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IN THE COURT OF APPEAL OF NEW ZEALAND CA. 49/88

SET 2

BETWEEN WARREN & MAHONEY of Christchurch, Architects

First Appellants

A N D BRIAN JOHN WOOD and RUSSELL ARTHUR POOLE of Christchurch Consulting Engineers

Second Appellants

A N D PETER MERVYN DYNES and CHERYL ANNE DYNES of Christchurch, Company Director and Married Woman

Respondents

Coram Richardson J (presiding)
McMullin J
Bisson J

Hearing 10 and 11 October 1988

Counsel R. Harrison for appellants
C.A. McVeigh and P.J. Egden for respondents

Judgment 26 October 1988

JUDGMENT OF THE COURT DELIVERED BY McMULLIN J

This appeal is brought from a judgment of Tipping J delivered in the High Court on 18 December 1987 in which he found for the respondents ("the Dynes") in an action brought by them against the first appellants ("the architects") and the second appellants ("the engineers") alleging negligence on their part in the building of a house and swimming pool on a section of land in Quarry Road in the St Andrews Hill

area of Christchurch in 1981. The facts are set out at length in the judgment under appeal, one of no less than 91 pages, and, in view of the limited area to which the appeal and cross appeal are now directed, it is unnecessary to review them in the same detail as did Tipping J.

In 1980 the Dynes instructed Sir Miles Warren, a member of the firm of Warren & Mahoney (the architects) to design a house and swimming pool to be built for them on a section of land at Quarry Road which they had purchased in 1979. They wanted him to design a home which would combine indoor and outdoor living. They regarded the pool as being an integral part of the whole complex. In the course of discussions Sir Miles suggested to the Dynes that the second appellants (the engineers) should be engaged to do any necessary engineering work on the project and they were later engaged by the architects for that purpose. In due course Sir Miles produced architectural drawings and plans. While the pool was an essential part of the complex it was decided to leave its construction until after the winter of 1981 and to proceed in the meanwhile with the building of the house. The pool became the subject of a separate contract and the work of constructing the entire project proceeded in two stages. The building permit issued for the house was subject to certain conditions which included the provision of a certificate as to design by a consulting engineer. Mr Poole on behalf of the engineers issued the appropriate certificate for the Christchurch City Council which was the

local authority in whose area the land was situated. When the relevant drawings had been prepared for the pool, associated spa pool and adjoining works the builders were asked to price that work as well. A separate application for a building permit was then made to the Council about the stage when the house was nearing completion. An appropriate engineering certificate from Mr Wood who was responsible for this part of the project was forwarded to the Council. The Council issued a building permit for the pool and associated works subject to the provision, on completion of the work, of a certificate from the engineers confirming completion in accordance with the structural design submitted.

As the building work proceeded difficulties began to emerge. Some of the ground upon which the complex was to be built was unstable fill which subsequent events indicated had been dumped on the site about the turn of the century as the unwanted overburden of a quarry then being operated nearby. A pothole at least 1.2 metres in depth developed about one metre from the northern foundation of the house and an uphill neighbour, a Mr Johns, expressed anxiety over the withdrawal of support for his land by the making of an excavation. The presence of the pothole was drawn to the attention of the architects by the building inspector. The architects' representative on the site seems to have treated it as of no significance. For this reason the building inspector also brought it to the notice of Mr Poole but the inspector's forebodings seem to have gone unheeded. In fact

the pothole indicated the presence of an "under runner" in the ground about one metre or more below the surface. An under runner is the name given to a tunnel system formed underground by subsurface erosion of the soils making up the ground structure.

Work on the house itself proceeded to completion and the Dynes moved into possession of it just before Christmas 1981. Work on the patio in front of the house and the construction of the pool proceeded and the pool itself was finished in January 1982 although work on adjacent areas was still not complete. Almost immediately the pool was filled the Dynes had problems with it. The level of water kept dropping, cracks appeared in the walls and became larger and at one stage a large amount of water escaped from the pool into a property on the downhill side to the considerable and understandable concern of the occupier. A vertical crack developed in the house itself and the marble tiles on the kitchen floor and upstairs verandah also cracked. However, all the necessary engineering certificates were given to the Council in connection with the house and pool and on 13 October 1982 the architects gave a final payment certificate which indicated that the total cost of the house part of the project was $188,052 and the total cost of the pool and patio area was $76,856. With the addition of chattels such as carpet, blinds, drapes and other work the total cost of the project to the Dynes, excluding the land, was $290,508.

In November of 1982 wet ground was noticed under the barbecue area near the pool. There was also widespread dampness under the pool but not caused by the pool which had in fact been empty for some months. Other consultants were now engaged to investigate the problems and one, a Mr Graham Salt, an expert in soil stability, concluded that the whole soil mass under the pool was on the move. It became urgent to ascertain the source of the water which brought this about. As a result of further engineering investigations it was found that the house and pool were built on made up ground to a depth of at least one metre, that is fill which had been brought on to the property as distinct from the natural soil structure and the Dynes contended that all this should have been discovered by the architects and engineers had proper care been taken by them before the building of the house and pool commenced. In September 1984, after taking legal and independent engineering advice, the Dynes commenced proceedings in the High Court against the architects, engineers and the Christchurch City Council.

They sued the architects in contract alleging breach of an implied term that the architects would exercise proper professional skill and care in the performance of their services. They sued the engineers in tort alleging that they had failed to observe the duty of care which they owed to the Dynes in the performance of their services. The Dynes claimed damages for breach of contract and tort in the sum of $527,024 for the faulty work, a sum of $17,929 for

engineering, valuation and other professional expenses and general damages of $50,000 for their distress, worry and inconvenience over the matter. They also sued the Christchurch City Council in negligence. However, as the Judge exonerated the Council from any liability and no attack has been made on that finding in this Court, it is unnecessary to discuss the liability of the Council further.

The architects acknowledged that they owed a duty of care. The engineers also acknowledged that they owed a duty of care and at the hearing they acknowledged that they were liable to the Dynes for losses suffered by them in relation to the pool - but not the house. In essence the engineers conceded that they were negligent in not properly designing a pool to be sited on the area or for not telling the Dynes that they could not have a pool on that area because it was the site of made ground.

The type of losses for which such acknowledgment was made were, firstly, wasted expenditure on the pool; secondly, the cost of removing the pool; thirdly, the reasonable costs of re-landscaping the pool area and fourthly, a contribution towards the plaintiffs' experts costs in connection with the pool.

It was common ground in the High Court that the pool is no longer a viable proposition either in its present form or in any other form and that it will have to be removed and

the area in front of the house re-landscaped or reorganised in some appropriate way.

In the High Court the stance of the architects was to fight both liability and the quantum of damages claimed by the Dynes in respect of the house and pool, and that of the engineers was to fight liability and damages for the house but only the quantum in respect of the pool. The case was conducted by them on that footing. Indeed the engineers had in the meantime covered over the pool and the area which would have been represented by the surface of the water, had it been filled, is now covered with paving blocks. All that, however, together with the pool and its surrounds will have to be removed in its entirety.

In the High Court counsel for the Dynes contended that it was not appropriate to sever the project into two separate compartments, one relating to the house and the other to the pool. His submission was that the project should be looked at as a whole. That view was accepted by Tipping J who concluded that the architects had no higher duty to the Dynes than to take such care as was reasonable in the circumstances. He was satisfied that there was no negligence on the architects' part in selecting the engineers to assist them with engineering matters; that they did not warrant, in an absolute sense, the satisfactory completion of the contract; but that they had been negligent in failing to follow up the pothole drawn to their attention by the building inspector in order to satisfy themselves

that the engineers were taking appropriate action over it. This, he held, was negligent oversight on their part.

At the trial counsel for the Dynes submitted that the engineers had been negligent in four respects. First, that Mr Poole ought to have addressed his mind to the possibility that the site was made ground instead of assuming that it was natural ground; that he should have inspected the whole site more closely and should have gone outside the site - particularly to the west where sufficient clues that the land was fill should have been apparent; and that he ought to have looked not simply at a growth covered bank but identified clumps of soil or small fragments of gravel or quarry rock which would have alerted him to the presence of fill. The Judge found that the Dynes had failed to prove that at that early stage of the project a reasonably competent and careful engineer would have been alerted to the presence of fill. Second, that after a bank on the site had been cut in the course of excavation works for the house, Mr Poole ought to have detected clumps of topsoil and other indications of fill. Again the Judge found that it was not established that a reasonably careful engineer would, on examining the cut bank or cleared platform, have been alerted to the fact that the land was fill. Third, that Mr Poole had failed to heed the obvious message of the pothole and the building inspector's concern over it. The Judge held that, with the Council's concern about suitable ground to the west and the presence of under runners lower

down on the site, the probabilities were that if Mr Poole had properly investigated the site he would have then concluded that the land was suspect and commissioned further extensive tests which would have demonstrated the presence of fill throughout the site. Thus the problems later encountered would have been avoided. Therefore he found the engineers negligence in failing to investigate the hole. Fourth, that on discovering the presence of fill the engineers ought not to have proceeded with the construction of the pool and ought to have investigated more thoroughly the land under and around the house. The Judge found the engineers negligent at this phase of the works also.

Having found both the architects and engineers guilty of causative negligence Tipping J went on to consider the question of damages. He concluded, quite rightly we think, that in the circumstances of the case there was no difference in the measure of damages which might be awarded according to whether the action was founded in tort or contract. Indeed, counsel did not contend otherwise. The judgment records that in the High Court the Dynes claimed to be entitled by way of damages to what the Judge called "full reinstatement damages", that is the cost of rebuilding the house and pool elsewhere, less the residual value of what they owned at the hearing; alternatively, to damages based on the difference between the value of the house and pool as they would have been if built according to design and as they were at the hearing, that is the diminished

value. The architects and engineers contended that the appropriate measure of damages was not the diminution in value of the property but the cost of restoring it to its former state, albeit on a much more limited basis than the full restoration claimed by the Dynes.

In the light of these contentions the Judge reviewed at considerable length the development of the principles which he thought governed the Courts' choice in individual cases between the reinstatement/restoration measure on the one hand, and the diminution in value on the other, and finally, after citing McGregor on Damages, 14th edition p.763 para 1121 (see now 15th edition, p.865 para 1396), concluded that where there has been damage to realty, whether such damage results from breach of contract or tort, there is no rule for the assessment of damages which must be applied in all cases; that the Court should not approach the assessment of proper compensation by saying that the prima facie rule is diminution in value in some circumstances and that reinstatement/restoration is proper in others; that in each case the Court must select the measure of damages which is best calculated to compensate fairly the plaintiff for the harm done while at the same time being reasonable as between plaintiff and defendant.

The Judge examined the assessments made by the four valuers who gave evidence before him, all on a diminution basis. Their assessments of the value of the property in a

notionally undamaged condition and its diminished value were: Mr Cook $520,000 and $160,000; Mr Telfer $525,000 and $180,000; Mr Schulz $475,000 and $150,000; Mr Baker $370,000 and $215,000. Balancing these assessments the Judge accepted a figure of $480,000 for the property in its notionally undamaged condition and $170,000 for its diminished value, which made for damages of $310,000 if the diminution in value principle were applied. He thought that there were difficulties in accepting the full reinstatement basis for which the Dynes contended (which was based on agreed costings from a quantity surveyor and adding in the costs of relocation was estimated to be $642,024) as it was not possible to reinstate the whole complex on the present site, it being accepted that the pool must be removed, and because the negligence of the engineers occurred only part way through construction. Furthermore there were further difficulties in equating land values as between the present property and such new property as might have been the notional site of reinstatement. He thought it reasonable for the Dynes to quit the property because of the uncertainty of the future and the fact that the house as it now is, without the pool, is not what they bargained for. For these reasons he awarded them damages on a diminution in value basis. There was, however, his finding that the operative negligence of the engineers did not occur until about June/July 1981 on the discovery of the pot hole at which point the foundations of the house had been laid and the framing erected. If at that stage the Dynes had abandoned their whole project, as

they might well have done had the instability of the site been made known to them, they would have incurred some loss and, if they had elected to proceed without a pool, it is probable that extra costs would have been incurred to secure the house. The Judge discounted his assessment of the loss on the diminished value basis by 10% to take account of these factors. He therefore fixed damages on the basis of a loss on a notional sale at $310,000 less 10% making for a net figure of $279,000. He also awarded damages for the relocation of the Dynes at $10,000, general damages for inconvenience at $15,000 and special damages of $11,528-33.

The architects and engineers appealed against the judgment, initially on both liability and damages, but at the hearing in this Court Mr Harrison abandoned their appeal against liability and said that the appeal was confined to damages. He intimated that there were indications in the decided cases that architects had a liability to their employers for any negligence by other persons or experts instructed by them in the execution of the duties which the architects had directed to be carried out, duties which in the present case, he said, included the provision of design certificates for the pool and the house. He said that the Judge's conclusion in the judgment under appeal that an architect had no liability for an engineer engaged by him was open to doubt following Moresk Cleaners Ltd v. Hicks [1966] 2 Lloyd's Rep. 338 and London Borough of Merton v. Lowe (1981) 18 BLR 130. As this matter was not argued, we

prefer to leave it open. However, even if the architects were not liable for the negligence of the engineers, they were, as the Judge found, liable for their own failure to follow up the discovery of the pothole and the evidence in support of that finding is unassailable. For these reasons we think that the decision to abandon the appeal on liability by the architects was wisely and responsibly taken. The appeal so far as it affects liability can therefore be dismissed.

The Dynes cross appealed against the findings of the Judge exonerating the engineers on the first two of the four particulars of negligence already discussed. The consequence of this finding was that there was no negligence on the part of the architects or the engineers until the discovery of the pothole in June/July 1981 and it led to the reduction in the damages which the Judge would otherwise have awarded by 10%. If then the cross appeal on liability were to succeed the Dynes would be entitled to these damages in full. Before dealing with the appeal by the appellants on damages which is itself an issue of substance in this case, it is logical to deal with the cross appeal on liability. Then the damages can be discussed.

Cross appeal on liability

Reference has already been made to the two heads of negligence on which the Judge exonerated the engineers. The first related to the failure of Mr Poole to address his mind

in the initial stages of building to the possibility that the site upon which the house and pool were to be built was made ground. The second was that after a cut had been made in the bank in the course of excavations he had failed to ascertain that the land was fill. While supporting the Judge's finding of negligence at the third and fourth stages, Mr McVeigh submitted that the Judge had erred in not finding negligence at the two earlier stages. He pointed to a number of passages in the evidence which supported such a finding. It is unnecessary to refer to these passages in detail. It is sufficient to say that, had the Judge reached the conclusion that the engineers were negligent at the two earlier stages, his findings could not have been disputed. There are, however, passages in the evidence which give some support to the findings the Judge made exonerating the engineers in the early stages. A Mr Morris, a consulting engineer who had practical experience going back to the Great Depression, said that the average consultant engineer in the Port Hills area would be largely guided by what he saw at the actual site - be it sidling, ridge, high ground or gully, and the nature of the exposed faces; that if these appeared to be massive and solid and not corroding or slumping, he would conclude that it was a safe building site and proceed with the work and if, as the work proceeded, the ground appeared to be dry he would approve the foundations. Mr Morris said that he looked at the vegetation growing at the Dynes' site and it appeared to be normal. He thought there were no other factors about the site which suggested

that it was unusual or that the soil was not original. For these reasons he would not have expected a careful practising structural engineer in 1981 to have commissioned penetrometer tests or to have undertaken hand auger tests to test the stability of the land. (A penetrometer is a device by which the soil structure is compacted and its stability is determined.) Mr Morris said that if Mr Poole had not seen any warning signs and if the freshly cut platform had appeared to him to be dry and solid he would not have expected him to carry out any further tests. Mr Poole, who gave evidence after Mr Morris, said that the presence of filling on a ridge was so unusual that he did not even think that the site might be made ground. He thought that it was part of a spur or ridge that he had had investigated in the early 1970s by a specialist when doing engineering work for a house to be erected on a nearby site for a Mr Fink Jensen. That site on specialist investigation proved to be satisfactory for building. He said that he also found hard ground around the whole perimeter of the Dynes' site when the cut was made for the excavations. The evidence suggests that the ground becomes unstable when wet and the fact that the bank was cut when the ground was dry may have misled Mr Poole into thinking it was suitable at all times. There was also the evidence of Sir Miles Warren. He said that although he had designed a number of houses for the Port Hills area prior to 1981 it did not ever occur to him that the Dynes' site may not have been natural ground and that when he inspected it he found it hard and dry. He saw no signs of under runners

when the excavation started. Although there was evidence which pointed to a contrary conclusion, the Judge was entitled to say that, in the light of the other evidence, the Dynes had not made out a case at the two earlier stages. Therefore we would not disturb his findings on liability. It follows that the cross appeal against the deduction of 10% from the damages otherwise to be awarded for diminution in value must be dismissed.

Damages

The main thrust of Mr Harrison's attack on damages was directed against the sum of $279,000 awarded for the diminution in value of the property. He submitted that Tipping J had erred in assessing damages on this basis instead of looking for proven rectification or restoration costs. He said that it was wrong to allow damages for the stigma attaching to the site and any uncertainty associated with it in the future when the Dynes had not crossed the evidential threshhold of proving that the site could not be stabilised against further settlement.

Before considering these submissions further it is convenient to refer to a number of evidential matters, some of them the subject of findings of fact, on which Mr Harrison rested his submissions. We set these out with comments on the relevant evidence. They are: (a) that the Judge found that the house had suffered only minimal structural damage to the date of trial, "the problems being all relatively

minor". He was then speaking only of the house and not the pool with its surrounds which it is agreed must still be removed. And he said that while the opinion of Mr Bell, a senior lecturer in engineering geology whose views the parties accept, was that structural damage to the house, consistent with foundation settlement, was minor to date it was not possible to examine the footings around most of the house to draw any positive conclusions. (b) That the damage suffered to date was due to the ingress of moisture on to the site causing compaction or settlement and that the potential existed for future additional settlement of the house under high soil moisture levels. (This was the Judge's observation on the evidence of Mr Bell.) (c) That the loess material (a predominantly silt soil laid down during former glacial times with layered profile characterised by three layers two of which are erodable) on the site, has a very high bearing capacity when dry. (This was the Judge's observation on the evidence of Mr Evans, a registered engineer of very considerable expertise and experience.). (d) That the most likely source of the present high moisture content on the site was seepage of water from surface infiltration from garden watering by Mr Johns, a property owner higher up the slope. (This was the view of Mr Evans whose explanation for the high moisture content of the site was accepted by the Judge as the most probable cause of the dampness. Mr Evans also indicated that a reasonably careful engineer ought to consider the possibility of water ingress from garden watering upon a site while accepting that a

number of engineers did not consider this as much as they should.) (e) That the future stability of the site could not properly be determined until further tests were carried out. (The Judge commented that Mr Evans acknowledged that the one thing that all the experts were agreed upon was that it was impossible to make any accurate prognosis for the house until further tests had been carried out. As the Judge said, no one was able to say at the moment what was the most cost effective solution. And Mr Evans accepted that this was a problem which had yet to be investigated.) And (f) that the site could be stabilised through the use of a limestone adhesive material to improve its bearing capacity. (Mr Bell said that it would be worthwhile considering this treatment when the engineers had a better assessment of the problem. Mr Evans referred to it as one of the three recommendations he made for the site in the future. The other two were the correction of the deficiencies in the surface water run off and house stormwater drainage to reduce further aggravation of the condition in the soft ground in front of the house and the making of further tests to resolve the problems and the ascertainment of the most economic methods of correction. The Dynes had not undertaken any of these steps after receiving independent engineering and geological advice early in 1984.)

Mr Harrison went on to analyse the award of $279,000 in the light of his submission that the only physical damage proved was an admittedly useless pool for which the Dynes

had expended about $75,000 and the removal of which would cost another $35,000. He suggested that $20,000 should be allowed for the reduced value of the house. By taking the sum of these three amounts from the award of $279,000 he calculated that the major component of that award must have been an allowance of $150,000 for the stigma which attached to the house and site as a result of the events of the past few years and any uncertainty which might attach to it in the future. Undoubtedly the Judge regarded this factor as important. He said:

> What is however a major problem for the plaintiffs is the uncertainty as to the future.
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> What has to be weighed is the plaintiffs' natural desire to quit themselves of a disastrous episode in their lives plus their desire not to have to live with the further uncertainty that would be inherent in their remaining in the house, with the fact that from the defendant's point of view it must appear out of proportion that they should be required in effect to pay for a completely new house when the present house has relatively minor defects, and on the expert evidence poses no real danger to the plaintiffs albeit that there is a risk of continuing general deterioration.

Mr Harrison said that an award of that kind did not fall within the applicable principles enunciated in Bevan Investments Ltd v. Blackhall and Struthers (No. 2) [1978] 2 NZLR 97 by Richmond P, delivering the principal judgment of this Court in a not dissimilar claim for damages resulting from the negligence of an engineer. In Bevan's case Richmond P referred to the judgment of the High Court of Australia in Bellgrove v. Eldridge (1954) 90 CLR 613, where the High Court (Dixon CJ, Kitto and Taylor JJ) rejected the

diminution in value approach and said:

> ... the respondent was entitled to have a building erected upon her land in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract. (617)

But the High Court went on to explain that this prima facie rule was subject to the qualification that the doing of the rectification work must be a reasonable course to adopt. In the Bevan case (105) Richmond P interpreted the High Court judgment to mean that the prima facie rule should be adopted unless the Court was satisfied that some lesser basis of compensation could in all the circumstances be fairly adopted. In many cases where the plaintiff wants his property restored to the same state it was in before the commission of the tort, the costs of restoration will be substantially greater than the amount by which the value of the property has been diminished and the test of reasonableness mentioned in Bellgrove v. Eldridge and Bevan will become important. In the present case, the appellants contend that the position is reversed and that the costs of the more limited restoration or rectification they say the Dynes should carry out will be less than the diminution in value. But Mr Harrison not only submitted that the Judge had taken the wrong measure of

damages. He contended also that the Dynes had not discharged the onus on them of proving the balance of what he termed their economic claim, estimated to be about $150,000, because this balance was predicated on the fact that the long term future of the house was uncertain when in fact there was evidence that the underlying causes of the future uncertainty were capable of effective treatment which, he said, ought to have been carried out by the Dynes prior to trial. As an alternative to that, he submitted that if the Judge had wished to overcome this fundamental failure he could have adopted the course, suggested by Mr Harrison at the trial, of adjourning this aspect of the claim for further reports on the nature and extent of the work which would be necessary to reinstate the property. This was the course taken by Hardie Boys J in Morton v. Douglas Homes [1984] 2 NZLR 548 which is referred to in the judgment of Tipping J.

We think that Mr Harrison's submission on the failure of the Dynes to make out their case cannot succeed in the circumstances of this case. In the light of the lack of knowledge of all parties as to what will have to be done to rectify the damage it would be unreasonable to expect that the Dynes should have undertaken any further investigation. That can only be undertaken when the pool and surrounds have been removed. Then the nature of the soil can be further investigated and recommendations made as to the requisite work. Even the exploratory work will take some months. As

yet no estimate of its expense, let alone that of the work of rectification, can be given. The appellants through their experts can do no more than venture an opinion, albeit an informed opinion, as to what measures may be taken but they have not been forthcoming with offers to undertake these measures in any event. For these reasons we reject the argument on the threshold test.

The real question is whether there should be a departure from the prima facie, but not inflexible, rule that the primary concern of the Court should be to ascertain the amount required to rectify the defects complained of in order to give the Dynes, so far as it is now possible, the equivalent of a building which is substantially in accordance with the contract they made with the architects.

All of the four valuers who gave evidence valued the property on a diminution in value basis, as they appear to have been instructed to do. In a report which was the basis of his evidence in chief one valuer, a Mr Cook, said that the vast majority of purchasers would not contemplate purchasing the Dynes' property on the basis of the evidence so obviously available to them on an inspection of the property; that they would quickly recognise the obvious defects in the site and call in professional advisers to assess the position. He said that while a number of comparable residences lacked the individuality, or at least the architectural merit, of the Dynes' residence, the vast majority of prudent purchasers

would be likely to elect to acquire property of this type rather than purchase the "risk" associated with the Dynes' property. That opinion seems to have been borne out by enquiries received by Mr Cook's firm of valuers and property investment consultants in reply to advertisements of the Dynes' property in the period 7 December 1985 to 1 May 1986. These advertisements were apparently quite extensive as they resulted in advertising bills of $943-12. Some seven enquiries were recorded. One enquirer made an offer of $116,000 for the property in July 1986, one an offer of $125,000 including chattels of $15,000 in August 1986 and another said he would offer $135,000 but did not in fact follow it up. Mr Cook's evidence was that the property has acquired a bad reputation or stigma.

But, in the state of knowledge he had, Mr Cook was unable to say how much it would cost a purchaser to restore the property. Nor could the other valuers. A second valuer, Mr Telfer, in a report which formed the basis of his evidence in chief, said that because between 1984 and 1987 it had not been possible to come up with an engineering possibility which would be economic to ensure the reasonable stability of the dwelling in the future, he thought that a purchaser, in the absence of any firm engineering recommendation, would heavily discount the price he was prepared to pay for the property in the knowledge that he might be required to face heavy expenditure on remedial action in the future. He thought a purchaser would regard the property as a considerable

gamble and temper his offer to cover the cost of any remedial work as well as to allow himself some profit on his enterprise. There is no evidence as to the likely cost of carrying out the requisite work. It was no doubt for these reasons that the valuers adopted the approach which they did, which proceeds upon the basis that possible purchasers would offer a greatly diminished figure for the obvious risks involved.

As we pointed out to counsel at the hearing, there is no evidence as to the cost of restoring the house to what it would have been had it been built according to plan on solid ground and the valuers have been obliged to make an assessment in the absence of that material. The rectification or restoration costs will only be available when the pool has been removed and further, possibly extensive, tests carried out. The costs of restoration may be $X or any multiple of that. If they are $X then on the prima facie measure discussed in Bellgrove v. Eldridge and Bevan's case, an award of $279,000 may be far too high should the Dynes elect to undertake the work. On the other hand if the cost of restoration is $2X or $3X it may be far too low. On the one view the award may represent a windfall to the Dynes; on the other hand it could be much less than their true entitlement.

For these reasons we suggested to counsel at the end of the first day's hearing that consideration might be given by the appellants to the formulation of some specific proposals to meet these difficulties. Over night Mr Harrison made his

best endeavours to meet this point. We are satisfied that he did his level best in this regard. On the second day of the hearing he produced a memorandum in which the appellants undertook at their own expense to remove forthwith the swimming and spa pool complex and all associated structures on the property and re-contour and landscape the subject area; to commission at their own expense forthwith a geo-technical investigation into the feasibility of stabilising the property to an engineering standard acceptable to the Christchurch City Council; that if the geo-technical investigation concluded that remedial measures were possible the appellants at their own expense would forthwith carry out and implement the measures as recommended and replace the pool complex area with a structure designed to enhance the utility and value of the property; and that following completion of the remedial measures as recommended and the expiry of such period as might be necessary for the parties to be satisfied as to the effectiveness of those measures, the property should be sold and the appellants would pay to the Dynes the difference, if any, between the sale price and the sum of $480,000 (that being the figure which the Judge adopted as the value of the property had the house and pool been erected to plan); and that if the geo-technical investigation did not conclude that the property was capable of stabilisation it should be sold on terms to be agreed between the parties and that the appellants would pay to the Dynes the difference between the sale price and the sum of $480,000.

Mr McVeigh intimated that for a number of reasons the proposals were not acceptable to him. These were, inter alia, that the difference between $480,000 and the sale price was unfair because $480,000 was the figure put on the design value in 1981 and that by the time the property was sold the design value might be higher; that the words "to be agreed" left room for disagreement; that the Dynes might have to wait for their money for as long as two or three years while the pool was removed, the investigations undertaken, remedial work done and a period allowed in which work could be assessed and the stigma removed. He said that the remedial work might not be easy and that its nature and extent would not even be known until the pool is removed. In summary he said that the proposals were experimental. But there were other matters of principle, he said, which stood in the way of the proposal and justified the course which the Judge took in adopting the diminution in value approach. His submissions on this point can be summarised as follows. (1) Although after it was discovered that the pool had to be filled in (some time in 1982) Mr Wood had suggested three options for the resolution of the dispute, one of which (that the appellants buy the house and pool as an entity) Mr Dynes then intimated was acceptable, nothing had been heard of the proposal again; that it was only on the eve of trial in November 1987 that the appellants intimated their acceptance that the house had been built on filled land but even then they fought the case on liability as well as damages; that at the trial they sought to treat the house and pool as

separate items and admitted liability only in respect of the pool; that they had maintained their denial of liability notwithstanding the judgment of Tipping J, only abandoning their appeal against liability a short time before the hearing in this Court; that no remedial work, however successful, would give the Dynes what they wanted - a total house and pool complex; that what they have lost is a lifetime family home; and that in any case they should not now be required to retain the house while further lengthy, and not necessarily conclusive, tests are made and remedial work carried out in the hope that a buyer will be found for it. As it happens, for reasons which seem to be related to the nature of their business, Mr and Mrs Dynes have moved to Queensland since the High Court hearing and the house is now occupied by a relative, possibly as a caretaker.

The reasons advanced by Mr McVeigh are compelling reasons why the Dynes should not be required to stand out of any damages to which they are entitled while further tests and possible remedial work are carried out. The acceptance of the appellants' undertaking would involve further delays with no certainty that a satisfactory solution would be reached. The appellants are apparently not prepared to purchase the property on the basis of the valuations made and carry out the remedial work themselves, which would be one solution. We think, too, that for the reasons discussed in his judgment Tipping J was entitled in the particular circumstances of this case to depart from what Richmond P in

Bevan's case called the prima facie rule. In the absence of further information it is not surprising that the valuers adopted a diminution in value approach. In the circumstances of the case it was really the only approach to adopt. Moreover we think that the extent of the work which is likely to be involved in this case distinguishes it from Morton v. Douglas Homes. Therefore we uphold the award of $279,000.

Mitigation

It was contended that the Dynes had failed to mitigate their losses and that they cannot claim damages for any losses which they ought reasonably to have avoided. The test of mitigation is whether they acted reasonably - Halsbury 4th ed. vol. 12 paras. 1193 and 1194. Mr Harrison joined issue with two passages in the judgment on the subject of mitigation. They are:

> The plaintiffs in considering what to do, in the face of the very difficult circumstances of this case, must in my view be entitled to take into account that they had grounds to look to others to compensate them. They were entitled to say to themselves: we will solve our problem in one way if we are entitled to no damages or only limited damages, but we would like to solve our problem in another way if the law permits us to receive damages assessed in that way.
>
> The decision of the Court of Appeal in the Dodd Properties case (Dodd Properties (Kent) Ltd v. Canterbury City Council [1980] 1 All ER 928) demonstrates that the fact that the defendants are denying liability is a highly material factor in whether or not the plaintiffs have acted unreasonably. Until a plaintiff knows what, if any, money he is going to have by way of compensation it will often be difficult for him to know what appropriate remedial steps should be taken.

It was contended that the Dynes were sitting back in reliance on their rights against the appellants to the exclusion of meeting their own duty to mitigate the losses. In the light of the appellants' failure to follow up their offer of settlement, their continuing denial of liability, the likely considerable costs of further investigations and remedial work and the absence of any real information or advice as to what was required to be done to rectify the damage, all of which we have already discussed, we do not think that the Dynes can be said to have acted unreasonably.

Mr Harrison also submitted that much of the problems of instability arose from the wetness of the soil, a factor to which the neighbour on the higher side, Mr Johns, said to be a heavy user of water in the watering of his property, had contributed. There is evidence to suggest that Mr Johns' water consumption is very much higher than that of other residents in the area. Mr Harrison said that the Dynes ought to have taken action and ought now to take action against Mr Johns in nuisance to stop him from using excessive water on his property to the detriment of others and thereby mitigate their losses. This submission also has significance on the question of whether damages should be assessed on the basis of diminution in value or the restoration principle because the stoppage of the water seepage would result in more stable ground thereby facilitating the restoration of the house.

There are some cases in recent years which have increased the liability of a land owner in nuisance and negligence for events occurring on his property, sometimes in circumstances not brought about by him. Goldman v. Hargrave [1967] 1 AC 645; French v. Auckland City Council [1974] 1 NZLR 340 and Leakey v. National Trust [1980] QB 485. But whatever trend these cases may indicate in the way of the readiness of the Courts to widen the scope of the law of nuisance, it would not be reasonable to expect the Dynes to have engaged or to engage now in a pioneering lawsuit in an endeavour to restrict Mr Johns using water on his land in what appears to be a natural user of it.

General Damages

It was submitted that the award of $15,000 for general damages "for the disappointment, frustrations and anxieties which this whole unhappy saga has caused" (the Judge's words) was excessive. Mr Harrison sought to support his statement by reference to the awards of $1,000 made for general damages in Stieller v. Porirua City Council [1983] NZLR 628 approved on appeal [1986] 1 NZLR 84 at 97, and Young v. Tomlinson [1979] 2 NZLR 441, both being building cases. But the circumstances in which the awards were made in those cases were somewhat different from the present. The factors upon which the award in Stiellers case was based are recorded at p.83 of the report of first instance. The Judge thought that they warranted only a modest award. They may have

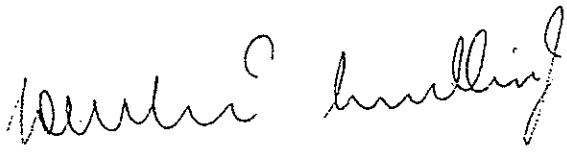
justified a higher award as to which we express no opinion because this Court declined to interfere with the award on the basis that it was not so low as to be an entirely erroneous estimate. The factors upon which the award in Young v. Tomlinson was based are set out at p.463 of the report and, although no doubt distressing to the plaintiffs, do not appear to have been of great significance. In the present case the negligence of the appellants put an end to the Dynes' expectations. Mrs Dynes had lived in the Port Hills area as a child and her family still lives close by. They liked the position of their section which had extensive views of the estuary. The house was to be their family home and the attached pool complex was very much a part of it. But as the faults developed and the engineering problems were discovered their expectations were replaced by disappointment and it is not too much to say that their dreams must have been shattered. It is understandable that as the pool which was part of the total concept cannot remain or be replaced they wish to be rid of the property altogether. Moreover, they have had to live with the problem for over five years during which the attitude of the appellants has not been helpful. The evidence of Sir Miles Warren of his inspection of the house just before the hearing hearing in the High Court, confined as it was to a description of the house only, does not cover the major problems which have bedevilled the project and, when compared with the evidence of the valuers, it hardly conveys a realistic picture of the state of the property. It is very easy to

discount the misfortunes of others. For these reasons we are not prepared to interfere with the award of $15,000 for general damages.

The appeal against the award for relocation was abandoned as was the Dynes' cross appeal on damages.

For the reasons given we dismiss both the appeal and cross appeal, but with a word of appreciation to both Mr Harrison and Mr McVeigh for the way in which they presented their arguments. They brought to our notice all relevant matters of fact and law without the huge proliferation of paper with which legal arguments are so often unnecessarily burdened. Their submissions did not suffer for that.

Having regard to the overall result of this case the respondents will be entitled to costs in the sum of $2,000 together with disbursements to be fixed by the Registrar including the reasonable travelling and accommodation costs of two counsel.



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