



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 140

APPLICANT HJ Ltd

RESPONDENT OI

The Tribunal orders:

1. HJ Ltd's claim is dismissed.
2. OI's claim for costs is dismissed.

Background

1. At the relevant time, HJ Ltd leased property adjacent to OI. Each party conducted small scale farming type activities on their respective properties.
2. On Sunday 26 February 2023, OI began moving belongings, such as water troughs and other chattels, from her property as her lease was ending.
3. On Monday 27 February 2023, OI removed all her remaining belongings as well as approximately 90 sheep from her leased property. One of the items removed was a gate which OI had installed at the commencement of her lease. The gate was in the boundary fence between HJ Ltd's property and OI's property.
4. OI says she vacated the land entirely at approximately 4:00pm on Monday 27 February 2023.
5. HJ Ltd said it arrived at its property at approximately 4:45pm on Monday 27 February 2023 and that the 16 sheep (14 males and two ewes) which had been on its land were no longer there.
6. HJ Ltd alleged in its claim that the 16 sheep were taken by OI, either intentionally or accidentally when she removed her 90 sheep. In the course of the hearing, HJ Ltd suggested that alternatively, OI was careless when she removed the gate and this allowed HJ Ltd's sheep to escape.
7. HJ Ltd claims the value of the 16 sheep from OI.
8. The issues to resolve the claim are:
 - a. Did OI take HJ Ltd's sheep when she moved her own sheep from her property?
 - b. Did OI owe a duty of care to HJ Ltd when removing the gate between their two properties, and if so did she breach this duty of care?
 - c. What loss did HJ Ltd suffer and is OI responsible for it?

- d. Is this claim frivolous and vexatious such that the Tribunal should make an order of costs in favour of the OI?

Did OI take HJ Ltd's sheep when she moved her own sheep from her property?

9. Proof that a party has stolen something is difficult in the absence of evidence from an eye-witness or evidence that the party has the stolen property in their possession. For that reason, HJ Ltd faced a difficult task in proving that OI took its sheep either intentionally or accidentally.
10. OI strongly denies that she took any sheep that did not belong to her. OI's partner DS, who attended as a witness, also denied that HJ Ltd's sheep were taken.
11. Both OI and DS said that at HJ Ltd's request they checked among the sheep on the new property to see whether any sheep that did not belong to them were present. Both say that the only sheep they have at the new property are their own sheep.
12. HJ Ltd points to the fact that its sheep weren't present on its property only a very short period of time after OI vacated her property. There was also a history of ill will between the parties.
13. Other than pointing to the proximity in time between OI vacating the property and the time at which HJ Ltd discovered that its sheep were no longer on its property, HJ Ltd could provide no evidence which shows that OI took its sheep.
14. HJ Ltd has failed to establish on the balance of probabilities, that OI took its sheep when she vacated her leased property.

Did OI owe a duty of care to HJ Ltd when removing the gate between their two properties, and if so did she breach this duty of care?

15. Whether a duty to take care exists depends on two simple principles:
- a. the nature of the relationship between the parties, and
 - b. the foreseeability of one party being harmed by the actions of the other if sufficient care is not taken.
16. The extent of the duty, or in other words how much care is required to be taken, depends on all the circumstances.
17. In general, neighbours do not owe significant duties to each other. However, where the actions of one has the ability to directly impact the other, there can be some duty to take care. The extent of that obligation is reasonably narrow though and does not require a great deal to discharge it.
18. HJ Ltd suggested that OI had a duty to ensure that HJ Ltd's sheep did not escape from HJ Ltd's land.
19. Obviously, OI does not have a general duty to look after HJ Ltd's sheep. The question is whether, having decided to remove the boundary gate, OI took on some obligation to look after HJ Ltd's sheep, and whether her actions in removing the gate showed a reasonable level of care, having regard to her role as a neighbour.
20. It is not unduly onerous to state that a neighbour has a duty to the other not to remove fencing or gates in circumstances where that removal would clearly cause loss to the other neighbour. This would mean that a neighbour should not remove a fence or a gate if it is clear that this would allow stock from a neighbour's property to escape onto the road, for example.
21. It is also the case that a neighbour has a duty not to remove an internal fence or gate without having regard to the safety of stock on the neighbour's property. OI therefore had some duty to HJ Ltd to take care when she made the decision to remove the internal adjoining gate between their properties.

This would not be an absolute duty to guarantee the safety of HJ Ltd's sheep, but in acting, OI needed to have some regard to the safety of HJ Ltd's sheep.

22. There are two relevant factors in determining whether OI took sufficient care when she removed the gate between their two properties. The first is whether OI gave any consideration to where HJ Ltd's sheep were on HJ Ltd's property and how they were fenced. The second is where the sheep might go if the boundary gate was removed.
23. The parties both gave consistent evidence that there was internal fencing on HJ Ltd's property that separated the sheep from other areas of HJ Ltd's farm operations. However, the parties were not in agreement as to where the sheep were in relation to the boundary gate that was removed.
24. HJ Ltd says that the sheep were confined to an area of the property which was right next to the gate which was removed. OI says the sheep were on the other side of the property, penned in by internal fences which HJ Ltd had put in place. She says that the sheep therefore could not exit HJ Ltd's property, even if the gate was removed because they were unable to reach the gate area.
25. There was no other evidence available to assist the Tribunal to make a determination between these two positions.
26. Both parties agreed that the removed gate did not allow HJ Ltd's sheep out onto public areas such as the road.
27. Taken together, the evidence before the Tribunal was that the most likely place HJ Ltd's sheep would go if they exited through the removed boundary gate was onto OI land. There was some discussion as to whether one of the boundary fences on OI's property was so broken that the sheep would then have escaped from OI's property, but again there was not sufficient evidence for the Tribunal to conclude that this was so. In any event, even if HJ Ltd's sheep escaped through that route, they would still have been on another neighbour's property.
28. Although it is not clearly established where HJ Ltd's sheep were at the time OI removed the gate, it is clear that OI did have regard to where the sheep were before she removed the gate. She believed they would not be able to reach the removed gate. Further she considered that even if they left HJ Ltd's property the sheep would not get any further than her land, or in a worst-case scenario, perhaps onto the neighbouring land behind.
29. HJ Ltd's evidence was that he searched on OI's land for his sheep but that he did not search on the neighbour's land.
30. Although OI owed a duty of care to HJ Ltd when she decided to remove the boundary gate, it has not been established that she breached that duty in removing the gate as she did. It is clear that OI did consider the safety of the sheep, including checking whether they might be able to escape via the gate, and where they might end up.
31. The onus is on HJ Ltd to prove the elements necessary for its claim, and here it has been unable to establish that OI removed a gate in circumstances that should have been clear to OI that HJ Ltd sheep could go out through that gate and be lost. It has therefore not proven that OI breached her duty of care to it.

What loss did HJ Ltd suffer and is OI responsible for it?

32. In relation to the allegation of theft or conversion of the sheep, HJ Ltd has been unable to show that OI is responsible.
33. In relation to the allegation of negligence, it is concluded that OI did not breach her duty of care.

34. Even if it was concluded that OI did breach a duty of care in the removal of the gate, there would need to be some evidence that the removal of the gate lead to the loss of the sheep.
35. HJ Ltd has not been able to show that the sheep did escape via this pathway. Although the sheep were not on its land or OI at 4.45pm, there is no evidence that they went through the back fence or otherwise escaped the area.
36. In the absence of any evidence about what happened to the sheep, the Tribunal is unable to conclude the OI is responsible for the loss of HJ Ltd's sheep.
37. Although the loss of the sheep must be very frustrating to HJ Ltd, without evidence to show that it is more likely than not that OI is responsible, the Tribunal is unable to make an order in favour of HJ Ltd.

Is this claim frivolous and vexatious such that the Tribunal should make an order of costs in favour of the OI?

38. Section 43 of the Dispute Tribunal Act 1988 provides that if, in the opinion of the Tribunal, a claim is made by a party that is frivolous or vexatious, the Tribunal may order that party to pay costs to the other party in connection with the proceedings.
39. These words require a real lack of genuine purpose in bringing a matter to the Tribunal. It often suggests that the claim is without real merit.
40. The issues raised by HJ Ltd in this case required genuine investigation and consideration. Although HJ Ltd has not been able to establish its case on the balance of probabilities, the case appears to genuinely reflect HJ Ltd's view and was pursued in an appropriate and timely manner before the Tribunal.
41. Accordingly, there is no basis for the award of costs.

Conclusion

42. HJ Ltd has been unable to show on the balance of probabilities what happened to its sheep, and in particular has not shown that OI is responsible for their loss. While HJ Ltd strongly feels that OI is involved in the loss of its sheep, there was insufficient evidence on which the Tribunal could make a determination to that effect.
43. HJ Ltd's claim is dismissed.
44. There was a proper basis for HJ Ltd's claim and HJ Ltd pursued it in a reasonable manner.
45. OI claim for costs is accordingly dismissed.

Referee: S Simmonds
Date: 30 June 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>.