(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2023] NZDT 359**

APPLICANT **HI**

RESPONDENT **UD**

The Tribunal orders:

1. The claim is dismissed.

Reasons

1. On 29 June 2020, a severe storm struck [city] and heavy rain fell. During this event, a section of the bank behind HI's house, which was partly on his land, and partly on UD road reserve, slipped. HI's trailer was damaged, for which he seeks repair costs of $791.60 ([redacted]).

2. In addition, HI was concerned about the way in which the UD intended to repair the bank and hired a lawyer to negotiate alternatives. He seeks payment of his legal fees of $3,762.00 ([redacted]).

3. UD was represented at the hearing by CC ([redacted]) and SK ([redacted]). The representatives accepted the general proposition that a duty of care exists between neighbours not to manage land in a way that causes foreseeable loss or harm. However, it defends the claim on the basis that the UD has not been negligent in any way as the bank is a natural slope that was not mismanaged. As a principal of law, in such cases, it submits that the lower land takes the risk of the slip. They also state that HI caused the slip by digging away the toe of the bank. They note that the UD has spent large sums fully repairing the bank. It denies the claim in its entirety and seeks legal costs of $1,951.32 associated with defending the proceedings on the grounds that the claim is frivolous and vexatious.

4. The issues to be resolved are:

   (a) Has the UD breached a duty of care in its management of the bank?

   (b) If so, were the losses incurred caused by the breach of duty?

   (c) If not, is the UD entitled to claim costs?

Has the UD breached a duty of care in its management of the bank?

5. Having assessed all the evidence presented, I have concluded that I lack the evidence required to establish that the UD has been negligent or adopted a nuisance in their management of the bank in a way that caused the loss claimed. I have reached this conclusion for the following reasons:

(a) As cited in the UD's submission, it was held in the District Court case of *Williams v Borland* (CIV-2011-085-463, 27 September 2012, Judge Harrop) that we live in an erosion-prone country, and the mere fact of a slip from one property to another does not create liability. In that case, Judge Harrop considered that it would be unreasonable to impose duties arising from slips where there is no prior warning of a specific risk and where there have been no actions that have caused or contributed to the slip.

(b) Likewise, to be liable under the alternative tort of nuisance, given the elements of liability under that head, it would need to be shown that the UD knew or ought to have known about the defect or condition giving rise to a hazard on their land and failed to take reasonably prompt action to abate the risk. I lacked evidence in this case to establish any prior warning of issues with the bank.

(c) After the slip occurred, the UD obtained a geotechnical report of the site. The report writer considered that the following factors contributed to the slip:

    (i) At some time in the past, the owner of the property has cut away the toe of the bank, oversteepening the face;

    (ii) There was a period of excessive rainfall which saturated the bank;

    (iii) Over many years, vegetation has been removed from the bank, which may have destabilised it.

(d) HI provided one page of an EQC report on the slip which noted that the land on which the house sits is "cut and fill" from the construction of the road, and the road above is also on a "cut and fill" platform. The bank is therefore not a natural structure. This factor sets the case apart from the case law cited, as there would be additional considerations about liability for land where a slip has occurred from a man-made bank, rather than a natural slope. However, the road, and thus the bank, was made in the 1930s. I was unable to make any finding based on the evidence presented that the bank was made at that time with any lack of due care. However, the EQC report noted that it was not HI who had excavated the toe of the bank, but a prior owner. It was HI's view that this page of the report proved the UD was liable. I am unable to reach that conclusion on the evidence presented. The explanation on that page provides a history which shows that HI could not be considered liable, but it does not establish the liability of the UD.

(e) As the principles set out above establish, the UD had a duty to maintain the bank with care to ensure it did not create a hazard that would give rise to foreseeable harm. Of the factors listed in the geotechnical report that caused the slip, the factor that the UD could be liable for is the removal of vegetation. It is a well-known fact that stripping a bank of vegetation can destabilise the bank. HI produced a photograph which tended to suggest that there were smaller shrubs just below the road that someone had removed, and this could have been the UD. Aerial photos provided in the geotechnical report also showed that vegetation has been removed between 2007 and 2019 on various parts of the bank. However, the bank is partly UD land and partly on HI's property. It was not possible to tell who had removed the vegetation. HI has not removed any, but past owners may have.

(f) HI showed photographs of water coming down tarps after the slip had occurred, which he considered showed that water had not been properly directed down the road and had therefore undermined the bank. However, the geotechnical report stated that water was channelled correctly down the road, and HI had made no previous complaint to the UD about water coming down the bank.

(g) Weighing all this evidence up, I could see that HI could not have caused or contributed to the slip, as he did not remove any vegetation, or excavate the toe of the slope. However, whilst it was possible the UD had removed vegetation, thus causing the slip, I could not make a finding that was probable.

6. I accept that HI has strong views about what has occurred, and that this has led to an escalated and protracted dispute that has cost the UD over $100,000 in remedial work and has resulted in HI selling his home and moving towns. I therefore wish to continue with the analysis to consider what the outcome might have been, had I been able to find the UD had stripped the bank of vegetation.

If the UD had removed vegetation in breach of a duty of care, were the losses incurred by HI caused by the breach of duty?

7. A negligent party is not automatically liable for loss unless their conduct was a cause of the loss, and the loss is sufficiently connected to the conduct. However, if there is more than one cause, then full liability can rest with more than one party if each has materially contributed in a way that cannot be divided into ascertainable degrees.

8. There are three principles within these propositions that are relevant to this dispute:

   (a) First, it is not enough that the conduct is part of a historical context necessary for the harm to happen: the conduct must be an *effective cause* of the event.

   (b) Secondly, if there is *more than one effective cause* that has materially contributed, each responsible party is jointly and severally liable for the full loss unless there is a means to apportion between them.

   (c) Third, there must be *proximity* between the cause and the damage: the damage must not be too remote from the action that caused the harm.

9. As a result of these principles, had a finding been made that the UD had removed vegetation without due care, it would have to have been shown that the removal of the vegetation was an effective cause of the slip. The geotechnical report states that the excavation of the toe of the bank was a likely factor, and the removal of vegetation may have been. If it is accepted that this is sufficient to say the vegetation removal is a contributing cause, then it would not be possible to apportion contribution as to causes. The UD would therefore be fully liable for all direct and proximate losses caused by one contributing factor. In this case, this would be the reasonable costs incurred to repair the trailer ($791.60).

10. However, it would not be possible to recover legal fees incurred in negotiating remedial solutions with the UD ($3,762.00). It was not established on the evidence presented that the initial remedial work was unsatisfactory, and in fact, HI originally consented to it, before retracting that consent later. This cost the UD considerable sums in lost design and consent fees. The legal fees were not in law sufficiently proximate to the slip, as they arose from an election to negotiate with the assistance of an advocate a situation arising from concerns about the road above the property, and the risks inherent in the layout of the land.

Is the UD entitled to claim any costs?

11. The UD has repaired the bank, and installed extensive timber walls at a significant cost, and HI has sold the property.

12. Prior to the hearing, the UD offered HI a without prejudice settlement of $791.60 (which, as described above, represents the maximum that any finding of liability could have sustained). The UD considered that the failure to accept the offer showed the continuation of the claim was frivolous and vexatious and sought costs.

13. Whilst the above analysis shows that the UD acted reasonably and in good faith in making the offer of settlement, I have concluded that the UD is unable to recover costs of the proceedings, despite the dismissal of the claim. The Disputes Tribunal is a layperson's forum. HI had a sincere and genuine belief in his claim, and he was entitled to have it heard. The claim was motivated by a sense on HI's part that he had been accused of damaging the bank himself, which has turned out not to be the case. This was a complex dispute both factually and legally, and HI had a right to bring the claim and ask for a decision to be made.

Conclusion

14. For these reasons, I conclude that neither party owes the other any sum arising from the slip, or its consequences.

Referee:

J Robertshawe

Date: **4 April 2023**

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.