



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

District Court

[2021] NZDT 1313

**APPLICANT**            **NA**

**RESPONDENT**        **OI, BX, DI and KI as trustees of the OI Trust**

**APPLICANT'S**        **ABC Ltd**  
**INSURER**

**RESPONDENT'S**     **XYZ Ltd**  
**INSURER**

**The Tribunal orders:**

OI, BX, DI and KI as the trustees of the OI Trust are to pay \$2,066.59 to NA on or before 15 March 2021.

**Reasons:**

1. NA owns a property that shares a boundary with a property owned by OI, BX, DI and KI as the trustees of the OI Trust (**Trustees**). None of the Trustees live at the property and their place is tenanted. NA says that falling trees located on the Trustee's property have caused damage to: the boundary fence shared with the Trustees; and to a fence on NA's property on another boundary; and that when one branch was cut into logs, the piled logs rolled and damaged the wall to her house.
2. NA claims \$3,964.43 from the Trustees in relation to the damage.
3. An initial hearing was held before a different Referee, which identified the correct parties, ensured notification of insurers and arranged an interpreter for the second substantive hearing.
4. ABC Ltd received notice of the substantive hearing as NA's insurer, and XYZ Ltd received notice as the insurer for the Trustees. Neither insurer attended the hearing.
5. The issues to be determined are:
  - a) Are the Trustees liable for the damage caused by falling trees to either fence?
  - b) Are the Trustees liable for the damage caused by the log rolling into the wall?
  - c) If so, does NA have a right to compensation from the Trustees?

d) Is NA entitled to the sum claimed?

## Background

6. It is understood that the chronology of events is as follows:

31/10/2019 First tree on Trustee property falls onto NA property

28/04/2020 Second tree on Trustee property falls onto NA property

06/06/2020 Tree branch cut down/felled (chopped branch then cut into logs and stacked)

22/07/2020 Rolling log causes damage to wall of NA home

20/08/2020 Third tree on Trustee property falls onto NA property

7. The trees were mature and very large, and the entire tree has fallen on each occasion. The fallen trees lay some metres into NA's property, falling perpendicular to the boundary fence.

8. The falling trees caused damage to the boundary fence. When the third tree fell, this also caused damage to another fence on NA's property.

9. NA contacted the Trustees each time a tree fell (or was cut). After the first tree fell, the parties treated it as a one-off event and the tree was cleared and it did not appear to lead to any issues between the parties.

10. After the second tree fell the Trustees became more concerned that the first event had not been a 'one-off'. They wanted to hire an arborist, and clear the tree and fix the fence, but the second tree fell during the Covid lockdown and so they had difficulty arranging a contractor to attend the property, including after lockdown. The Trustees reside in Tauranga and the property is in Whangarei.

11. In June, a branch of a tree was deliberately felled (and at the same time the second fallen tree was removed). This was arranged by the tenants without the knowledge of the Trustees. The logs were then piled. However, the logs later rolled and caused damage to the wall of NA's house.

12. In July 2020, the Trustees hired a local property manager who was to arrange for an arborist to attend the property. The third tree fell a month later.

13. On 6 October 2020, the Trustees emailed NA and said the remaining trees would be pruned or felled for safety and when that was complete the property manager would arrange the fence repairs. In later communication that month, they said that the property manager had arranged for repairs to both fences.

14. NA informed the Trustees that she did not want them to attend to the repair of the fence. She also confirmed this position at the hearing.

15. NA's reluctance to have the work attended to by a contractor arranged by the Trustees appears to stem from previous experience of: 1) work being carried out for the Trustees by a contractor who NA says she had declined to use herself, whereupon that contractor had behaved rudely towards NA; 2) work being carried out by a friend of the tenants at the property (with whom there is a fractious relationship); and 3) a contractor for the Trustees entering NA's property with no prior notice or permission (and through a locked gate).

16. It is also worth noting that NA has wider concerns that do not necessarily relate directly to the damage caused by the trees. The core of NA's concern is her belief that problems emanating

from the property should lie with the Trustees as owners. The bundle of issues is, according to NA, indicative of poor management of the property.

17. Those ancillary concerns include:
  - a) Threatening behaviour by the tenants, including references to a gun;
  - b) The tenant's dog coming onto NA's property and causing damage to her property and attacking her on one occasion; and
  - c) Theft from her property following a party held by the tenants.
18. NA's claim states that these issues are not included in the claim. For completeness it is noted that on the face of it such issues rest with the tenants.
19. A further complication is that NA appears to perceive the fact of trees falling as being the result of something other than a natural occurrence. NA pointed to the trees on the other side of the Trustee's property as not being so affected and noted that the trees always fell on her side of the boundary. NA appeared to believe there were deliberate attempts to increase sunlight in the backyard of the Trustee's property. In the correspondence, NA also seemed to take issue with the Trustees wanting to ensure the trees had all been taken care of/made safe prior to the repairs to the fence being carried out, to avoid another tree falling and causing further damage after the repairs to the fence had already been carried out. NA appeared to see this as further provocation and delay.
20. No further evidence was provided to support such concerns and there does not appear to be any reason to believe that there is any deliberate act at play either to make the trees fall or to have them fall in a certain direction.
21. Due to the damage already caused by falling trees, it is clear that other trees may have needed to be cut down for safety and to avoid any further nuisance, which it is understood has been completed.
22. Finally, the communication between the parties appears to have been at odds. NA appears to feel that the Trustees have delayed unnecessarily, not used proper contractors, not communicated sufficiently early on to explain their intentions, and used what she perceived to be threatening language. The primary concerns are around lack of communication in relation to what she perceives as a failure to account for damage to her property, and that the repairs to her wall carried out by her insurer will prove to be insufficient in the future.
23. The Trustees for their part feel that NA has pointed to delays when she would not allow their contractors to carry out work, when her own insurer had advised that work had been carried out (to the wall), that she has been impatient in the context of the Covid lockdown and its aftermath, that she has not allowed them the opportunity to carry out the necessary repairs and not acknowledged their efforts to communicate and fix the problems. They have also requested that NA now address her concerns to the property manager.

**Are the Trustees liable for the damage caused by falling trees to either fence?**

24. The law of nuisance applies to this claim. An action for private nuisance protects a person's right to the use or enjoyment of an interest in land.
25. Damage caused by trees on neighbouring land may give rise to liability, depending on the circumstances. Generally, there is no liability unless the trees are inherently dangerous or kept in a dangerous state. Where roots or branches of trees encroach on neighbouring land causing sensible damage there will be an actionable nuisance.

26. If a property owner is responsible for creating a nuisance, particularly where there is physical damage, there is no need to prove any fault on the part of that owner. However, the harm caused must be foreseeable.
27. It may also be relevant whether the respondent has created the state of affairs or inherited it, and the reasonable care taken in relation to the applicant if it is inherited.
28. Where an occupier is liable for damage to a fence, he or she is liable for the whole cost of repair to the fence and the provisions under the Fencing Act 1978 whereby the costs of repairing or replacing a boundary fence is shared equally between neighbours do not apply (section 17, Fencing Act). That means that if the Trustees are liable for the damage to the fence, they are liable for the full cost of the repair.
29. No evidence was provided as to the cause of the weakness in the trees or in relation to particularly strong winds (although NA noted that on a day when there were strong winds in Whangarei it had been less windy at her property).
30. It is not known how long the Trustees have owned the property or for what period of time the fallen trees were in a precarious state.
31. However, the Trustees were already on alert with two trees having fallen and so could have reasonably foreseen the potential for a further tree to fall and cause damage prior to the third tree falling. The third tree falling caused damage to the boundary fence and the damage to the other fence.
32. The Trustees accepted that it was unusual for three trees to fall and that there may be an inherent danger in the remaining trees and so had an arborist prune and cut the trees to ensure that there was no further danger or risk of nuisance.
33. Given that three trees fell in the space of 10 months it appears that the trees had reached a state where they were no longer structurally sound. The trustees were given notice and a reasonable opportunity of abatement, that is, an ability to rectify the situation.
34. The Covid Lockdown contributed to the difficulties faced by the Trustees in responding. The country moved to Level 3 on 27 April 2020 and to Level 2 on 13 May 2020. Even after this time there was difficulty in procuring contractors due to pent up demand.
35. However, when the third tree fell it was over 3 months after the country had moved to Level 2 and prior to concerns being raised about the Trustees hiring contractors to carry out the repairs.
36. I am satisfied that the trees had been kept in a dangerous state and that after two trees had fallen this state was known to the parties and the potential for a further tree to fall was reasonably foreseeable. The third tree falling then damaged both fences.
37. I therefore find that the Trustees are liable for the damage caused to both fences.

**Are the Trustees liable for the damage caused by the log rolling into the wall?**

38. The piled logs came from a tree branch that was deliberately cut, not a fallen tree. Therefore, the damage caused by the rolling log was not as a consequence of or related to the trees that fell. Rather, this was a separate act where the cause of action relates to a duty to pile logs so as not to cause harm to another person's property. That is, the law of negligence applies.
39. The person(s) carrying out the act of piling the logs is the person who has the duty to ensure that harm does not occur. On occasion, a person can be held liable for the actions of another (for example, an employer for the actions of an employee), but that requires that the other party has some level of control over the person at the time he or she is carrying out the act.

40. The Trustees did not arrange for the branch to be cut down, or the logs to be stacked and did not attend to any of this work themselves. They also had no knowledge that the work had been carried out. They cannot be said to have had any control over the piling of the logs.
41. I therefore find that the Trustees are not liable for the damage caused to the wall of NA's house by the rolling log.

**If so, does NA have a right to compensation from the Trustees?**

42. Where a nuisance is proven, there is right to compensation for the foreseeable loss suffered by the applicant as a result of the nuisance. The level of compensation is that required to restore the applicant to the position he or she would have been in if the act had not occurred.
43. Where the applicant is insured against the harm or damage caused, any actual or potential insurance cover for the damage is *not* taken into account to reduce the compensation due by the respondent. (Rather, if there is insurance cover for the event, then the applicant would receive the excess and the insurer would be reimbursed its costs from the compensation payable by the respondent.)
44. On reflection following the hearing and taking into account the point of law stated in the immediately preceding paragraph, I am satisfied that the right to compensation from the respondent remains notwithstanding any potential insurance cover for the same damage.
45. Given my findings above, I am satisfied that NA has a right to compensation from the Trustees for the damage to her fences, but not for the damage to her wall.

**Is NA entitled to the sum claimed?**

46. NA originally specified her claim as follows:

\$397.50 plus GST (\$457.12) for repairing the other fence  
\$2,702 plus GST (\$3,107.30) for repairing the damage to the wall  
\$400 insurance excess (due to possible increase in fees/loss of waiver on future claim)  
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\$3,964.42 Total

47. Prior to the first hearing, NA amended her claim to the following:

\$3,507.30 for future risk due to inadequate repair of the wall and asbestos exposure  
\$397.50 plus GST (\$457.12) for repairing the other fence  
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\$3,964.42 Total

48. In the amended claim, NA stated that she had deducted from her claim the costs of the repair of the wall and her insurance excess. (ABC Ltd was phoned during the hearing and gave evidence that the tenants had accepted liability for the costs of the damage to the wall and the insurer had carried out the repairs. NA also said that ABC Ltd had not covered any of the costs related to the fences and that she had ended her contract with the insurer.)
49. Although NA did not specifically relate her amended claim to the damage to the boundary fence, it is understood that she intended for this cost to be met. In an email to the Registrar dated 16 January 2021, prior to the substantive hearing, NA identified as part of her claim the repair of both fences.
50. The cost to repair the shared boundary fence was estimated in a quote to NA's insurer as \$1,507.50 (plus GST = \$1,773.62). This sum includes clearing debris adjacent to the fence, which it is understood has already been attended to, but it does not include the removal and disposal of the debris so would likely only account for a very small portion of the overall figure.

51. The Trustees supplied a quote they had received for the repair of the boundary fence being \$475.00.
52. During the hearing consideration was given to whether there would be no compensation payable for the boundary fence as this was being covered by insurance. However, as stated, on reflection it is understood that the potential insurance cover does not minimise the compensation due from the Trustees to NA. As NA has not received any insurance cover in relation to the fences, it is appropriate that the compensation is paid in full to her directly.
53. The midpoint of the quotes supplied by the parties for the repair to the boundary fence is \$1,124.31.
54. NA claims \$942.28 in relation to the repair of the other fence. This includes the cost of replacing the chain-link fence to match the existing material.
55. The Trustees supplied a quote they had received for the repair of the other fence being \$425.00.
56. The quote for the Trustees only included restraining the wire. During the hearing, the company that supplied the quote to NA gave evidence that restraining the existing fence would not be an effective or durable repair.
57. On the basis of the evidence of the fencer, I am satisfied that it is reasonable that the fencing is replaced rather than restrained. As NA is entitled to be restored to the position she was in prior to the nuisance, I am also satisfied that it is appropriate to replace the fence with the same material as the existing fence.
58. Except for the additional cost of matching the fence to the existing chain-link material, the quotes provided for repair to the other fence are close to one another in value.
59. I am therefore satisfied that \$942.28 for the repair of the other fence is supported on the evidence.
60. As I have not found the Trustees liable in relation to the damage to the wall, there is no compensation due in relation to that part of the claim.
61. The total sum for the fence repairs as set out above is \$2,066.59.
62. For these reasons, I find that the trustees of the OI Trust are to pay the sum of \$2,066.59 to NA by the date stated in this order.

**Referee:** T Baker  
**Date:** 24 February 2021



## 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 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 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside 20 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>.