(Disputes Tribunal Act 1988)

ORDER OF DISPUTES TRIBUNAL

District Court **[2023] NZDT 466**

APPLICANT **FN**

APPLICANT **NH**

RESPONDENT **K Ltd**

SECOND RESPONDENT **O Ltd**

The Tribunal orders:

K Ltd is to pay FN and NH $5,421.00 by 15 September 2023.

Background

1. NH and FN own a property on [Address]. They wanted to carry out a two-lot subdivision.

2. They contacted K Ltd, a surveying business in [Town]. ZB, a surveyor at K Ltd, came to the site in October 2021.

3. ZB was familiar with the property. It was previously owned by his cousin. His cousin had also considered doing a two-lot subdivision. At ZB's suggestion, his cousin had installed a fence at the mid-point of the property.

4. The lot size is approximately 8200m2. To comply with the Council requirements, each newly created lot had to be not less than 4000m2.

5. ZB drew up a scheme plan after meeting with NH and FN.

6. The scheme plan utilised the existing fence as a boundary between proposed Lot 1 and Lot 2.

7. Lot 1 faces onto [Address] and it contains the existing house and driveway. Lot 2 is at the back of Lot 1, with access via an unformed right of way over the western edge of Lot 1. In this plan, Lot 2 is 4090m2 and Lot 1 is 4109m2.

8. NH and FN engaged O Ltd (IB) to assist with preparing and filing the resource consent application. They provided a copy of ZB's plan to IB.

9. Part of the information required for the resource consent application was a stormwater report. This work was carried out by M Ltd (EV).

10. The application was filed. Resource Consent was granted in June 2022.

11. NH and FN sought quotes to carry out the stormwater drainage detailed in the report. The quotes that they received were close to $50,000.00.

12. They discontinued work on completing the subdivision at that time.

13. Some time later they spoke with "other professionals" in the planning / surveying industry, who suggested that they could complete the subdivision without the need for a right of way by adjusting the boundary line between Lot 1 and Lot 2. This would remove the up-front cost of stormwater drainage, which mostly pertained to the right of way.

14. FN telephoned ZB. FN submitted that ZB initially told her that the boundary could not be changed without reducing one of the lots below the 4000m2 limit, but then conceded that it could be done, and he drew an amended scheme plan.

15. On the amended plan:

    a. The boundary is no longer on the fence line.

    b. Access to Lot 2 is over the same strip of land, but this strip is part of Lot 2 not Lot 1, so that Lot 2 has a 'dog leg' or 'pan handle' shape. This removes the need for a right of way over Lot 1.

    c. Lot 1 is 4035m2 and Lot 2 is 4164m2.

16. NH and FN engaged O Ltd to prepare and submit a request to vary the resource consent, based on the amended scheme plan. The Council issued a new resource consent in January 2023.

17. NH and FN seek costs and losses on the basis that the amended plan was the "correct" way to do the subdivision, and K Ltd and O Ltd should have advised them accordingly.

18. The claim seeks $10,000.00 comprised of:

    a. The cost of the stormwater plan prepared by EV ($2,932.50);

    b. [Region] District Council and O Ltd fees relating to the variation ($2,239.00);

    c. Interest on loan ($1,551.00);

    d. Legal fees ($442.75);

    e. General compensation for delay and stress ($2,834.75).

19. O Ltd and K Ltd filed a joint counter-claim seeking costs associated with preparing for and attending the hearing.

20. The hearing took place by phone on 15 August 2022. All parties attended the hearing. IB represented O Ltd. ZB represented K Ltd.

Findings

21. O Ltd and K Ltd were obliged to exercise reasonable care and skill in the services that they provided to NH and FN.[1]

22. There are two strands to the argument put forward by NH and FN that O Ltd and K Ltd failed to meet that standard:

[1] Consumer Guarantees Act 1993, section 28

a. That ZB unilaterally decided, or that he influenced / persuaded NH and FN to agree, to use the existing fence as the boundary line between Lot 1 and Lot 2. In so doing, he failed to turn his mind to other ways of carrying out the subdivision.

b. That, irrespective of how the decision to use the existing fence line came about, ZB and IB had a duty to identify that the sub-division could be done more simply and at a lesser cost by drawing the boundaries differently, and that they had a duty to advise NH and FN about this.

23. I accept that part of the exercise of reasonable care and skill of a surveyor in drawing up a scheme plan for a sub-division is to think about the best way to draw the boundary lines having regard to the clients wishes, the local Council requirements, and consideration of minimising cost and complexity where possible.

24. The parties disagree about what was said when ZB met with NH and FN on site in October 2021.

25. ZB submitted that FN specifically told him that she wanted to use the existing fence as the boundary line. He then explained that in order to keep the lot size above 4000m2, there would need to be a right of way over the front lot to access the rear lot. FN accepted this at the time.

26. FN and NH submitted that:

a. They had no preferences as to where the boundary was to be drawn.

b. They relied on ZB's guidance.

c. When ZB arrived at the property, he told them that his cousin was the previous owner and he explained why the fence was put up.

d. ZB made an assumption that the boundary would be on the fenceline, without considering (or discussing with them) the possibility of other options.

27. I have no independent evidence about the conversation in October 2021.

28. In terms of the disputed aspects of the conversation, my finding is that NH and FN's recollection is more persuasive. I am satisfied that:

a. They did not have a strong preference for the boundary line to be on the fence, and their principal concern was to carry out the subdivision in the most efficient and least costly way possible.

b. If they had been told that they could have carried out the subdivision without the need for a right of way easement they would have taken that option.

c. It is reasonable to think that ZB entered the conversation with an understanding or expectation that the boundary would be on the fenceline, without that idea being introduced by NH and FN, because of his knowledge of the history of the fence.

d. NH and FN were genuinely surprised (indeed shocked) when they later discovered that the boundary could have been drawn differently.

29. Having made a finding that NH and FN did not stipulate that the boundary must be on the existing fenceline, I find that:

a. ZB had a duty to think about the best place to locate the boundary, in order to meet the [Region] District Council requirements and to carry out the subdivision in the most efficient manner.

b. There was an option to carry out the subdivision without the need for a right way easement.

c. At the least, ZB was obliged to identify and discuss this option with NH and FN.

d. ZB failed to do this.

e. This amounts to a failure to exercise reasonable care and skill, a breach of section 29 of the Consumer Guarantees Act 1993.

30. In terms of the claim against O Ltd, I accept IB's statement that she was not involved in the design of the scheme plan.

31. The only arguable basis for a claim against O Ltd is that O Ltd had a duty to identify that the boundaries could be drawn differently and to bring this to NH and FN's attention.

32. IB submitted that people have a wide variety of reasons for wanting boundaries to be drawn in a particular way, and that this is a matter for the surveyor to work through with the client.

33. It was reasonable for IB to assume that those conversations had already taken place before the project came to her.

34. My finding is that the exercise of reasonable care and skill in IB's role, which was to prepare and submit the resource consent application to the [Region] District Council, did not include identifying and suggesting alternative lot configurations.

35. Where a service provider fails to exercise reasonable care and skill, the consumer has a range of remedies under the Consumer Guarantees Act 1993, including the right to:

> Obtain from the supplier damages for any loss or damage to the consumer resulting from the failure […] which was reasonably foreseeable as liable to result from the failure[2]

36. The costs claimed by NH and FN, set out in paragraph 18 above, are all of this 'consequential' type.

37. My findings are:

a. The [Region] District Council and O Ltd fees for variation to the resource consent were a direct and reasonably foreseeable consequence of the failure. The amount claimed is proven.

b. The engineering cost claimed represents only the portion of EV's initial work that related to stormwater drainage for the proposed right of way, plus the time spent by EV to prepare an amended report for the variation application. This cost is a direct and reasonably forseeable consequence of the failure. I accept EV's calculation of the cost.

c. The interest cost and legal fees are not direct and reasonably foreseeable consequences of the failure.

K Ltd did not know the financing arrangements that NH and FN had in place for the project. Although the failure caused a delay in issuing the 'final' resource consent, the question of when NH and FN would receive income from the project (by the sale of one of the lots) is affected by a wide range of factors that K Ltd could not foresee.

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[2] Section 32(c) CGA

NH and FN made their own decision to seek legal advice.

d. Damages for stress and inconvenience are recoverable at law, particularly if the provision of enjoyment is the purpose, or part of the purpose, of the contract[3].

   Courts are generally more reluctant to award compensation for stress and inconvenience if the contract is commercial in nature.

   In this instance, NH and FN acted in their private capacity, but the nature of the contract itself – property development – is commercial in nature.

   I acknowledge that NH and FN did experience stress and inconvenience.

   Having regard to these factors I will award general compensation for stress and inconvenience of $250.00

38. The joint counter-claim seeks compensation for costs associated with preparing for and attending the hearing. The Disputes Tribunal has no power to award costs, except in certain limited circumstances, none of which apply in this instance[4]. Therefore, the counter-claim must be dismissed.

39. K Ltd is to pay NH and FN $5,421.00.

Referee: Nicholas Blake
Date: 25 August 2023

[3] *Farley v Skinner* [2002] 2 AC 732
[4] Section 43, Disputes Tribunal Act 1988

Information for Parties

Rehearings
You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal
There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.
Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a $200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions
If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information
Further information and contact details are available on our website: http://disputestribunal.govt.nz.