IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M. 299/76

No Special Consideration

N10.

IN THE MATTER of Section 107 (3) of the Summary Proceedings Act 1957

A N D

IN THE MATTER of an appeal from a determination of the Magistrate's Court at Lower Hutt

BETWEEN LOWER HUTT CITY CORPORATION
(Raymond v. F. Venables)

Appellant

A N D GREGORY HOMES LIMITED

Respondent

503

Hearing: 3 November 1976

Counsel: N.B. McGregor for appellant
A.C. Jolly for respondent

Judgment: 5-11-76

RESERVED JUDGMENT OF WHITE J.

This is a case stated pursuant to s. 107 (3) of the Summary Proceedings Act 1957, on appeal from a determination of the Magistrate's Court at Lower Hutt on 6 May 1976.

The respondent was charged under s. 30 of the Health Act 1956 that on 3 February 1976 by default or sufferance the respondent permitted a nuisance, namely a sewer drain to be in such a state or situation as to be likely to be injurious to health. Section 29 provides that "Without limiting the meaning of the term 'nuisance', a nuisance shall be deemed to be created ....(a) Where any....drain....is in such a state or is so situated as to be offensive or likely to be injurious to health.'

It was accepted that as at 8 October 1974 a sewer drain on the defendant's property was in a damaged state as a result of a slip caused or contributed to by the respondent's excavations so that it constituted a nuisance. To guard against

"possible health hazards" the appellant carried out temporary repairs during October 1974 because the respondent, after having been given notice to attend to the matter, had failed to do so. The Magistrate found as a fact that since the temporary repairs were carried out there had been no further escape of effluent. He decided that before the repairs the sewer line had been left in such a state or situation as to be likely to be injurious to health and that "it may be in such a state or situation as to be likely to be injurious to health in the future." But he held that it was not in that state or situation on the date of the alleged offence or on the date of hearing because there was no escape of effluent on those dates.

The learned Magistrate summed up the situation as it existed at the date of hearing as follows:

> " ....The excavation itself is shown in various photographs produced and appears to be substantial. At certain points there is a drop of at least seven feet and the excavation is subject to the action of stormwater flowing from a fractured stormwater drain. There has been since the temporary repairs slight movement in the earth in the area because the line of the temporary repairs has moved not to the extent of causing a fracture but to the extent of causing undue strain and indeed possible obstruction by reason of the flow of effluent in the line that is incorrectly aligned. "

Although two questions are set out in the case stated Counsel were agreed that the question for determination was whether on the facts as stated the situation as it existed on the date of the alleged offence constituted a nuisance within s. 29 (a). It was necessary therefore for the appellant to show that at the relevant date the situation was likely to be injurious to health. On the facts as stated, the finding was that such a situation might develop "in the future." I agree that there may be circumstances in which a drain is in a state or situation which would support a finding that it is likely to be injurious to health without proof of any actual escape of effluent but I have not been persuaded that the Magistrate could reasonably have arrived at only that conclusion on the facts stated in the present case. Applying the principle stated

in Police v. Digby (No. 2) (1971) N.Z.L.R. 1134, to the question for determination, the answer is that this is not a case where it has been shown that on the facts as stated a conviction ought to have been entered. Accordingly the appeal is dismissed.

Solicitors

Hogg, Gillespie, Carter & Oakley, Wellington, for the appellant

Phillips, Shayle-George & Co., Petone, for the respondent