

BETWEEN

**CD
APPLICANT**

AND

**XY LIMITED
RESPONDENT**

Date of Order:

18 June 2014

Referee:

Referee Reuvecamp

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that XY Limited must pay CD the amount of \$10,400.00 on or before 18 July 2014 and arrange for all cracks in the exterior walls of CD's property to be re-pointed in a colour consistent with the pointing colour currently used on the property within 2 weeks of the date of this order

Facts

[1] XY Limited is in the process of developing a large section of land for the purpose of constructing a retirement village next to CD's property. In doing so it is excavating and compacting the land.

[2] CD claims that cracks are appearing in his property as a result of the vibrations created by XY Limited's use of heavy machinery on the land. CD claims compensation for the estimated repair costs of \$27,000.

[3] To stay within the jurisdiction of the Tribunal CD reduces his claim to \$15,000.

[4] XY Limited declines liability claiming that its activities are in compliance with resource and Council consent requirements and within generally acceptable vibration rates for this kind of work.

Law

[5] Law of Nuisance

Issues

[6] Are the cracks appearing in CD's property due to XY Limited's activities on the neighbouring section?

[7] Are those cracks a foreseeable consequence of those activities?

[8] Do those activities constitute a substantial interference with the use or enjoyment of the land by CD so as to constitute an unacceptable nuisance entitling him to compensation?

[9] If a nuisance of a substantial nature is established, what is the appropriate remedy?

Reasons

[10] The law relevant to this claim is the law of nuisance. The law of nuisance applies to a situation where an individual has created or allowed to continue a situation which substantially interferes with use or enjoyment of land possessed by another person. If it is shown that the person who caused or allowed the nuisance to continue knew or ought to have known that it was interfering with another person's enjoyment or use of their land, that person may be liable for any reasonably foreseeable damages.

Are the cracks appearing in CD's property due to XY Limited's activities on the neighbouring section?

[11] I accept that a considerable number of cracks in CD's property appeared after the development work started, by comparing the pre-development report commissioned by XY Limited with the evidence provided by CD. This link is for the greater part conceded by XY Limited. I therefore find that XY Limited did create a situation which interfered with CD's use and enjoyment of land by causing frequent vibrations extending to and impacting on his property.

Are those cracks a foreseeable consequence of those activities?

[12] Since XY Limited is an experienced property developer and commissioned the pre-development report it is clear that it anticipated potential impact of its excavation and compacting activities on the neighbouring sections. XY Limited claims that the vibrations measured by its seismographs indicated that they never exceeded 5 ppv's (peak particle velocity, a measurements of the movement and force or vibrations expressed in millimeters per second) near CD's property, which, as its geological engineer/expert witness advised, is generally considered to be the level at which some property damage may be anticipated and that it complied with Council and Resource Consent requirements.

[13] I find that neither of those defences will avail it in circumstances where actual property damage to CD's property occurred especially where XY Limited was promptly and at various occasions advised of cracks appearing when heavy equipment was operating. Compliance with regulatory requirements does not provide authority to cause damage to another person's property.

[14] XY Limited further provided expert evidence of an geological engineer that CD's property was built on an old streambed which may have caused it to be more susceptible than otherwise foreseeable to vibration damage. I accept that this may be correct, since the

relevant stream also ran through XY Limited's adjoining land the subject of the development. It led XY Limited to conduct considerable excavation, filling and compacting work involving heavy machinery to take the subsoil structure into account.

[15] I find that in view of this knowledge XY Limited was or should also have been well aware of the potential impact of the work on CD's property, which was built on the same subsoil. This is in addition to the general principle in tort law that once loss is foreseeable the wrong doer will have to take his victim as it comes, i.e. if special characteristics of the victim cause it to suffer graver consequences than one might generally expect from an otherwise foreseeable event, then the wrongdoer is still liable for those consequences.

[16] I find that this places the issue whether the loss suffered by CD was foreseeable beyond doubt, whether or not generally acceptable limits are exceeded. In addition, I find that CD was in frequent contact with XY Limited warning it at various occasions about the impact the work was having so that it cannot be reasonably argued that this kind of damage was not foreseeable.

Do those activities constitute a substantial interference with the use or enjoyment of the land by CD so as to constitute an unacceptable nuisance entitling him to compensation?

[17] The evidence submitted establishes a considerable number of cracks which appeared after the work on the neighbouring section commenced. Although I accept that some cracks were existent before the work commenced, I find that the evidence before me establishes a clear causal link between the physical vibrations and noise experienced by CD and the cracks which have appeared since the work commenced.

[18] I accept the evidence of the structural engineer/expert witness for XY Limited that the damage is not of a structural nature. However I find that the multitude of cracks in walls, cornices and tiles at CD's property establish that the impact on his property amounts to a substantial interference with the use and enjoyment of his land, is well in excess of what can be described as of a minor nature and entitles him to compensation.

If a nuisance of a substantial nature is established, what is the appropriate remedy?

[19] CD claims that the interior cracks will need to be filled before the relevant rooms will need to be fully repainted. This is to avoid unsightly difference in colour remaining visible. Some tiles will need to be replaced with a possible need to also replace or re-grout adjoining ones. Cracks appearing in the external walls will need to be re-pointed. He submits a quote

for this work from a building and decorating firm for \$27,390. I take that amount as inclusive of GST on the basis of the requirements of the Fair Trading Act.

[20] XY Limited claims that this quote is excessive in amount, that part of the estimated work is not a direct consequence of its activities or necessary, and that the real costs relating to that are deducted, are more likely to be around \$9,000. Adding GST this means around \$10,350.

[21] I find that the quote relied upon by CD is excessive in that there appears to be no need for repainting of 29 interior door panels at \$4,350. I also find, as submitted by XY Limited, that the proposed tiling work appears to be based on an excessive charge per square meter. I therefore reduce the amount of \$1,250 allowed for the last-mentioned item to \$850 (incl.GST). I further deduct the allowance for \$1,750 to repair the exterior brick work because the parties have agreed that XY Limited will attend to re-pointing all cracks in the exterior brick work within 2 weeks from the date of this Order. The amount remaining of the quote relied upon by CD then is \$20,890. It is therefore still more than twice the amount accepted as reasonable by XY Limited.

[22] If I was to accept CD's quote so adjusted, I would further have to take into account that the relevant property is 18 years old, the last 2 ½ years being occupied by CD. To CD's knowledge it does not appear to have been repainted recently. Repainting the interior as quoted would therefore create a freshly redecorated property for CD and result in a considerably better situation than he was in before the damage was done. The law allows for restitution to the previous situation but not a windfall and a deduction will need to be applied to take the likely improved value into account and adjust compensation accordingly.

[23] I find that the average interior will require repainting after around 10 years. The earlier inspection by XY Limited did not disclose substantial defects or bad maintenance. But there was existing minor damage. I will deduct 10% for that, reducing the quoted repair cost to, say, \$18,800. I will assume that the property had been repainted after 12 years providing a small margin. That means that with another 6 years lapsed, the interior was roughly halfway the term reasonably expected to lapse before it would need to be repainted again as a matter of course. I will work with 50% of the estimated cost i.e. \$9,400. Although I have earlier deducted the \$4,350 allowed in the estimate for the doors, some allowance for blending the colour of the doors with the rest of the repainted interior will be required. I therefore add back an additional \$1,000 for that purpose. The total arrived at then is \$10,400.

[24] The amount of \$10,400 is close to the amount of \$10,350 estimated by XY Limited which I find is somewhat on the light side for repairing and stopping numerous cracks and fully repainting the interior of a relatively large house as owned by CD. However, if I had increased the last mentioned figure to a more realistic level, I would still have to take into account any betterment ensuing due to the early repainting and the result would not be far away from the figure already arrived at.

[25] I find therefore that the amount of \$10,400, together with the re-pointing work on the exterior walls agreed to be undertaken by XY Limited within the next 2 weeks, will constitute fair compensation for the loss suffered by CD. I order accordingly.