsible and so I do not need to decide this. However, I do note that had I found ZVL was responsible, there is insufficient evidence to suggest the damage now complained of has been more recently caused by excessive car washing. Mr FY for WQ Council produced as part of his evidence, correspondence between AGJ (or her solicitors) and the Council from 1997 in which AGJ complained of, among other things:

- (i) Her problems with water run-off coming down from ZVL's property that had not occurred before he concreted and, the way it was laid did not allow for natural run-off; and
- (ii) The run-off was causing damage – concrete cracking in her paths with water seepage underneath going under the house in the soil in line with ZVL's drive.

[8] Although AGJ explained that this damage related to different problems to those she was experiencing now, had I to decide this matter, I would not have been persuaded it was possible to isolate on the evidence provided damage that had allegedly occurred in 1997 and well outside of the limitation period and that which is complained of today. This is particularly so where Mr EM's report suggests car washing had been taking place for 15 years; and in December 2006 AGJ was complaining to the Council about water coming on to her property from the garage. That would suggest the problems now complained about are the same as those that have been complained about for some time and so the damage interrelated.

If yes, is the amount of the cost to repair the damage \$4150.60?

[9] As I have decided ZVL is not responsible for causing any damage he is not required to pay any costs to repair and the claim is dismissed.

Does ZVL have grounds to claim costs and are the costs claimed actual and reasonable?

[10] I find ZVL has grounds to claim costs. However I find only the HP Ltd costs of \$793.20 are actual and reasonable and I award these only.

[11] For costs or fees to be awarded in the Disputes Tribunal the party claiming them must come within the limited grounds provided for in s 43 of the Disputes Tribunals Act 1988 (DTA).

[12] On balance, I am satisfied that AGJ and AGK's claim can be described as frivolous and so comes within the exception for costs provided for in s 43 of the DTA.

[13] I have had regard to AGJ's explanation that ZVL chose to incur those costs and she should not be responsible for them. AGK offered no further comment on this issue. However, I am satisfied AGJ and AGK have persisted with these allegations that ZVL is causing water damage to their lower lying property for over 16 years and in the face of clear advice from the Council, that he is not responsible for those problems as they arise naturally given she is in a lower property. I find to persist with those same allegations in this Tribunal to be a frivolous claim and ZVL was forced to seek further expert advice in the form of the HP Ltd report. I award the costs claimed for that report in full.

[14] ZVL also claims \$925.00 for costs related to his brother's apparent work on this matter for him. I have not been provided with any report relating to that work and it seems to be simply ZVL's brother charging him for helping him co-ordinate and put together a response to this claim. I do not put that assistance in the same category as an independent expert's report and dismiss the claim for those costs.