Set I

OFFICE

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 1417/82

BETWEEN G.H. CRAIG

Plaintiff

AND EAST COAST BAYS CITY COUNCIL

Defendant



Hearing: 5 March 1984

Counsel Mr Holmes for plaintiff
Mr Worth and Miss Tohill for defendant

Judgment: 4 April 1984.

---

JUDGMENT OF PRICHARD J

---

In this action the plainttiff, who owns a residential unit at 527 Beach Rd, Murrays Bay, claims the sum of $40,000 as damages alleged to have been caused by negligence or breach of statutory duty on the part of the Council in granting town planning approval for the erection of a second dwelling on the property at 525 Beach Rd, adjacent to the plaintiff's property.

The Council's decision to permit the erection of the second dwelling was made on 2 April 1980. A building permit was issued on 5 June 1980 and the dwelling completed about October 1980.

Until the second dwelling was erected on the property at 525 Beach Rd, the plaintiff had a good view from his

livingroom and bedroom windows; the view extended along the East Coast beaches of Murrays Bay, Mairangi Bay and Campbells Bay. The roof of the second dwelling on the property at 525 Beach Rd substantially obstructs that view. The plaintiff claims in his pleadings, to have suffered a diminution of $30,000 in the value of his property, and to have lost the enjoyment of amenities of his residence in respect of which he claims a further $10,000 damages.

In addition the plaintiff claims an unspecified sum as exemplary damages by reason of the Council's refusal to supply him with a copy of the site plan and its refusal to take steps to prevent the second dwelling being erected, plus $3000 as aggravated damages in respect of the "injury to his feelings and dignity caused by the manner in which the defendant acted."

Both properties are zoned "Residential A". It is quite clear that under the then operative district scheme of the East Coast Bays City Council a specified departure was required for the erection of more than one detached residential unit on one site in a residential zone. Ordinance 15 of the operative district scheme provided that not more than one residential building should be erected on any site in a residential zone. Ordinance 9 provided that apartment houses containing not more than 2 residential units should be a predominant use in a

residential A zone. The effect was that if two residential units were erected on one site, they had to be physically joined together so as to be classed as one building. The Council was not able to grant a waiver of or dispensation from the terms of Ordinance 15 as Ordinance 13 of the operative district scheme specified those ordinances in respect of which a S.36(6) waiver or dispensation could be granted; ordinance 15 was not among them.

At the relevant time there was also in existence the Council's proposed second reviewed district scheme. The proposed scheme had been publicly notified, all objections and appeals had been disposed of and the scheme had been amended to give effect to successful objections. All that remained to make the second reviewed district scheme operative was a resolution of the Council. That resolution was passed on 1 October 1980 and the second reviewed district scheme became operative on 10 October 1980.

The existence of the proposed new district scheme, duly notified and amended to give effect to successful objections and appeals, meant that works which were in accord with the proposed new district scheme could be carried out without obtaining consent to a specified departure from the operative district scheme. This was the effect of S.74(3) of the Act, later repealed and

replaced by s.74A. (By S 17 of the Town & Country Planning Amendment Act 1980, which came into force on 23 December 1980).

The proposed revised district scheme did permit more than one dwelling house on the same site; but any such dwelling houses had to be separated according to the following formula:

'Separation Distance Between Dwelling Houses on the One Site.

(i) No two dwellinghouses on the same site shall be so located that a sight line drawn from the main point on any glazing to the livingroom of one unit penetrates the main glazing to the livingrmms of the other unit unless such windows and doors are not less than 21m apart; provided that this distance may be reduced by Council where topography would ensure the same measure of privacy.

(ii) Where the sight line from the main glazing of one unit does not penetrate the main glazing of the other unit, the separation distance may be reduced to a minimum of 6m ...."

Unless it complied with the separation distance formula the erection of the second dwellinghouse was not in accordance with the proposed new district scheme.

It was contended for the Council that the position in which the second dwelling house was placed on the property at 525 Beach Rd, did comply with the separation formula. In my view it did not. Paragraph (i) of the formula clearly applies only where the main livingroom windows of one building look into the main livingroom windows of

another. Paragraph (ii) applies in all other cases. In the present case the two buildings were so arranged that their main windows were at right angles to each other - the sight line from the livingroom window of one livingroom unit did not "penetrate" the livingroom window of the other. Paragraph (ii) applied. The buildings had to be separated by at least 6m. In fact they were separated by only 3.8m.

I find that the siting of the second building was not in accord with the proposed new district scheme. Accordingly, s.74(3) did not apply; the second building could not be erected lawfully on the site except with the Council's consent to a specified departure from the operative district scheme. Such consent can be given only on a notified application.

What happened was that a builder approached the Council for a permit to erect the second building. No doubt the builder was employed by the lady who owned No.525. It was found that if the proposed new building was sited 6m away from the existing building, part of it would be over a sewer line. This is an obstacle which can be overcome - but it seemed to Mr Cameron, then the Council's assistant town planning officer, that the practical solution was to site the new building 2.2m closer to the existing building than the proposed new district scheme permitted. So Mr Cameron, wishing to be helpful,

initiated an application to the Council for planning consent.

Mr Cameron's report to the Council's Town Planning Committee referred to the fact that no letter had been received in support of the application, pointed out that the proposed building was only 3.8m from the existing building and recommended that a "dispensation" be approved to avoid bringing the unit over the sewer line. The Town Planning Committee accepted Mr Cameron's recommendation, and in due course the Council resolved that the dispensation be approved.

At no stage was the plaintiff consulted or notified of the application. It was only when the construction of the building commenced that Mr Craig became aware of what had occurred.

The property at 525 Beach Rd is a sloping section. It falls away on a distinct gradient towards the street frontage. Had the second unit been built a further 2.2m away from the original unit, it would have been sited further down the slope, and the obstruction to Mr Craig's view from his windows would have been minimal. When he saw what was going on Mr Craig protested to the Council's Town Planning officer and to the Mayor, but he received no satisfaction. Mr Snowden, the City Planner, took the line that if the new building had been joined to the

existing building (which it could have been without planning permission under the operative district scheme) it would have been even further up the slope, and Mr Craig would have been even worse off. So what was he complaining about? And anyhow, Mr Snowden suggested, Mr Craig had no rights in the matter; the bulk and location requirements were there to ensure that the building on No.525 had adequate light and air and that a degree of privacy was afforded to the occupants of the units on No. 525 - the requirements were not there to preserve the neighbours' views.

Mr Snowden was quite right. The units could have been built without planning permission if they were joined together; the bulk and location requirements were designed for the comfort of the occupants of the units on the site where they were built; Mr Craig had no legal right to the preservation of his view of the East Coast beaches. But Mr Craig's point was he had not been notified or consulted, and that he had not been given a hearing - and on that point Mr Craig was right; the so-called dispensation should have been the subject of a notified application for a specified departure from the operative district scheme.

Had Mr Craig been afforded an opportunity to put his case to the Town Planning Committee, it is probable that the Council would have declined to allow the second building

to be sited where it obstructed the view from No.527, or if it had allowed the building to be sited where it now stands it would have insisted upon a different roof line. Mr Craig felt with some justification, he was being treated in a cavalier fashion. As McMullen J observed in AG V Mt Roskill Borough (1971) NZLR 1030,1043: "It is important that people should have a chance to be heard on matters of town planning which affect them."

Mr North for the Council placed a good deal of reliance on the Judgment of Speight J in Anderson v East Coast Bays City Council (1981) NZTPA.35. In that case it was held that:

> "..The object of height, bulk and location restrictions in a district scheme is to promote coherence and harmony of buildings in an area, not to protect the view enjoyed by individual house-owners, who must accept that an occasional dispensation may be granted."

But Speight J pointed out:

> "Although no property owner has a legal right to the preservation of views and no such right is conferred by the Town & Country Planning Act, nevertheless, when a Council comes to consider specified departure applications, this is something which it can take into account as was done in AG v Mt Roskill Borough Supra"

The scheme statement of the second revised district scheme contains the following passage :

"8.1. VISUAL AMENITIES:

Bulk and location control are set out in the Code of Ordinances. Such controls are not always adequate to protect view from existing lots.

East Coast Bays is an area which commands magnificent views out to sea and of Rangitoto from many vantage points. Some development in the past has needlessly blocked views from existing residences. The provisions of this scheme cannot prevent this from taking place without specifying a building platform and a maximum permitted height for each lot, which would be a monumental task."

In view of this policy statement there is every reason to think that had the Council proceeded as it should have done by way of a notified application, the departure from the operative district scheme would have been allowed only on terms which would have obviated or at least minimised the detriment which the plaintiff has sustained as a result of the siting of the second unit on the adjacent property.

Except in relation to the measure of damages, I do not think it avails the Council to say that without consent the building could have been sited adjacent to and joined to the existing building with even worse effects on the plaintiff's view.

The question whether a Council can be liable for an unauthorised consent to the erection of a building on one property to the detriment of the owner of a neighbouring property is an important one. In AG v Birkenhead Borough

(1968) NZLR 383. Richmond J held that failure to comply with the provisions of the Town and Country Planning Act 1953 does not confer any new rights apart from rights specified in the legislation on any individual members of the public against the persons who so fail to comply and that a person suffering special damage by reason of non-compliance has a right to ask the Court to exercise its equitable jurisdiction by way of injunction to secure compliance with the public general duty imposed but has no claim for damages against those at fault unless there has been an interference or threatened interference with some private right vested in such person and recognised by the law."

In the Birkenhead case, the cause of action alleged was breach of statutory duty. Since that judgment there has been considerable development of the common law tort of negligence. It is now clear from cases such as Anns v The Merton London Borough (1977) AC.728 (1978) 2 AER 492 that a private citizen can bring an action for negligence against a public authority.

I see no reason in principle why such an action should not lie where a Council negligently fails to observe the procedures dictated by the Town & Country Planning Act, and by its own district scheme, and thereby omits to require a notified application where this is a legal requirement. This of course has no relevance to the

performance by the Council of a quasi judicial function in determining a notified application for planning consent, nor will it apply in the absence of any negligence. And it can apply only where the plaintiff is a person who would, in the normal course of events, be notified of the application.

The existence of a duty of care to give only valid and authorised permissions was recognised by Jeffries J in the unreported decision of Port Underwood Forests Ltd v Marlborough County Council (Blenheim Registry, Judgment 21 January 1982.) That was an action by the party to whom the invalid consent was given.

I know of no New Zealand authority for the proposition that a neighbour who suffers detriment through negligent failure on the part of a Council to require a notified application can maintain an action for damages founded on the tort of negligence. However, there is Australian judicial authority in Freeman v Shoalhaven Shire Council (1980) 2 NSWR 826,841. In that case Kearney J awarded damages to a neighbour whose land value was affected by a loss of view when an invalid consent was given to a variation of a Council's consent to the siting of a building, the specific fault of the Council being a failure to give notice of the change sought by the applicant. Kearney J observed that the duty to proceed on notice was not the exercise of a quasi judicial power,

but a duty in the operative or administrative area of the Council's activities. He went on to say:

> "I consider that the circumstances of the present case bring it within the latter category, so as to create a duty of care by the council to the plaintiffs. I consider that in order to render effective the statutory entitlement of the plaintiffs to notice and to object and have their objection considered, a duty towards the plaintiff was imposed on the council to take reasonable steps to ensure that its decision, made in the light of their objection, was duly carried into execution. This seems to me to be a necessary supplement to or incident of the plaintiffs' rights in relation to the council. Further, it seems to me that in acting as it did, the council failed to take reasonable care, and, on the footing that the plaintiffs can establish any damage thereby caused to them, I would consider that the council incurred a liability in negligence to the plaintiffs."

I am in respectful agreement with the view so expressed and accordingly, I hold that the plaintiff in the present action is able to recover such damages as he can show to have been caused by the defendant Council's negligence in not requiring a notified application for a specified departure from the operative district scheme.

As to the measure of damages, Mr Ashton, a Registered Valuer called by the plaintiff, was of opinion that through the building out of its view, the plaintiff's property had suffered a loss of value of up to $6750. This figure was arrived at on the basis of present values. Mr Ashton's opinion was not challenged, but it was contended that the damages should be measured not at date of trial, but as at the date when the damage occurred.

In cross-examination Mr Ashton agreed that in the light of the average general increase in values since 1980, it would be reasonable to put the figure at $3800 as at October 1980. Mr Ashton was also asked in cross-examination to apportion the loss between the effect of the roof conformation and the effect of the siting of the building. He said that 80 percent was referrable to the roof line, and 20 percent to the siting of the building.

On the basis of that answer, Mr North submitted that the damages should be only 20 percent of $3800 - ie $760 - or if damages are to be assessed as at date of trial, 20 percent of $6750 = ie $1350. I do not think this sort of apportionment between roof configuration and site of building is realistic. The building was sited in fact, where it was sited with the roof which it in fact had, in consequence of the planning permission given without the plaintiff being afforded a hearing. Had he been afforded a hearing, and had he been successful in his objection, then his objection might have been met by either requiring a different siting of the building, or requiring a different roof configuration, by either of which means the obstruction to his view would be wholly eliminated.

In my view it is proper to measure the damages as at date of trial, as was done in the Building Inspector cases, and

as was done also in Freeman v Shoalhaven Shire Council (supra). On the other hand, what the plaintiff was deprived of was a right to object and to be heard in support of his objection. What has to be evaluated in money recovery terms is the value of that right, and this can only be determined by reference to the likely consequences of the objection being made. This is an exercise in hypotheses which involves a consideration of the chances of the plaintiff being successful on a notified application in persuading the Council, (or the Planning Tribunal) not to grant the specified departure, taking into account as well the possibility of the view being obstructed at some future date in a perfectly legitimate fashion, and the further distinct possibility that had the owner of No.525 been faced with the plaintiff's objection, she might well have met the position (or threatened to meet the position) by abandoning her plans for a separate building and redesigning the second unit so that it was joined to the existing unit. This would have involved some alteration of the existing building, and may not have been as attractive a design from the point of view of the owner of No.525. but it would have entirely obviated the necessity to obtain planning consent. Had the plaintiff been presented with a threat that if he persisted with his objection the owner of No.525 would take a course which the plaintiff could not prevent and which would obstruct his views far more effectively than the original proposal,

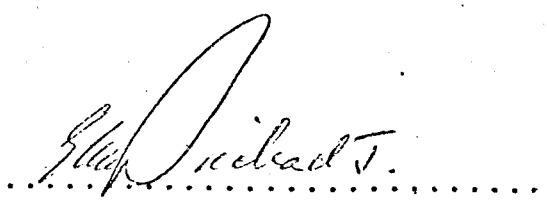
I think the plaintiff would probably have decided to accept the lesser evil and have abandoned his objection. Of all the contingencies affecting the value of the plaintiff's right of objection, it seems to me that this is the most sifnificant.

This, of course, was essentially the point made by Mr Snowden in his discussions with the plaintiff prior to the commencement of this action.

Weighing up all the contingencies as best I can, I consider that the most that can be justified is an award of one-third of the diminution in the value of the plaintiff's property, assessed as at date of trial. I do not think a separate award can be made for "loss of amenities" - no evidence was given by the valuer in this regard, and it seems to me, the loss on this score must be fully reflected in the diminution in value of the land.

I do not think this is a case for aggravated or exemplary damages. The initial mistake in granting permission without a notified application is understandable. It was negligent but not an intentional disregard of the plaintiff's rights and interests. The subsequent attitude of Council officers may not have seemed to the plaintiff to be calculated to improve his relations with the Council; but the points made by the City Planner were not entirely unreasonable.

Accordingly, there will be judgment for the plaintiff for the sum of $2250 with costs according to scale, plus disbursements and witness expenses as fixed by the Registrar.



E.M. Prichard J

Solicitors

Turner Hopkins for Plaintiff

Stevenson & Young for Defendant