IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2006 409 2486

IN THE MATTER OF	the Property Law Act 1952
BETWEEN	ANDREAS VINZENZ LAGEDER Appellant
AND	MICHAEL OSTASH Respondent

Hearing: 5 February 2007

Appearances: Appellant in Person
G E Slevin for Respondent

Judgment: 7 February 2007

ORAL JUDGMENT OF CHISHOLM J

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[1] This appeal and cross-appeal arise from an order of the District Court pursuant to s129C of the Property Law Act 1952 requiring a stand of seven trees on the respondent's property at 23 Howard Street, Christchurch to be removed at the cost of the appellant (the applicant in the Court below). The appellant appeals against the requirement that he is to bear the cost of removing the trees and the respondent cross-appeals against the order for removal.

Background

[2] Mr Lageder, the appellant, purchased the property at 25 Howard Street in April 2004. Its rear boundary adjoins the property owned by the respondent, Dr Ostash. Seven pine trees, which were planted many years before Mr Lageder purchased his property, are located close to the boundary. They are over 20 metres high and some branches overhang Mr Lageder's property.

[3] For about 18 months the parties attempted to arrive at a solution in relation to the trees. Initially Dr Ostash was prepared to allow some of the trees to be removed and Mr Lageder was prepared to meet the cost of removal. Ultimately, however, negotiations foundered and Mr Lageder made application for the removal of the trees pursuant to s129C.

[4] Mr Lageder claims that the trees interfere with his enjoyment of his property in a number of respects: first, pine needles interfere with the gutter, stormwater and lawns; second, cones fall or are blown on to his property and constitute a danger; third, roots from the trees have uplifted the ground on his property; and, finally, during winter months there is substantial shading on his property because the trees block the sun for several hours each day.

[5] Although Mr Lageder represented himself in this Court, he was represented by counsel at the hearing in the District Court where he gave affidavit and oral evidence. His evidence was supported by evidence from Mr Stewart, a registered valuer, who had valued a back section that Mr Lageder intended to subdivide off his property. Affidavits supporting Mr Lageder's application were also sworn by three neighbours.

[6] Affidavit and oral evidence was given by Dr Ostash in opposition to the application. Ms Low, a registered valuer, also gave evidence in opposition. Her evidence was to the effect that Mr Lageder had purchased his property in 2004 at a discount, it being alleged that this reflected the existence of the trees.

[7] Having concluded that the requirements of s129C had been made out, Judge Crosbie ordered removal of the seven trees. He imposed six conditions: the removal was to be carried out by a qualified arborist acceptable to the respondent or, if his agreement was not forthcoming, the arborist was to be appointed by the Court; the costs of the removal were to be met by Mr Lageder; an indemnity was to be provided; Dr Ostash's property was to be cleared of all timber, stumps, or debris resulting from the removal of the trees; and the timber was to be delivered at Mr Lageder's cost to such place as Dr Ostash directed within a 20 kilometre radius of Christchurch. The Judge directed that each party was to bear his own costs.

This Appeal And Cross-Appeal

[8] While the appellant has raised relatively wide-ranging issues, I explained to him the constraints that I face in terms of delving into the Judge's factual findings. This is, of course, because Judge Crosbie had the advantage of seeing and hearing the witnesses who gave evidence. I must comply with the approach indicated by the Court of Appeal in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd & Anor* [1998] 3 NZLR 190.

[9] Once those constraints are taken into account, Mr Lageder's appeal essentially comes down to an appeal against the conditions. As I understand it, the conditions of primary concern to him are: that he is required to bear the costs of removal of the trees; the implications of having to remove the stumps; the requirement for him to contribute $750 for landscaping; and, finally, the requirement that he meet the cost of transporting the timber within 20 kilometres of Christchurch.

[10] Dr Ostash's cross-appeal relies on six grounds: first, Mr Lageder had no standing to bring the cross-appeal because Mr Lageder was not an "*occupier*" in terms of s129C(1); second, because Mr Lageder bought the property at a discount reflecting the presence of the trees and must have been aware of their effect on his property at the time of purchase, he could not satisfy the requirements of s129C(8)(b); third, it was not open to the Judge to find that the trees were a danger for the purposes of s129C(5) and (8)(a); fourth, the Judge erred by considering *future* effects of the trees; fifth, he also erred by considering the evidence of the neighbours; and, finally, the section does not permit an order where the applicant is seeking to increase the value of his land.

[11] It is logical to begin with Dr Ostash's cross-appeal and determine whether or not the order should have been made. If Dr Ostash's cross-appeal fails then Mr Lageder's appeal against the conditions will be considered.

Legislation

[12] Section 129C relevantly provides:

> ***"129C District Court may order removal or trimming of trees, or removal or alteration of structures injuriously affecting neighbour's land***
>
> *(1) For the purposes of this section,—*
>
> *occupier, in relation to any land to which this section applies, means a person who is entitled to occupy the land and who satisfies the Court that he is residing or intends within a reasonable time to reside in a building erected or to be erected on the land:*
>
> *…*
>
> *(3) The occupier of any land to which this section applies may at any time apply to a District Court for an order requiring the occupier of any other land (whether or not that land is land to which this section applies) to remove or trim any trees growing or standing on that other land, or to remove, repair, or alter any structure erected on that land.*
>
> *…*
>
> *(5) On any such application the Court may make such order as it thinks fit, if, having regard to all the circumstances of the case, and, where required, to the matters specified in subsection (6) of this section, the Court considers the order to be fair and reasonable, and to be necessary to remove or prevent, or to prevent the recurrence of—*
>
> > *(a) Any actual or potential danger to the applicant's life or health or property, or to the life or health of any person residing with the applicant; or*
> >
> > *(b) Any undue obstruction of a view than an occupier would otherwise be able to enjoy from the applicant's land or from any building used for residential purposes erected on that land; or*
> >
> > *(c) Any other undue interference with the reasonable enjoyment of the applicant's land for residential purposes:*
>
> *…*
>
> *(6) In any case where the applicant alleges that a tree is obstructing his view or is otherwise causing injury or loss to him the Court, in considering whether to make an order under this section, shall have regard to the following matters:*
>
> > *(a) The interests of the public in the maintenance of an aesthetically pleasing environment:*
> >
> > *(b) The desirability of protecting public reserves containing trees:*
> >
> > *(c) The value of the tree as a public amenity:*

(d) The historical, cultural, or scientific significance (if any) of the tree:

(e) The likely effect (if any) of the removal or trimming of the tree on ground stability, the water table, or run-off.

…

(8) The Court shall not make an order under this section unless it is satisfied—

(a) That the tree or structure is causing or is likely to cause loss of or injury or damage to the applicant's life or health or property, or the life or health of any other person residing with the applicant; or

(b) That the tree or structure is obstructing any view that an occupier of the applicant's land would otherwise be able to enjoy, or is otherwise causing injury or loss to the applicant by diminishing the value of the property or reducing the enjoyment of it for residential purposes—

and that the hardship that would be caused to the applicant or to any other person residing with the applicant by the refusal to make the order is greater than the hardship that would be caused to the defendant or to any other person by the making of the order.

…

(10) An order may be made under this section whether or not the wrong being caused by the tree or structure constitutes a legal nuisance, and whether or not it could be the subject of any proceedings otherwise than under this section.

(11) In determining whether or not to make an order under this section the Court shall have regard to the time when the applicant became the occupier of his land in relation to the time when the wrong commenced, but if the Court thinks fit, having regard to all the circumstances of the case, an order may be made notwithstanding that the applicant became the occupier of his land after the wrong commenced.

(12) Every order made under this section shall provide that the reasonable cost of carrying out any work necessary to give effect to the order shall be borne by the applicant for the order, unless the Court is satisfied, having regard to the conduct of the defendant, that it is just and equitable to require the defendant to pay the whole or any specified share of the cost of such work

…".

This is, of course, a comprehensive code.

Was Mr Lageder An Occupier?

[13] Mr Slevin's submission that Mr Lageder was not an occupier revolves around the subdivision of Mr Lageder's property. In his first affidavit Mr Lageder said he purchased the property with a view to subdividing off, and selling, the back section.

He intended to use the house at the front of the property as his home. It is clear from the evidence that the trees primarily affected the section to be subdivided off. However, in his second affidavit Mr Lageder deposed that while he had obtained subdivision consent, he did not see any point in proceeding with subdivision until the issue of the trees was resolved.

[14] Prior to the appeal hearing I admitted further evidence in the form of copies of new Certificates of Title that have now issued as a result of the subdivision. But, as Mr Lageder correctly pointed out, those titles were issued on 24 July 2006, which was after the District Court hearing on 25 May 2006. Judge Crosbie was required to determine the matter as at the time of hearing. He was aware that subdivision consent had been given. The subsequent issue of titles is irrelevant.

[15] That effectively puts an end to the submission that Mr Lageder was not an occupier in terms of the Act at the relevant time. There was ample evidence to support the Judge's finding that he was an occupier. In terms of the definition Mr Lageder was physically residing on the land and the fact that he and his wife spent some time at the Akaroa farm did not preclude the Judge from being satisfied in terms of the definition that they were residing at 25 Howard Street.

[16] The first ground of the cross-appeal fails.

Purchase At A Discount

[17] This ground of the cross-appeal was also carefully traversed by Mr Slevin. In essence his argument is this: Judge Crosbie found that Mr Lageder had purchased the property at a discount which reflected the existence of trees; therefore, unless subs 8(a) is available (and Mr Slevin submitted that it was not) Mr Lageder could not satisfy the subs (8)(b) requirement because no *"injury or loss … reducing the enjoyment"* of the property for residential purposes could be established; this is because the discounted purchase price had already reflected any reduction in enjoyment by virtue of the detrimental impact of the trees (there being no suggestion that there had been any significant growth of the trees between the time of the purchase and the date of hearing).

[18] In my view Mr Slevin's argument is flawed both factually and legally. There are three reasons.

[19] First, the Judge's finding that the property had been purchased at a discount *reflecting the existence of the trees* was not open on the evidence. It is clear from paragraph [55] of his decision that the Judge was basing his conclusion on the evidence of Ms Low. However, Ms Low expressly stated under cross-examination: *"I am not stating that it's because of the trees, the discount. I am stating that he got a discount, full stop."*

[20] Equally importantly, Ms Low did not see the condition of the home at the time Mr Lageder purchased it. By the time she inspected it had been renovated by Mr Lageder. Ms Low said in her affidavit:

> *"It is assumed that at the time of purchase, the house was in average original condition typical of a dwelling of this era".*

This assumption was, of course, fundamental to any suggestion that the purchase price reflected the presence of the trees rather than the condition of the house. There was uncontradicted evidence from Mr Lageder that when he purchased the house it was *"run down, mouldy, damp and full of rotten timber"* and that he found it to be even worse once he started renovations.

[21] There is therefore no evidence that any discount was attributable to the trees and Mr Slevin's proposition cannot get off the ground. In expressing that view I have not overlooked Mr Slevin's submission relating to the correspondence between the parties.

[22] Second, as Mr Slevin acknowledged, his argument becomes academic if subs (8)(a) applies. In my view there was ample evidence to support the Judge's view that subs 8(a) applied because the trees were causing ongoing damage to Mr Lageder's property. Mr Lageder's evidence in this respect was largely uncontradicted. Thus it was not essential for Mr Lageder to meet the requirements of subs (8)(b).

[23] Third, regardless of the first two reasons and even if Mr Lageder had purchased at a discount, the Court was entitled to be satisfied that the trees were causing injury or loss to the applicant because they reduced his enjoyment of his property for residential purposes. When determining whether there has been injury or loss by reduction in the enjoyment for residential purposes in terms of subs (8)(b) the comparison is between the situation that prevails as a result of the existence of the trees and the situation that would have prevailed if the trees were not there. To the extent that *Chinnery & Ors v Stewart* (District Court, Christchurch Registry, 22 June 1994) suggests a different approach, I decline to follow it.

[24] The second ground of cross-appeal fails.

Was It Open To The Judge To Find Danger?

[25] On the evidence it was open to the Judge to find that there was danger from falling cones and/or branches and for that reason this ground of cross-appeal cannot be sustained. In any event a finding of danger was not imperative to the outcome. A finding of undue interference in terms of subs (5) and injury or loss by reason of reduced enjoyment under subs (8)(b) was sufficient.

Did The Judge Err By Considering The Future Effect Of The Trees ?

[26] The Judge's reasoning is captured by paragraphs [61] to [64] of his decision:

> *"[61] While on one hand the applicant could be seen to be seeking an Order to better his position when he first purchased the property, (an approach that is inconsistent with the principles set out in Warbrick), the evidence as to ongoing damage, potential risk and danger, inconvenience and effects on the applicant's life and property was essentially unchallenged. I am satisfied that the totality of effects, as corroborated by the evidence of his neighbours, establishes that the trees are both causing, and likely to cause, damage to the applicant's life and property and that the situation is likely to worsen.*
>
> *[62] While I have some sympathy for the fact that all of the witnesses came to their properties with the trees in existence, the state of the trees is simply inconsistent with any care being taken with them, let alone care for the effects on neighbours.*
>
> *[63] While I have found that the applicant's purchase price reflected a discount for the effect of the trees, I am nonetheless satisfied that the trees in the future will continue to adversely affect the applicant's and neighbouring properties in the manner described by them. I am satisfied that the trees constitute actual or potential danger to the applicant's property.*

> *[64] I accept from the evidence of the applicant and his neighbours that the considerable shading from the trees, their unmanaged state and the effect of pine needles and pinecones interfere with the reasonable enjoyment of the property and neighbouring properties. These factors constitute undue interference with the reasonable enjoyment of the applicant's land. Indeed, the evidence of the respondent recognises the considerable effects that the trees have levied on his neighbours' properties. Little if any effort has been made to ameliorate such effects. I am satisfied that, although the purchase price of the property reflected the influence of the trees, the overbearing nature of the trees and their significant effects is likely to further diminish the value of the applicant's property."*

This ground of appeal focuses on paragraph [63].

[27] In my view the Judge was entitled to look at the likely future impact of the trees on Mr Lageder's property. But even if I am wrong in that view, it is clear that the Judge accepted that there were "*ongoing*" effects from the trees which, of course, refers to an existing situation. This ground of cross-appeal cannot succeed.

Did The Judge Err By Considering Evidence Of Neighbours?

[28] The Judge used the evidence of the neighbours to corroborate Mr Lageder's evidence: see paragraph [61]. He was entitled to do so.

Does Section 129C Permit An Order Where The Applicant Is Seeking To Increase The Value Of Land Affected?

[29] It would be more accurate to say that Mr Lageder was seeking an order to overcome the injurious effects of Dr Ostash's trees. In terms of s129C the Court was entitled to make an order if Mr Lageder could meet the threshold requirements of subss (5) and (8) and could satisfy the Court that it should exercise its discretion in favour of making an order after considering all relevant matters, including those referred to in subs (11). The fact that an order might have the effect of increasing the value of the applicant's land does not prevent an order being made.

[30] This means that the last ground of the cross-appeal fails. The cross-appeal is dismissed accordingly.

Mr Lageder's Appeal

[31] I have explained to Mr Lageder that s129C(12) requires the reasonable cost of carrying out any work relating to the removal of the trees is to be borne by him unless the Court is satisfied, having regard to the conduct of Dr Ostash, that it would be just and equitable to require Dr Ostash to pay the cost (in whole or in part). That direction has been laid down by Parliament and the Courts are obliged to apply it.

[32] Judge Crosbie considered Dr Ostash's conduct and decided that the presumption had not been displaced. In reaching that conclusion he took into account that the trees were clearly in existence at the time Mr Lageder purchased his property, that Dr Ostash's proposals to trim or remove some of the trees had been rejected, that Mr Lageder's approach, as the Judge saw it, was *"demanding and aggressive"* and, finally, that Dr Ostash had made conciliatory efforts to resolve the matter.

[33] Subject to what I am about to say, I have not been persuaded that there has been any error in the Judge's approach. Thus the order for Mr Lageder as applicant to bear the cost of removal must stand. There are, however, two points.

[34] First, condition (d) states:

> *"The removal of the trees is to include ensuring that the respondent's property is cleared of all and any timber, stumps or debris resulting from the removal of the trees"*

The reference to removal of stumps is capable of further debate between the parties and, given the history of the matter, I think that possibility should be removed.

[35] Section 129C only entitles the Court to make an order for the payment of *reasonable* costs of removal. Having read the evidence and having viewed the photographs of Dr Ostash's property, I do not believe that Mr Lageder could be reasonably required to bear the cost of removal of the stumps below ground level. This reflects: first, the obvious lack of maintenance by Dr Ostash of his property; second, potential complications that might arise if the roots are close to services; and, third, that it is virtually inevitable that Dr Ostash will receive some return for

the trees. If Dr Ostash wants to remove the stumps below ground level he can do so at his own expense. Consequently condition (d) is modified by inserting after the word "*stumps*" the words "*down to ground level*".

[36] When I raised the issue of whether stumps should be removed below ground level Mr Lageder questioned whether the level of the ground around the trees was actually ground level. To avoid any argument I record that when I speak of ground level, I am referring to the existing ground level as depicted in photograph 9 exhibited in Dr Ostash's affidavit of 16 January 2006. Both these parties have already had a considerable battle over this matter and I would be appalled to think that there would be any argument about what constitutes ground level.

[37] This gives rise to the other point. The orders made in the District Court did not include an order reserving leave to either party to apply further should the need arise. While I am certainly not encouraging any further application (the parties should move on) it seems to me that given the history of the matter it would be wise to include a reservation of leave to apply further. I include such reservation accordingly.

Outcome

[38] Subject to the addition of the words "*down to ground level*" after the word "*stumps*" in condition (d) and the reservation of leave to apply further, both the appeal and cross-appeal are dismissed. There will be no order as to costs.

Solicitors: Wynn Williams, Christchurch for Respondent

Copy to: Applicant