IN THE SUPREME COURT OF NEW ZEALAND

SC 111/2010
[2011] NZSC 17

	BETWEEN	BRIAN THOMAS STREET Applicant
	AND	MICHAEL JOHN BROUWERS Respondent

Court: Elias CJ, McGrath and William Young JJ

Counsel: S W Hughes QC for Applicant
C T Gudsell QC for Respondent

Judgment: 9 March 2011

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal on four grounds, contending that:

(a) the finding of Andrews J in the High Court[1] as to the cause of the slip should not have been disturbed by the Court of Appeal[2] and, in the alternative, if her reasons were inadequate, the case should have been remitted to her, "to provide full reasons as to what she considered had caused the collapse of the bank";

(b) the Court of Appeal's conclusion that he was liable in nuisance for removal of support was wrong;

(c) the Court of Appeal's conclusion that he was liable in negligence was wrong; and

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1 See *Brouwers v Street* [2009] NZRMA 500 (HC).
2 See *Brouwers v Street* [2011] NZRMA 11, [2010] NZCA 463.

(d) the Court of Appeal was wrong to award costs against him in the High Court and Court of Appeal as he had been legally aided in both courts.

[2] We are satisfied that the case does not warrant leave to appeal. Given the very particular facts, the case is unlikely to prove to be of precedential significance and there is no appearance of a miscarriage of justice.

[3] We agree with the Court of Appeal that the reasons given by Andrews J for rejecting the Brouwers' case on causation were inadequate. We note that Ms Hughes QC maintained in her application for leave to appeal that, contrary to what was said in [22] of the Court of Appeal judgment, she had argued that the case should be remitted to Andrews J. Whether this is so or not is of no real moment. In the context of the case as a whole, the practicalities of the situation required the Court of Appeal to resolve the issue directly itself, something which it was well-placed to do given the nature of the dispute and the related evidence (which did not involve issues of credibility or reliability). Finally, the conclusion reached by the Court of Appeal, that the cause of the slip was the failure of the flume, is well reasoned and closely associated with the evidence to which the Court referred. It is not an appropriate issue for a further appeal.

[4] We agree that the law as to removal of support is not without its difficulties and perhaps some uncertainty, at least at the margin. It is clear, however, that liability cannot be confined to loss of support resulting from digging activity (whether mechanical or manual). For instance a defendant who deliberately sluiced away a bank would plainly be liable. And since liability is not dependent on negligence or intention, the fact that in this case the sluicing was accidental rather than deliberate is, likewise, not controlling. The failure of the flume and consequent removal of support for the neighbouring land were very foreseeable.[3] Mr Street's operation of his drainage system including the flume posed very real risks to the stability of the adjoining land. In this context it is in accord with the principles of

[3] Foreseeability of harm is a requirement for the recovery of damages in nuisance, see *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 717 (PC); *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264 (HL). Foreseeability is not discussed specifically in relation to removal of support in the Court of Appeal judgment, but it is clear from the foreseeability analysis undertaken as part of the negligence enquiry (at [99]) that the relevant risks were foreseeable.

the law of nuisance that the consequences of the failure of the system should be to Mr Street's account. This conclusion is not inconsistent with the approach taken by the Court of Appeal in *Blewman v Wilkinson*[4] because in that case the removal of support had occurred when all the relevant land was in the ownership of the defendant and thus the plaintiff's land had not been supported when he purchased it.

[5] The judgment of Andrews J as to negligence proceeded on the basis that the flume as constructed complied with local authority standards, a conclusion based on a concession by one of Mr Brouwer's experts. But that standard, which was after all just a minimum, was satisfied if the structure was able to cope with a one in five year event. While such a standard may be appropriate where all the affected land is in single ownership (which was the position when the flume was constructed), it was plainly inadequate in respect of the situation which developed on the subdivision of the property.

[6] This part of the case is made slightly awkward by reason of the pleadings and associated timing issues.

[7] Because Mr Street was continuing to use the drain at the time of subdivision, he owed a subdivider's duty of care[5] in respect of the drainage system. And in any event, he owed his neighbour a duty of care on ordinary principles.[6] But unless the flume was put in place as part of the exercise of getting the land ready for subdivision, the particulars of negligence should have focused on what happened at and after subdivision. They would thus have been addressed not to how the flume had been designed and constructed (which was the primary focus of the pleading) but rather to Mr Street continuing to operate it in circumstances when it had not been properly designed and constructed and in not remedying any defects. The flume was constructed before (but not long before) the subdivision. It may be that this was with the subdivision in mind, in which case the way the particulars of negligence were drafted would have been correct. In any event:

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4 *Blewman v Wilkinson* [1979] 2 NZLR 208.

5 As discussed in *Blewman v Wilkinson* at 212 per Cooke J.

6 See for instance *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741 (CA) where the loss of support in question was in respect of an artificial structure on the neighbour's land only, rather than an interference with the natural right of support, and thus not subject to strict liability.

(a) Mr Street accepted that he was under a duty of care in relation to the construction of the flume; and

(b) there is no challenge in this Court (and there was apparently no challenge in the Court of Appeal) to the time focus of the particulars.

[8] The Court of Appeal either had not been told or had overlooked Mr Street's legal aid status and therefore made what would otherwise have been the orthodox costs orders. This will need to be revisited because such orders can only be justified if there are "exceptional circumstances"[7] and a finding of exceptional circumstances has not been made. Such reconsideration can be best addressed on a recall application.

Solicitors:
Govett Quilliam, New Plymouth for Applicant
Law West, New Plymouth for Respondent

[7] See Legal Services Act 2000, s 40(2).