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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

nrir

M. 708/83

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BETWEEN TONY JELAS ENTERPRISES
LIMITED c/- Mr P. E.
Newfield, Solicitor,
29-32 Shortland Street,
Auckland, Contractors

Appellants

AND WAYNE DENNIS SANDS of
Hokianga, Farmer and
JENNIFER JEAN SANDS
his wife

Respondents

Hearing: 3rd February, 1984

Counsel: Dennis for Appellants
Holmes for Respondents

ORAL JUDGMENT OF SINCLAIR, J.

This is a civil appeal which has its origins in the re-alignment of the East Coast Bays highway adjacent to which the Respondents owned a piece of land and on that land was erected a glass house or glass houses in which tomatoes were growing. Due to the advent of a long weekend reconstruction work of the road outside the Respondents' home had by force of circumstance to come to a halt, that work being undertaken by the Appellants for the Rodney County Council.

The road is one which obviously, from the evidence, is used very extensively by traffic and over the weekend in question it is alleged that dust from the roadworks got on to the outside of the glass houses operated by the Respondents coating them to some degree with the result that there was

damage to the tomato crops and loss resulting from that damage.

The appeal has caused me some concern because in the course of the judgment in the District Court certain findings of fact were made, those being made on the basis that there was a duty of care owed by the Appellant to the Respondents. Just how that duty of care arose is not defined in the judgment, nor is it defined as to whether or not the duty of care was to the occupants of all properties adjacent to the roadworks or whether it was peculiarly a duty of care to the Respondents alone.

While evidence was given as to the possible knowledge of the Appellant as to the existence of the tomato crop, there are no findings of fact on that topic at all in the judgment and in view of the fact that that is not adverted to at all it would be quite wrong for this Court to try and examine the evidence in what is really a vacuum and come to a conclusion without having seen the witnesses. While it may be that on a question of credibility the Respondents have been accepted on certain aspects, there is no finding as to whether or not they have been accepted on this crucial aspect of the matter. In those circumstances I do not see how an Appellate Court can, with justice to both parties, examine the evidence and see whether or not the particular finding of fact was justified having regard to the nature of the evidence and the views which the presiding Judge had in relation to the particular deponent.

Of even greater worry is that there are no findings at all in relation to the allegations of negligence made by

the Respondents against the Appellant. The judgment refers to a duty of care but there is nowhere anything said as to whether the Appellant had discharged the duty of care which was owed by a reasonably competent contractor engaged in the roading works and whether the standards had been breached and, if so, in what respects. Without findings on negligence it is impossible for this Court, not having seen the witnesses, to arbitrarily come to a conclusion on that crucial aspect.

Regrettably, having regard to the amount which is involved, it seems to me that the only course for this Court to adopt is to direct that the judgment which has been entered in favour of the respondents on portion of the claim and a non suit which has been entered in respect of the balance of the claim should be vacated and the Court should direct a new hearing of the action in the District Court. Obviously that should be before a Judge other than the one who originally heard the matter.

So far as the result of the judgment in the District Court is concerned, it is quite evident from the decided cases which are quoted in McCabe v. Cassidy (1966) N.Z.L.R. 112 that in a claim of this nature it is not proper for a Court to enter a judgment of non suit in respect of one part of the claim and an actual judgment in respect of another portion. That is particularly so where the claims have not been divided, but the comment in McCabe's case is to the effect that even where claims have been divided the same principle ought to be applied.

In all the circumstances the judgments which have

been given in the District Court are vacated and a new hearing is directed. There will be no order as to costs.

P. P. King

SOLICITORS:

Johnston Prichard Fee & Partners, Auckland for Appellant
Turner Hopkins, Auckland for Respondents