

BETWEEN

CW
APPLICANT

AND

XD
RESPONDENT

Date of Order:

4 September 2015

Referee:

Referee Whinerary

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that XD is to pay CW the sum of \$1,322.00 within 14 days of the date of this order. The counter claim is dismissed.

Facts

[1] CW is seeking to recover from XD half the cost of an arborist consultant and half the cost of felling a tree on the boundary between his and XD's properties. XD is counterclaiming against CW for damage which was done during the tree felling work and also for rent incurred by CW who used his property as a workplace and car park.

[2] The law governing this claim is the law of contract and the law of negligence. A contract is a mutually binding agreement made up of an offer by one party and an acceptance by the other. A contract cannot be unilaterally imposed upon one party without their consent. The law of negligence says that people must maintain reasonable and sufficient control of themselves and their possessions so that they do not cause harm to others. If a person fails to maintain sufficient control or take reasonable care and as a result someone else suffers loss then they may be liable to pay compensation.

Issues

[3] The issues to be determined by the Tribunal in this case are:

- a. Did XD agree to pay the arborist's consultancy fee and half the cost of the tree felling work?
- b. Did CW fail to take care and negligently damage the fence, concrete and feijoa tree?
- c. Is CW liable to pay rental for his use of XD's property?

Did XD agree to pay the arborist's consultancy fee and half the cost of the tree felling work?

[4] CW said that there was a big protected tree at the back of his section on the border with XD's property. He knew from when he did building work on his house that it was protected and nothing could be done with it without resource consent. CW said that he engaged an arborist to look at the tree after big branches fell off in June and July. Some of the branches were 3-4 metres long. CW had safety concerns. He approached the tree expert after getting a recommendation from a friend. After an investigation, the expert told

CW that there were two options, either completely cut it down or try and protect it. At this point, CW told the arborist that he thought the neighbour would agree to the tree being cut down since he had applied for resource consent to do this a few years before. The expert said he could apply for resource consent for the felling of the tree but that this would require both owners' consent.

[5] CW then went to see XD and asked for his consent to the resource consent application to cut down the tree. XD signed the papers and the council granted the resource consent. The arborist's bill was \$713.00.

[6] At this point, CW went and saw XD who told him that he needed to get quotes for the felling. CW obtained quotes and XD agreed to the one from ABC which was for \$2,645.00.

[7] XD acknowledged at the hearing that he was liable to pay half the felling cost because he had agreed to it. However, he argued that he was not liable to pay half the arborist's fee because he had not agreed to it. He said that he consented to applying for the consent and for the tree to come down but had never met the arborist and this cost was not discussed. In addition, he said that he would not have agreed to pay this extra cost because he had already obtained resource consent for the tree to come down in 2010. A copy of this consent was produced to the Tribunal.

[8] I find that XD is only liable to pay half the cost of felling the tree (being \$1,322.50) because he agreed at the time to share the costs and because he acknowledged liability at the hearing. However, I find that he is not liable to pay half the arborist's fee. I say this because CW engaged the arborist before he spoke to XD and also because there is a difference between a person consenting to a resource consent application being filed and consenting to it being filed and agreeing to pay the charges associated with that application. It is more likely than not that XD only consented to the application being filed and not to pay the arborist's fee as well. He had not been consulted about the engagement of the arborist and he already had resource consent to chop the tree down.

Did CW fail to take care and negligently damage the fence, concrete and feijoa tree?

[9] XD said that during the time the tree was being cut down, the fence at the corner of the driveway was damaged, branches of the feijoa tree were cut by about 25-30% and the concrete on the driveway was damaged. Photos of cut fence were produced along with photos of the feijoa tree and damaged concrete.

[10] CW acknowledged that all this damage had been done but denied that he had done it. One of the workmen must have done it.

[11] I find that XD has not proven on the balance of probabilities that CW caused the damage to his property. I say this because his letter to CW dated 8 March 2015 clearly stated that the damage was caused by the contractor. At the hearing, XD also said that he did not know who caused the damage but that it was most likely a contractor. However, his view was that because CW engaged the contractors then he is responsible for their actions.

[12] The law does not support XD's view. A third person can only be liable for someone else's actions where they have direct control over them. For example an employer may sometimes be liable for the actions of an employee. This is not the case here. CW engaged the tree felling company as an independent contractor. He had no say over the way in which the job was done. CW cannot therefore be found liable for the damage to the property. This part of XD's claim is therefore dismissed.

Is CW liable to pay rental for his use of XD's property?

[13] XD said that without his consent, CW's garden contractor used his section for CW's garden work. The work bench was set up on the land, the concrete mixer and truck were there and timber was cut there. This meant that XD and his family could not use the area to park their cars and this caused them parking trouble. XD produced several photos which showed the use of the land by CW's contractor. XD calculated the rent on this land over the period to be \$1,116.90. This was based on Trademe data and the market value of the land.

[14] CW said that he asked XD if he could use the back of his section for access while the fence was down to make it easier for work to be done on his garden. He did not agree to pay rent.

[15] I find that there is no evidence that CW and XD entered into an agreement with respect to the use of the land. There is no evidence of when the rental amount was agreed or how much it should be. A contract cannot be unilaterally imposed on another person without their consent. Therefore XD cannot lawfully charge CW rent for the use of his land. If XD was unhappy with the truck and wood on his section then he would have been legally entitled to have it removed but without consent, he could not charge CW money. The counterclaim is therefore dismissed.

[16] Finally, it is worth noting that there may still be some outstanding issues between CW and XD relating to boundary fences. As at the time of the hearing, neither party had taken any steps under the Fencing Act therefore the Tribunal was not in a position to make any decision about the future of the fences on the properties.