

BETWEEN

AFN

APPLICANT

AND

ZUI

RESPONDENT

Date of Order:

8 June 2012

Referee:

Referee Eyre

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZUI is to pay AFN the sum of \$653.79 by 5pm on Monday 25 June 2012.

Facts

[1] In 2006, AFN realised that her drain was damaged and leaking, so she instructed RT (a plumber) to repair the drain. AFN considers the drain was damaged by the roots from ZUI's rhododendron tree.

[2] In 2011, AFN again had problems with her drain but in a different area from 2006. AFN instructed MN (a different plumber) to repair her drain. AFN considers that this damage was also caused by the roots from ZUI's tree and that the damage in 2011 was a continuation of the damage from 2006.

[3] ZUI disputes that it was her trees that caused the damage.

[4] AFN is claiming the cost of the plumbing work required to repair the drain, in 2006 and 2011, from ZUI.

Issues

[4] The issues are as follows:

- (i) Did ZUI's rhododendron tree create a nuisance by damaging AFN's drains? In 2006? In 2011?
- (ii) If so, did ZUI know about the nuisance (or ought she to have known)? In 2006? In 2011?
- (iii) Was the damage caused by the tree roots a reasonably foreseeable consequence?
- (iv) If so, what is the appropriate remedy?
- (v) Does the Limitation Act 1950 apply?

Law

[5] 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 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.

[6] I have also had regard to the Limitation Act 1950, the Limitation Act 2010 and the Disputes Tribunals Act 1988. The Disputes Tribunals Act 1988 provides the jurisdiction and authority for the work of the Disputes Tribunal. In particular, s 18(6) requires the Disputes Tribunal to "determine the dispute according to the substantial merits and justice of the case".

Decision

Did ZUI's rhododendron tree create a nuisance by damaging AFN's drains in 2006?

[7] I find that AFN has not established on the balance of probabilities that ZUI's rhododendron tree created a nuisance and damaged her drains in 2006. This finding is based on the following reasons.

[8] AFN and ZUI both agreed in evidence at the hearing that the drain repair work that was undertaken by RT in 2006 was entirely carried out in the reserve opposite AFN and ZUI's property and under the steps outside their properties. The invoice from RT stated that bad roots were down the drain and this was not disputed by ZUI.

[9] ZUI has presented evidence that shows that there are a number of trees in the reserve, which are significantly closer to the affected portion of AFN's drain than ZUI's rhododendron tree. AFN did not dispute the factual accuracy of this evidence.

[10] ZUI has presented evidence from MN, which stated that he considered that the damage caused by roots in the drain in the reserve should be paid for by the XX City Council Parks and Reserves Department. Likewise, ZUI has given evidence that PL suggested the 2006 plumbing bill should be reimbursed by the XX City Council. I find that this evidence indicates that both MN and PL considered the damage to be caused by trees in the reserve.

[11] AFN has not presented any evidence which indicates that it is more probable than not that ZUI's rhododendron tree damaged her drain in 2006, rather than one of the trees in the reserve.

[12] I have had regard to the fact that AFN considers RT to have done an inadequate job of repairing her drain, and that the damage may have actually been further along her drain and closer to her house, which could mean that it was in fact ZUI's rhododendron tree that either caused or contributed to the damage in 2006. However, as no evidence has been provided to support this suggestion, AFN has not established this on the balance of probabilities.

[13] As it has not been established on the balance of probabilities that ZUI's tree caused the damage in 2006, ZUI cannot be found liable for the 2006 plumbing bill and accordingly the 2006 incident will not be considered further.

Did ZUI's rhododendron tree create a nuisance by damaging AFN's drains in 2011?

[14] I find it is more probable than not that ZUI's rhododendron tree created a nuisance by damaging AFN's drain in 2011. This finding is made for the following reasons.

[15] ZUI and AFN both agreed in evidence that the repair work required on AFN's drain in 2011 was centred around the drain "mushroom" on AFN's property, which is next door to ZUI's property.

[16] AFN stated that MN told her the 2011 damage was caused by the "roots from next door".

[17] It is clear from the photographs and diagrams presented in evidence that the rhododendron tree is in very close proximity to this drain, it has significantly increased in size, and both parties accepted would be expected to have a big root system.

[18] ZUI accepted in evidence that it was possible her rhododendron tree contributed to the damage to the drains.

[19] I have had regard to the evidence presented by ZUI that it was likely to have been other tree roots that caused the damage to the drains, given the nature of rhododendron tree roots. However, I consider that this evidence is insufficient to prove on the balance of probabilities that the rhododendron tree roots did not at the least contribute to the damage.

[20] I have also had regard to ZUI's suggestion that the repair work carried out by MN included work done as a result of wear and tear on the mushroom, and that new drains have now replaced the old style drain pipes that were previously on AFN's property. These issues will be taken into account when I consider the remedy.

Did ZUI know about the nuisance (or ought she to have known) in 2011?

[21] I find that ZUI did know or ought to have known about the nuisance in 2011, based on the following evidence.

[22] ZUI has given evidence (in her written statement) that she was aware that AFN had had problems with her drain in 2006, and at that time ZUI instructed MN to investigate the problem. MN advised ZUI that there were roots in the drain. Accordingly, ZUI was aware there were tree roots causing problems with AFN's drains in 2006.

[23] I therefore find that based on ZUI's knowledge of the 2006 problems, ZUI either knew or ought to have known that her trees could potentially be causing a nuisance to AFN's drains in 2011.

[24] I have had regard to ZUI's assertion that she did not know her tree roots were causing problems with AFN's drains, but for the reasons detailed above, I consider that ZUI ought to have known her tree roots may be causing a nuisance.

Was the damage caused by the tree roots a reasonably foreseeable consequence?

[25] I find that the damage to the drains caused by the tree roots was a reasonably foreseeable consequence, for the following reasons.

[26] AFN and ZUI both agreed that, in theory, it is foreseeable that tree roots may cause damage to nearby drains and this had already happened in 2006. However, ZUI disputed that was what necessarily happened in this claim.

[27] The evidence presented by both parties regarding the proximity of the rhododendron tree to the mushroom and the area of drain pipes that were repaired in 2011, indicates that it is reasonably foreseeable that the tree roots would reach the drain pipe and cause damage.

[28] ZUI also provided evidence by SD, an arborist, that while in his opinion tree roots will not normally break a drain, they will be attracted to a crack in a drain for a variety of reasons.

[29] I have had regard to ZUI's implicit suggestion that perhaps the drains were cracked through wear and tear, and the problem was only exacerbated by the roots rather than caused by them. This issue will be considered further in relation to the appropriate remedy for this claim.

If so, what is the appropriate remedy?

[30] I have found that the damage caused to the drain pipes by ZUI's rhododendrons in 2011 was a nuisance that ZUI knew or ought to have known about. I have also found that the type of damage that occurred was reasonably foreseeable. I find also that, as AFN's drain pipes had to be replaced, it is clear that the damage caused was substantial. Accordingly, the

law of nuisance requires AFN to be compensated for the damage caused to her property by ZUI's rhododendron trees.

[31] AFN has claimed \$933.98 from ZUI, which was the cost to repair her drain in 2011.

[32] I consider that the substantial merits and justice of this claim require that ZUI pay only 70 per cent of the cost of repairs to the drain, which is \$653.79. I have reduced the amount that ZUI should pay from the full amount to 70 per cent for the following reasons.

[33] ZUI has argued that some of the repair work is likely to have been necessary as a result of general wear and tear on the drain pipes and/or mushroom, which would have been very old as they still had the copper pipes. AFN did not dispute this and AFN now has the benefit of new pipes.

[34] ZUI has also presented evidence (discussed earlier in this decision) indicating that although tree roots may exacerbate problems with drains they are unlikely to have been the initial cause of a crack. This evidence was not disputed by AFN.

Does the Limitation Act 1950 apply?

[35] I have found that there is insufficient evidence to find ZUI liable for the damage caused to AFN's drains in 2006. Accordingly, it is not necessary to consider whether ZUI would have a defence to this part of the claim under the Limitation Act 1950.