



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 287

APPLICANT KQ

APPLICANT LT

RESPONDENT SG

APPLICANTS' INSURER J Ltd

The Tribunal orders:

SG is to pay KQ and LT \$4,405.65 on or before Friday 7 July 2023.

Reasons:

1. KQ and LT own a home in [City]. SG previously occupied the adjoining property. KQ and LT say that in October 2021 SG damaged the brick boundary fence between the properties when reversing his vehicle out of his driveway. Despite expressing their concerns KQ and LT say SG then took it upon himself to make repairs. These repairs are described by KQ and LT as of poor quality and using materials not in keeping with the original brickwork. In addition, they say SG painted the front-facing part of the fence without their consent. KQ and LT say they have tried to be patient in efforts to resolve this matter and have approached SG numerous times to get the situation remedied. They say SG refuses to pay for the damage and/or engage with them on remediation of the fence.
2. KQ and LT claim \$6,695.65 for repair costs and their losses. I note the claim was initially lodged for \$6,887.65 but amended to the lesser sum at the hearing.
3. This order records that the Applicants' insurer is ABC, a division of J Ltd. KQ and LT advise they filed a claim with their insurer, but due to the circumstances their claim was declined. I am advised that in an effort to assist KQ and LT, J Ltd did send a hold-liable letter to SG on 19 August 2022, however I am advised there has been no response. To comply with the requirements of s28 of the Disputes Tribunal Act 1988 ("DTA"), a copy of this order is sent to J Ltd out of an abundance of caution.
4. This matter was heard before me on Mon 17 April 2023. KQ and LT attended by teleconference however the Tribunal was unable to make contact with SG. On the evidence I am satisfied that:
 - a. notice of the hearing has been served on SG's home address, which is now at [Address 1], rather than [Address 2] where he lived at the time of this incident;
 - b. the hearing was clearly advised to the parties as being conducted by teleconference and despite request, SG has not provided a phone number to the Tribunal;

- c. KQ and LT have made strenuous efforts to obtain contact details, including putting correspondence directly into SG's letterbox, which SG has returned directly to their letterbox indicating a likelihood he read the correspondence to know to do so; and
 - d. having considered all the circumstances, I am satisfied there is just cause for the Tribunal to continue with hearing of this matter in the absence of SG, as the combination of these events indicate a clear unwillingness to participate in the hearing process.
5. The Tribunal's usual process of contact with a respondent also asks a respondent to provide details of any insurance cover they hold which may affect the claim. The Tribunal notes no information has been provided by SG. This is despite KQ and LT indicating there had been some initial discussion with SG's insurer, but they say after initial contact there has been no further response or activity.
6. The Issues to be resolved are:
- a. Did damage to the fence result from SG's failure to take reasonable care?
 - b. Was SG entitled to paint the street frontage of the fence?
 - c. Are KQ and LT entitled to \$6,887.65 as claimed, or to any other sum

Did damage to the fence result from SG's failure to take reasonable care?

7. The law of negligence requires that parties who owe a duty of care to each other take reasonable care to ensure they do not cause damage to the property of another or cause another person to suffer loss. Drivers of vehicles are included under this umbrella of people who are subject to this duty. General responsibilities of drivers include that they must always drive with care and according to the conditions. The Land Transport (Road User) Rule 2004 (LTR) explains more specific rules that drivers must abide by in New Zealand, and these rules are summarised in the NZ Road Code. While this incident occurred on a driveway on private property, I am satisfied the same standard duty of care, and responsibilities, apply.
8. I find damage to the fence did result from SG's failure to take reasonable care
9. I say that because I accept the evidence provided by KQ and LT that:
- a. a neighbour saw the damage and took photos immediately afterwards, some of which are presented in evidence;
 - b. the event was described by a neighbour as having occurred during a time when SG was reversing out of his driveway with a load of green waste, but had overlooked closing the rear passenger door which then collided with the brick fence;
 - c. the neighbour provided a voice recording at the time of what they say occurred;
 - d. in an initial discussion SG did accept responsibility for the driving incident to KQ and LT suggesting he was embarrassed about the event, but from the time KQ and LT expressed concerns about the remediation process SG has chosen not to engage or assist them further.

Was SG entitled to paint the street frontage of the fence?

10. When property damage occurs, law about compensation for negligence says a party should be put back into the position they were in prior to the damage occurring.
11. I find SG was not entitled to paint the street frontage of the fence.
12. Photographic evidence of the site shows there is a double-brick boundary fence between these properties. Prior to this incident occurring there had been a brick protrusion on SG's side of the fence, near the footpath; I understand this to have been part of a prior structure. When SG attempted repairs to the fence, photos show this protrusion was removed and SG chose to repaint his side of the fence. While he is entitled to do that, SG's decision to paint the front (i.e., street-facing) part of the fence constitutes "work on a fence", as that phrase is defined in the Fencing Act 1978 ("FA"). I say that because this is a part of the fence in which both neighbours have an

interest. The FA is clear that work on a fence can only occur by agreement, or, by following procedures set out in the FA for service of a Fencing Act notice.

13. I am satisfied on the evidence that an agreement was not made, nor was a Fencing Act notice served.
14. KQ and LT wish the front-facing part of the fence to be restored to its natural brick appearance because:
 - a. this was the condition of the fence prior to the damage; and
 - b. the natural brick appearance is more aesthetically consistent with their own home and the natural brick finish on their side of the fence.
15. It is clear the current condition of the fence does not put KQ and LT back into the position they were in prior to the damage occurring. As this is their legal entitlement, and the current condition of this part of the fence is a direct result of SG's actions, KQ and LT are entitled to compensation to have the fence restored.

Are KQ and LT entitled to \$6,887.65 as claimed, or to any other sum?

16. As earlier stated, a person who carelessly damages another person's property must pay the cost of putting the other person back into the position they would have been in had the damage not occurred. Section 17 FA also makes clear that a person who damages a fence is liable for the whole cost of making good the fence.
17. I find KQ and LT are entitled to compensation of \$4,405.65.
18. KQ and LT's claim for compensation is made up of the following components:
 - a. \$1,024.65, based on an estimate prepared on behalf of ABC to remove and re-lay bricks in the fence to a professional standard;
 - b. \$3,381.00, based on a conservative estimate of the cost to remove paint from the porous natural bricks and restore them to a condition in which they can be re-used;
 - c. \$180.00 for the filing fee paid to the Disputes Tribunal;
 - d. \$610.00 being estimated time spent by KQ and LT in their efforts to resolve this matter; and
 - e. \$1,500.00 in compensation for stress and loss of enjoyment of their property over the last year and a half or more since the damage occurred.
19. The sum awarded of \$4,405.65 is the combined total of items 18.a. and 18.b.
20. I award item 18.a., because having found the damage resulted from SG's negligence, it is clear SG is obliged to pay the cost of repair. Photographic evidence makes clear:
 - a. visible cracks remain in the fence which appear consistent with the damage described; and
 - b. the standard of visible mortaring and repair work is not of a professional standard.
21. I award item 18.b, because having found that SG was not entitled to paint the street frontage of the fence, it is clear to me his choice to do so constitutes damage to the fence. As earlier stated, s17 FA says a person who damages a fence is liable for the whole cost of making good the fence. For the avoidance of doubt, this reasoning applies equally to the cost of damage awarded regarding paragraph 18.a., however due to the involvement of the vehicle I chose to consider that matter under the law of negligence in these circumstances.
22. KQ and LT were questioned at the hearing about the cost of remediation of the street-facing bricks, given this is a (relatively) small area. I note however that:
 - a. the fence is of a reasonable height, and involves attention to a considerable number of individual bricks and/or brick surfaces:

- b. the estimate provided by [Painting company] is noted as an estimate only, and records the cost may be greater depending on the removal and adherence circumstances encountered;
- c. [Painting company]'s estimate was prepared some 6 months ago; the fence repair estimate was given in June 2022. Given the cost of materials and other inflationary pressures that have arisen since that time, the Tribunal acknowledges it is likely KQ and LT may not now be able to arrange these items of work without additional cost, and that they carry this risk;
- d. I accept the submission made by KQ and LT that while this fencing issue remained unresolved they have been unable to complete their own landscaping and fencing improvement plans.

For these reasons I am satisfied that the overall award made is a reasonable and fair award in all the circumstances.

23. I decline to award items c, d, and e as set out in paragraph 18. I say that because the limitations on the awarding of costs under s43 DTA prevent me from doing so because I am satisfied the rare circumstances discussed in that section do not apply here.

Conclusion:

24. For all these reasons, SG is obliged to pay KQ and LT \$4,405.65 in accordance with the terms of this order.

Referee: Malthus
Date: 13 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>.