



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 748

APPLICANT **NU**

RESPONDENT **OA**

The Tribunal orders:

The claim by NU against OA is partially proved. OA is to pay NU the sum of \$590.58 on or by 5:00 pm on 20 January 2024.

Reasons

1. On 13 February 2023 (after storm Gabrielle) at around 10:30 am, NU (the applicant) found that a large Jacaranda tree (the tree) had crashed over his driveway and car shelter completely blocking his access and causing damage to his property. The applicant now claims against the OA (The respondent) for \$9567.52.
2. The applicant has a property that borders [Road] in [ity]. A search of Google Earth Street view shows the frontage of the property and the tree that fell on the applicant's car shelter and car.
3. The photo shows an old stone wall at the front of the property which the applicant explained was built possibly in the 1950s.
4. It is accepted by both parties that the stone wall is not the actual boundary of the applicant's property but is actually part of the public road frontage. It was accepted that the tree that fell, although behind the stone wall was growing on the public road frontage.
5. The issues to be resolved are:
 - (a) Did the respondent breach a duty of care?
 - (b) Did the respondent breach the Fair Trading act 1986?
 - (c) If not, did the respondent breached the Consumer Guarantees Act 1993?
 - (d) If not, what is the remedy?

Did the respondent breach a duty of care?

6. The Disputes Tribunal has a limited jurisdiction to consider claims in contract and in "torts" for the loss or destruction of property".
7. Part of the applicant's claim is framed in the tort of "negligence".

8. In essence the applicant claimed that the respondent was negligent because the respondent did not acknowledge that the tree was growing on land belonging to the respondent.
9. The applicant submitted that the tree was beginning to show signs of rot and that the respondent has a duty to inspect the tree. The applicant submitted that the respondent should have inspected the tree to ensure that it was healthy.
10. In essence the applicant submitted that because the tree was unhealthy it was reasonably foreseeable that the tree would fall in strong winds and damage would occur in its path.
11. The applicant submitted that because the tree was on the respondent's property and because the respondent breached its duty of care to look after the tree and the tree did fall over and cause damage, the respondent should pay for all the damage.
12. In support of his claim the applicant submitted that the respondent had the means and technology available to "know" that the tree was on their property.
13. I am not satisfied that the applicant has proved that it is more likely than not that the respondent breached a duty of care as claimed. I make my finding for the following reasons:
14. I have taken into account the respondent's submission that from the side of the road the tree appears to be in private property. As a background I accept that the old stone wall has been there for many years and the tree is clearly quite old.
15. I also accept the submissions by the respondent that in order to ensure that the roads are operable, trees that encroach within 3 metres of a curve or five metres on a straight line from the edge of the road are routinely inspected by an arborist every three years. I acknowledge the respondent's submission that to inspect every tree would be an impossible task and a huge burden on the tax payer.
16. I have viewed the applicant's photographs but in particular I refer to the Google Earth Street View which supports the respondent's claim that the tree appears to be on private property. I also observed there are a number of trees growing down that road behind the old stone wall.
17. Further, and this cannot be overstated, I accept that the tree came down in one of the worst weather events New Zealand has had in recent times. I acknowledge the many tasks that the respondent had to deal with as a result.
18. For these reasons I am satisfied that the tree did not come down as a result of a breach of duty by the respondents but it is more likely, based on the evidence that was provided by both parties, that the tree fell down during an extreme weather event.
19. For these reasons I am satisfied that the applicant has not proved that the respondent was negligent.

Did the respondent breach the Fair Trading Act 1986 ?

20. The applicant submitted that the respondent was in breach of the Fair Trading Act 1986.
21. The applicant submitted that the respondent provided false statements to him when he attempted to resolve his differences. The applicant said that the respondent falsely and incorrectly stated that OA has no responsibility for clearing and removal of the crashed jacaranda tree over his driveway.
22. The applicant provided a time line of events and it was not disputed that despite attempts by the applicant to explain to the respondent that the tree was on land belonging to OA and not on private property, the respondent did not initially acknowledge his explanation.

23. The applicant explained that eventually the respondent did accept that the tree was growing on private property but by that time some months had passed.
24. The applicant said that the respondent was engaging in misleading and deceptive conduct in making submissions to the Disputes Tribunal which were clearly false.
25. I am not satisfied that the respondent has breached the Fair Trading Act 1986 for the following reasons:
26. There is an argument that the Fair Trading Act 1986 does not apply to the relationship between the applicant and respondent. The OA is not in "trade" in the normal sense and the applicant is not a 'consumer' in the way that the Act is usually interpreted. However, even if I consider the claim on the basis that the Fair Trading Act 1986 does apply, I do not accept that OA was engaging in misleading or deceptive conduct when it disputed with the applicant whether or not the tree was on private or public land.
27. In making my finding, I take into account the letter from the OA to Mr NU apologising for the error.
28. I accept that the respondent genuinely believed the tree to be on private property for the reasons outlined in paragraph 14.
29. Further, I do not accept that the statements in the written submissions to the Tribunal which the applicant does not agree with, are misleading or deceptive conduct.
30. For these reasons I am more than satisfied that the Fair Trading Act 1986 is not relevant to the claim and even if it applies to the parties there is no evidence of an actionable breach.

Does the Consumer Guarantees Act 1983 (CGA) apply?

31. I am not satisfied that the applicant has proved that he fulfils the definition of a consumer as it is provided for in the Consumer Guarantees Act 1983. I make my finding when I consider that the "interpretation" clause in the CGA, defines a consumer as a person who acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption.
32. If in fact the CGA does apply in the circumstances of the claim and the applicant is considered a consumer, I am not satisfied that the OA has breached the CGA for all the reasons outlined above in relation to negligence and the Fair Trading Act 1983.

If not, what is the remedy?

33. The respondent eventually acknowledged that the tree was in fact on public road frontage and paid and arranged for its contractor "GI" to remove the cut up debris at a cost of \$20,000.00.
34. The respondent acknowledged that the applicant had no choice but to cut up the tree that was blocking his driveway at his own expense because at the time they disputed the applicant's requests.
35. For these reasons I am satisfied that the respondent should pay the applicant for the costs for the removal of the fallen tree and grass seed.
36. For these reasons the claim by Mr NU against OA is partially proved.
37. For these reasons the OA is to pay Mr NU the sum of \$590.58.

Referee: K Johnson
Date: 19 December 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>.