**IN THE HIGH COURT OF NEW ZEALAND**
**NEW PLYMOUTH REGISTRY**

**CIV 2005-443-000546**

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|---|---|
| BETWEEN | MICHAEL JOHN BROUWERS AND PATRICIA KAY BROUWERS<br>Plaintiffs |
| AND | BRIAN THOMAS STREET<br>Defendant |

Hearing: 3-7, 10-11 November 2008, 2-4 February, 30 March 2009

Appearances: C T Gudsell QC and S Herbert for Plaintiffs
S Hughes QC for Defendant

Judgment: 28 May 2009 at 2:30PM

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## (RESERVED) JUDGMENT OF ANDREWS J

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*This judgment is delivered by me on 28 May 2009 at 2:30 ~~am~~/pm pursuant to r 11.5 of the High Court Rules.*

.....
*Registrar / Deputy Registrar*

Solicitors: Law West, PO Box 309, New Plymouth (S Herbert)
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Counsel: C T Gudsell QC, PO Box 19085, Hamilton (Plaintiff)
S Hughes QC, PO Box 8213, New Plymouth 4620 (Defendant)

**Introduction - Overview**

[1] The NIWA[1] National Climate Summary for February 2004 described rainfall for that month as:

> Extremely wet, with devastating floods, in the central, south and west of the North Island.
>
> ...
>
> A total of 30 monthly historical rainfall records were swept aside in a number of regions during the exceptionally wet February that produced widespread flooding and extensive infrastructure damage. Rainfall was very much above average in the south and west of the North Island from Waikato to Wellington, ... It was a month of climate extremes.
>
> ...

[2] At New Plymouth airport, NIWA recorded rainfall of 398mm for February, 416% of normal, and the second-highest monthly rainfall since records began in 1863. Heavy rainfall was recorded on 1-3, 14-16, 17-18, and 28 February.

[3] At that time the plaintiffs, Mr and Mrs Brouwers, owned a property on Surrey Hill Road, inland from Oakura, Taranaki, on the northern flanks of the Kaitake Ranges. They were building a barn on the property, with storage areas on the ground floor and living accommodation above. This was almost completed by January 2004.

[4] At about 9pm on 28 February 2004 the bank at the south-east (rear) boundary of the property collapsed. In daylight a massive slip was revealed. The Brouwers' house was not safe to live in.

[5] The Brouwers have sued the defendant, Mr Street, from whom they bought the property, and who owns the adjoining property to the south. They claim that Mr Street is liable to them under the following causes of action:

a) Removal of support;

b) Negligence; and

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[1] National Institute of Water & Atmospheric Research

c) Breach of statutory duty.

[6] The Brouwers' allegations all relate to Mr Street's construction of a drainage system from a wetland or swamp area to the west of the Brouwers' property, which involved channels and a culvert under the accessway on the Brouwers' south-west boundary, then a flume constructed to take water down the bank on Mr Street's side of their south-east boundary, into an area of native bush on Mr Street's property.

[7] Mr and Mrs Brouwers allege that the drainage system (in particular the flume) failed to carry the water it was required to carry on 28 February 2004 and collapsed, discharging water directly onto the bank. They allege that the discharge eroded the bank, causing it to slip away, and take part of the Brouwers land with it.

[8] Mr Street denies liability under each of the three causes of action.

[9] Before considering the Brouwers' causes of action, it is necessary to set out the facts in more detail including, where necessary, the Court's findings as to factual matters in dispute.

**Facts**

*Evidence*

[10] Evidence for the plaintiffs was given by Mr Brouwers, with expert evidence given by Mr Chapman (Civil Engineer), Mr McKay (Civil Engineer, employed by an engineering consultancy firm owned as to 70% by the new Plymouth District Council and as to 30% by the South Taranaki District Council), Mr Browne (Geologist, specialising in ground water), and Mr Gifford (Valuer). Evidence for the defendant was given by Mr Street, with expert evidence given by Mr Barbarics (Geo-technical Engineer), and Mr Dyer (Consents Officer, Taranaki Regional Council, in 2004).

[11] An A3 bundle of aerial photographs, other photographs, and site plans, was provided to the Court. The photographs were dated from 1981 to 2008. Aerial photographs taken on 17 December 2003 were marked by the witnesses in relation

to “pre-slip” and “post-slip” matters. There were a number of photographs taken on 3 and 5 March 2004, showing the property and the slip.

[12] At the suggestion of counsel, I visited the area on Monday 2 February 2009. That visit was useful for general familiarisation and orientation, but there has obviously been considerable modification of the area in the five years since 2004.

[13] A “site plan” included in the A3 bundle, prepared by Mr McKay in April 2004, is useful for general orientation. A copy of that site plan is annexed as an Appendix to this judgment. I have added the notations “Kingsley” and “Kingsley Hill”. Otherwise, the notations are Mr McKay’s, not all of which were accepted by witnesses for the defence.

*Prior to the Brouwers’ purchase*

[14] In 1980 Mr Street’s parents purchased a 50-acre block of land on Surrey Hill Road. That block comprised the land depicted in the Appendix (identified as “298 Brouwers” and “296 Street”), together with the land to the south of that identified as “Kingsley”, in which the word “swamp” appears.

[15] Between 1981 and 1983 a pond was created on the Kingsley land in the area of an existing watercourse, more or less in the area described in the Appendix as “swamp”. This was constructed by digging out earth, and creating a dam using blue gum logs, which were placed along the southern edge of what is depicted in the Appendix as the “Street” property, more or less between the two points identified as “600 dia steel culvert” and “approximate position of original outlet of swamp”.

[16] In 1988 Mr Street and his friend Mr Kingsley purchased the property from Mr Street's parents. Mr Street was at that time a young man of 20, and spent much of the years from 1990 through to 1995 living elsewhere in the area, or overseas.

[17] In 1995 Mr Street and Mr Kingsley subdivided the property. Mr Street took the land to the north of the property (identified on the Appendix as the “Street” and

"Brouwers" properties), while Mr Kingsley took the land to the south of the property (the land identified as the "Kingsley" property on the Appendix).

[18] At that time, the pond drained through a combination of logs and earth, laid as a platform allowing water movement underneath, and over the top as a ford when there was heavy rain. There was no formed accessway between the Kingsley and Street properties, only a cattle track that extended for a short distance in a southerly direction from the south-eastern end of the pond.

[19] Mr Street then constructed an accessway on his property. The accessway left Surrey Hill Road at the point marked "296 Street" on the Appendix, followed the route of the cattle track and the boundary down across the areas marked "600 dia steel culvert" and "approximate position of original outlet of swamp", then curved around towards the east.

[20] This involved altering the drainage from the pond. Mr Street dug an open channel on either side of the accessway, so that water was channelled from the pond across the accessway into a further channel, then into a flume that conducted water down a bank ($34^{o}$) into native bush. The course of the channel and flume is shown on the Appendix. The position where the drainage system crosses the accessway is marked "600 dia steel culvert" on the Appendix.

[21] Mr Street said in evidence that the new channel/flume drainage system was at the same vertical elevation as the old drainage from the pond; that is, that there was no fall between the new and old drainage. He said that the trench he dug for the channel was deeper than the original drainage system. He also said that he altered the drainage because he had observed some slipping in the gully near the original log/earth platform, and because of his concern at water overtopping the ford. He also said that the alteration was to minimise stormwater runoff and erosion.

[22] Mr Street said that following the construction of the new channel/flume drainage, the depth of the pond was reduced by some 300 to 450 millimetres. With the build up of sediment from the catchment over the years, the pond became a wetland, or swamp.

[23] When constructing his accessway, Mr Street excavated the former cattle track alongside the pond down approximately 1.8 metres, lower than the base of the pond. In doing so he unearthed more blue gum logs on Mr Kingsley's side of the track, in front of the pond. These would appear to be the blue gum logs that had been used to dam the pond.

[24] The drainage constructed by Mr Street comprised, as noted above, open channels and a flume structure. The accessway crossing was by way of a culvert made out of large mill slabs, creating a square wooden box culvert.

[25] Mr Street described the flume construction as follows:

> I used materials to construct the flume tanalised poles H4 treatment 150 x 25 H3 boards, 100 x 50 tanalised H3 rails, new corrugated iron and assortment of galvanised nails and No. 8 wire. ... The tanalised posts were rammed into the bank they were of a length 1 metre long and rammed into the bank up to 500mm half the length of the post. The 100 x 50 rails were checked into the post and nailed with galvanised 4 inch nails to the post. The poles with the rails ran parallel down the bank approximately 500mm apart. This allowed a sheet of corrugated iron to cup and form a trough longitudinal to the poles to form the flume. ... The concrete formed an abutment between that end of the open trench and start of the flume. The concrete was poured at the end of the trench and over top of the iron at a maximum depth at the bottom of 2-3 inches smeared up the side of the bank, feathering out to nothing and approximately four wheelbarrows of concrete used in this matter.

This flume structure is referred to later in this judgment as "the February flume".

[26] In about 2003 Mr Street replaced the wooden box culvert with an 800mm diameter steel culvert pipe, which fed into the open drain leading to the flume. The accessway was metalled over the culvert. Mr McKay said in evidence, and noted on the Appendix, that the culvert was 600mm diameter, not 800mm. However, he did not measure it, and accepted Mr Street's evidence that the culvert pipe was 800mm diameter.

[27] Mr Street in his evidence said this was done "in 1999 to 2000". However, I accept Mr Brouwers' evidence that the culvert was replaced at a time that he identified as "when the barn was at least closed in, possibly February 2003".

[28] In 2000, Mr Street subdivided his land, so as to create the block later sold to the Brouwers. The section subdivided off is outlined in bold on the Appendix. Mr Street said that the reason for the line of the south-east boundary was so that the channel/flume drainage remained on his land.

[29] Mr Street said that approximately 12-18 months after the flume was erected, he observed a reasonably heavy storm. He noted some splashing in some areas down the length of the flume. At those points he raised the height of the sides of the flume with more corrugated iron and 150 x 25 mm boards, tensioning the tops of those together with No. 8 wire to stop any "bulging effect" happening. He also inspected the structure from time to time, particularly during times of heavy rainfall.

*The Brouwers' purchase and construction of barn*

[30] The Brouwers' purchase of the subdivided section settled on 14 December 2000. Mr Brouwers said in evidence that at the time of purchase he did not take much notice of the channel or flume as they were on Mr Street's land. He recalled the wooden boxed culvert and, as noted above, recalled when that was replaced. He noticed the logs in the bank on the Kingsley side of the accessway, although he referred to them as "telegraph poles".

[31] Mr Brouwers is a builder. He designed an Adobe (mud brick) barn, incorporating American Indian, Spanish, and North African influences, which he would build himself. He placed the barn close to the south-east and south-west boundaries, as shown on the Appendix. Because of this proximity he was required to obtain approval from neighbouring owners. When he sought approval from Mr Street, Mr Street expressed concern at the proximity, referring to the slip that had occurred earlier at the point of the original drainage from the pond. This was the first mention to Mr Brouwers of any slips in the area. Mr Brouwers inspected the area but was not concerned. Mr Street approved the siting of the barn.

[32] In September 2001, Mr Brouwers (with Mr Street's consent) removed a row of 20 to 30 pine trees from near the eastern boundary of his section, and planted natives on the hillside over which the south-east boundary crosses.

[33] In October 2001, Mr Brouwers started construction of the barn. Mr Brouwers described the barn as follows:

> The dwelling, I call it a barn, it was my workshop, it was 128 sq m on the base which was all workshop and one third of the upper level was open plan, two small bedrooms to the south for each one of our girls, the rest of it was open plan. Office, kitchen, dining, lounge combined. ... The area was going to be for us to live in while the house was being built then as guest accommodation for family and friends after the house was built.

[34] To create a flat building site, Mr Brouwers flattened a slight knoll near the northern boundary of the section and pushed the resulting material onto the building site.

[35] The barn incorporated a "pole house" construction. Mr Brouwers dug the holes for the foundation poles, going down two metres to solid clay. He struck water at 800 millimetres in the holes for the four poles at the rear (south-east boundary) side. He removed the water prior to pouring concrete for the foundation poles.

[36] Mr Brouwers also erected a water tank, pump shed and septic tank soak pit near to the south-east boundary. The siting of these is noted on the Appendix. The overflow from the water tank was directed over the hillside. Construction of the barn was almost completed by January 2004.

*28 February 2004*

[37] As Mr Browne said in evidence:

> ... persistent rainfall was a notable feature of the weeks and months prior to the slip occurring.

[38] There was no rainfall gauge at, or in the immediate vicinity of, the Street and Brouwers properties. The experts disagreed about the assessment of the rainfall on 28 February 2004 at those properties, and about whether it could be regarded as "exceptional". It was agreed that, being at a higher altitude, rainfall at Surrey Hill Road would have been greater than that recorded at New Plymouth airport (referred to at [2] above). For present purposes, it is sufficient to note Mr Browne's statement, above, and Mr Street's statement that:

> ... the weather in February of 2004 was more extreme than I have ever previously experienced it. It rained continuously for 24 days causing widespread flooding and erosion problems throughout Taranaki. The 28th of February was particularly bad.

[39] Mr Street inspected the flume at about 7pm on 28 February. He said in evidence:

> I found a water course that was flowing like I've never seen water before. There was so much rain the flume appeared to have been working sufficiently to handle that [but] it was at its maximum. ... I did venture down beside the flume and while doing that wanted to get the hell out of there straight away because the water under foot was soggy, the footing under ground was so muddy that with surface water running off it was hard to get a decent footing on that side of the bank. ... The water in the ground was loaded up with surface water and the amount it was still raining over top.

[40] Under cross-examination Mr Street said that when he inspected the flume at 7pm, the entire content of the water in the flume was contained within the flume – that is, there was no spillage onto the slope over the length of the flume, before its discharge point at the bottom of the gully.

[41] Mr Brouwers also said that it had rained heavily over the two days before 28 February, and was still raining that evening. He was at the barn with his two daughters, and at about 9pm he felt a "land movement tremor" which he described as a "a very sharp movement and a thud". Mr Brouwers went outside with a torch and found there had been a "considerable subsidence right behind the barn". He went back inside, got his daughters, and left the property.

[42] As noted earlier, Mr Browne is a Geologist specialising in ground water. He visited the Brouwers' property on 29 February 2004, out of personal interest. He did not take photographs or make notes at the time (he was not retained as witness for the Brouwers until August 2007). Mr Browne described what he saw as follows:

> I approached the site down the Brouwers driveway. I took a quick look at the slip from beside the Brouwers house. My first impression was the huge size of the slip. I then retraced my steps and went around the north-west side of the building and onto the Street driveway. I met Brian Street and we reviewed the situation together.
>
> Moving around various vantage points confirmed my first impression that the slip was very deep and a massive amount of earth had moved down into

> a valley. The scale was impressive. It was so close to the house, it was perched on the edge, it looked precarious. I wondered if the slip would go again.
>
> I was noting the key features of the immediate area. One was the nearby wetland. I recall immediately suggesting to Brian Street that he divert the watercourse, that is the stream which was still flowing out of culvert and channel below the wetland. I considered this to be a prudent step to avoid any exacerbation of the situation.
>
> We gave a wide birth to gaping tension cracks on the side of the driveway.
>
> We headed off down the Street driveway into the valley to find the toe of the slip. I recall climbing through a fence and looking for a place to traverse the slip.
>
> The debris extended a sign distance down the gully, say 100m or more below the slip scarp.
>
> The debris comprised deep, sloppy unconsolidated mud, vegetation and the remnants of the flume.

[43] Mr McKay visited the area on 10 March 2004, on instructions from New Plymouth District Council. He observed that the channels and culvert had accommodated the flow of water without overtopping. However, the flume had collapsed and was destroyed. Mr McKay saw flume materials (corrugated iron and trestles) at the "toe" of the slip.

[44] The slip was described as a "slip circle type" failure.[2] This occurs where a slope fails by rotating around a fixed point. The shape of the failure surface (the scarp of the slip) approximates an arc. As the failure surface extends to the base of the gully floor, it is a deep-seated failure.

*Aftermath*

[45] In the immediate aftermath of the events of 28 February, Mr Brouwers moved his family's personal effects from the barn. He was given some assistance by Mr and Mrs Street.

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[2] "Matters Agreed by Experts" 3 November 2008.

[46] Mr Brouwers also diverted the outlet for the overflow from the roof of the barn, away from the slip face and down Mr Street's accessway. That was all he could do at the time on his property.

[47] On 1 March 2004 Mr Street arranged for two diggers to realign the water channels, so that the outlet from the wetland was at the southern end of the wetland, away from the Brouwers' barn. A new 600mm steel culvert was constructed across the accessway at the southern end of the slip zone. Further, Mr Street constructed a replacement flume from the new culvert, leading downhill to the bottom of the gully. He described this as being "in many ways ... there for emergency purposes while remedials to the whole waterway" were undertaken. The replacement flume is referred to later in this judgment as "the September flume".

[48] Mr Brouwers had initially considered having remedial work done on his property, and had discussed the possibility with engineers. A New Plymouth District Council Building Inspector's report dated 30 August 2004 records that:

> ...
>
> 2. The reinstatement of the property land slip behind the new house is being engineered by Lux Fonseka of Tse Taranaki Limited and will be undertaken during the summer.
>
> ...
>
> I advised Michael [Brouwers] of the following requirements prior to issue of a [Code Compliance Certificate].
>
> 1. Engineer certification in writing confirming land stability to support the structure.
>
> 2. Reinstatement of potable water supply.

[49] Mr Brouwers obtained a quote for remedial work, dated 28 September 2004, which set out the prices for four options for construction of retaining walls, ranging from $41,634 to $82,362 (GST exclusive). However, Mr Brouwers said in evidence that he was then told that the cost could quadruple, depending on whether an appropriate footing could be found, or if further reinstatement was required as a result of further slippage during construction of the retaining wall.

[50] As the engineers would not give him a fixed price for remedial work, or guarantee the work, Mr Brouwers decided to sell. He put the property up for sale by tender and eventually sold it for $255,000, about a year after the slip. It is relevant to note that by this time Mr and Mrs Brouwers' marriage had irretrievably broken down.

[51] Mr Gifford gave evidence that the property's market value immediately prior to the slip was $450,000 and that its hypothetical value as at 31 January 2005, assuming the slip had not occurred, was $515,000 (in both cases, inclusive of GST, if any).

[52] The property was sold again in May 2007. Mr Gifford was uncertain as to the sale price, believing it to have been $415,000 or $455,000. By then, the land boundaries were configured differently.

*September 2004 event*

[53] On 13 September 2004 there was again very heavy rain in the area. There was an extremely heavy downpour early in the afternoon. Both Mr Brouwers and Mr Street observed the effect at their properties. Mr Brouwers took photographs and Mr Street made a video recording.

[54] The culverts installed in March could not handle the volume, and water backed up and overflowed to run down the Street accessway. The September flume "blew apart" (to use Mr Brouwers' words).

[55] Comparing the February and September events, Mr Street said that:

a) The February event was characterised by long periods of wet weather beforehand, whereas the September event was not;

b) In the February event the pond and wetland did not overflow onto the driveway, whereas in the September event they did;

c) The land contours had changed between February and September, so that the water went in different directions; and

d) He saw no water overflowing the sides of the flume in February, whereas he did see that in September.

[56] Mr Brouwers, who said that he "wasn't taking particular notice" of the weather in February 2004, agreed that the September event was "a short sharp event".

[57] Mr Browne agreed under cross-examination that the February and September events were differentiated by the duration of the rain leading up to them.

**First cause of action: Removal of support**

[58] This cause of action was pleaded at paragraphs 15-18 of Mr and Mrs Brouwers' statement of claim, as follows:

> 15. THE lands of the Plaintiffs and the Defendant were in their natural state.
>
> 16. THE Plaintiffs' Lands were supported by the Defendant's lands.
>
> 17. THE Defendant, by wrongfully altering and diverting the swamp outlet caused the water discharged from the outlet to remove from the Plaintiffs' lands its natural support.
>
> 18. BY reason of the Defendant's wrongful actions:
>
> 18.1 Part of the Plaintiffs' Lands gave way, subsided and slipped.
>
> 18.2 The Plaintiffs' right of enjoyment of the lands in its natural state was removed.
>
> 18.3 The Plaintiffs' Lands diminished in value by $295,000.00.

[59] Mr Street admitted that the Brouwers' land was supported by his land, but otherwise denied the allegations.

[60] In essence, the case for Mr and Mrs Brouwers was that their land was supported by Mr Street's land. They have a right to enjoy their own land, unaffected by any act done by Mr Street. They allege that Mr Street's actions in altering the

drainage from the pond, by way of the open channels and the February flume, caused the slip. They allege that Mr Street is responsible for the removal of support for their land, and is strictly liable to them for loss caused by that removal of support.

[61] In his submissions on behalf of Mr and Mrs Brouwers, Mr Gudsell cited the judgment of Cooke J in *Blewman v Wilkinson*[3] at 209:

> It has long been accepted that a landowner has a right to enjoy his own land in its natural state, unaffected by any act done by way of excavation on the adjacent or subjacent land. If and when an excavation which has interfered with the support of land by land causes damage by subsidence, the landowner for the time being has a right of action against the original excavator. Liability is strict in that negligence need not be proved. The leading New Zealand case is the Court of Appeal decision in *Byrne v Judd* (1908) 27 NZLR 1106. Recent recognitions of the principle in this Court are to be found in *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741, 760, and *Bowen v Paramount Builders Ltd* [1977] 1 NZLR 394, 425.

[62] In order to succeed on this cause of action, it is clear from that passage that Mr and Mrs Brouwers must prove, on the balance of probabilities, that:

a) Their land was in its "natural state";

b) Mr Street excavated on his land;

c) That excavation caused a loss of support for Mr and Mrs Brouwers' land; and

d) Mr and Mrs Brouwers suffered loss as a result of damage by subsidence.

[63] If these elements are proved, then liability is strict; that is, there is no need to prove negligence on the part of Mr Street. I therefore turn to consider those elements.

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[3] *Blewman v Wilkinson* [1979] 2 NZLR 208 (CA).

*Was the Brouwers' land in its "natural state"?*

[64] It is to be noted, first, that it is the *plaintiffs*' land that is required to be in its natural state. That is clear from Cooke J's judgment in *Blewman*, and from the opening words of the judgment of Richardson J in the same case, at 212:

> It is not necessary for the purposes of this case to review the historical development of the law in relation to the right which a landowner has to the support of his land. It is sufficient to record that *Byrne v Judd* (1908) 27 NZLR 1106 established that an owner of land has the right to have his land remain in its natural state, unaffected by any act done in the adjoining or subjacent land, and accordingly he has a right of action against a former owner of the neighbouring land whose excavating has caused his land to subside.

[65] As to what is meant by "natural state", Mr Gudsell referred to the judgment of Gault J in *Greenfield v Rodney County Council*[4] where the Judge said, at 9:

> The right to support is limited to land in its natural state in the sense that by development, construction of buildings and the like, the land owner cannot impose a greater obligation on his neighbour. It is taking that point to the absurd to suggest that the right is enjoyed only in respect of land in its virgin state, even if that could be identified. There is no suggestion in the evidence that the use and development of the plaintiffs' land in any way increased the likelihood of the slips …

[66] It can be taken from the passage just cited that the Court must be satisfied in this case that Mr and Mrs Brouwers did not do anything on their land that "in any way increased the likelihood of slips". In *Greenfield*, clearance and conversion of pasture land was held to be within the scope of "natural state". In this case, Mr and Mrs Brouwers carried out some earthworks, built the barn, removed trees, and constructed the water tank and septic tank on their land.

[67] In *Bognuda v Upton & Shearer Ltd*[5] Turner J said of buildings on land, at 760:

> The owner of *land* in its natural state has a *natural* right to enjoy his own *land*, unaffected by the acts of others in excavating adjoining land, which may deprive it of support. …

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4 *Greenfield v Rodney County Council* HC AK CP2762/88, 12 December 1990.

5 *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741.

> The owner of *buildings*, contrasted with land in its natural state, cannot, in the very nature of things have any *natural* right to their support, for they are not naturally on the land. This statement must of course be read subject to the qualification that if it can be shown, in the event of a subsidence, that the land would have subsided of its own weight without the buildings upon it, then the owner may include damage to his building as loss consequential upon his natural right to the enjoyment of his land in its undisturbed state, for such a matter should have been foreseen as probable damage by him who removed the support from the land. [Original emphasis.]

[68] Although Mr Street's amended statement of defence refers to "the Plaintiffs removal of trees and earthworks undertaken by the Plaintiffs", little attention was given in submissions to the requirement that Mr and Mrs Brouwers' land was in its "natural state". In her submissions on behalf of Mr Street, Ms Hughes focused on the question of "excavation".

[69] Mr Gudsell submitted that:

a) Mr Street's land supported (what is now) the Brouwers' land before the pine trees were planted, and thus the removal of the pine trees did not affect the land's natural state; and

b) The evidence was that any earthworks carried out by Mr Brouwers were limited to construction of the building platform, and "there was no evidence that this development had any effect on the slip".

[70] Mr Gudsell concluded his submissions on this point by submitting that "the plaintiffs' land satisfies Gault J's requirements as to 'natural state'".

[71] It can be accepted that the planting and removal of trees, and the flattening out of a building platform, did not take the Brouwers' land out of its "natural state". However, in the light of the judgment in *Bognuda*, there must be considerable doubt whether, following the construction of the barn, water tank, and septic tank on the property, the land was still in its natural state. Against that, if the construction of the barn, water tank, and septic tank took the land out of its natural state, it would be necessary to go on to consider whether the land would have subsided, in any event, had they not been there. That question was not addressed in submissions. However,

given the Court's finding on other elements of this cause of action, it is not necessary to make any finding on the point of "natural state".

*Did Mr Street excavate on his land?*

[72] Ms Hughes submitted that there was no excavation. Mr Gudsell submitted that there was.

[73] In his written submissions, Mr Gudsell submitted that for this cause of action the Court is required to "determine whether anything the defendant did on the neighbouring land caused the subsidence"[6]. Mr Gudsell further submitted that an excavation "is simply a positive act leading to the removal of support".

[74] In oral submissions, however, Mr Gudsell accepted that "excavation" is an essential element of the cause of action, and that the phrase "anything the defendant did" in *Greenfield* is a reference to excavation. That concession was appropriate; no New Zealand authority was cited (and the Court's own research has disclosed no authority) where a claim for removal of support by means other than excavation has been discussed or upheld. To the contrary, statements of the law in New Zealand cases refer to excavation.

[75] *The Shorter Oxford Dictionary* gives the meaning of "excavate" as:

> 1. Make hollow by removing material from inside; make a hollow or hollows in; remove material from (the ground) so as to make a hole.
> 2. Make (a hole, channel, etc.) by removing material.
> 3. Uncover or investigate by digging; unearth; make a systematic exploration of (an archaeological site) by this means.
> 4. Extract by digging.
> 5. Make an excavation; take part in an archaeological excavation.

"Excavation" is defined as "the action or an act or excavating".

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[6] A reference to *Greenfield*, at 6.

[76] In this case, it was accepted that Mr Street had dug the channels that conveyed water from the pond to the culvert, and from the pond to the flume. That action clearly falls within the meaning of "excavation". However, the expert witnesses agreed that:

> … over the top part of the slope, the pipe and channel were capable and in all probability coped with the flow during the storm event of 28 February 2004.[7]

Accordingly, there is no basis for a finding that the excavation of the channels caused the loss of support on the Brouwers' land.

[77] As to the flume, Ms Hughes submitted that, being a structure erected on the surface of the land, it patently was not an "excavation". Accordingly, she submitted, the necessary element of "excavation" was not made out. In response to that submission, Mr Gudsell submitted that it is flawed to say that the flume is not an "excavation". It is, he submitted, simply one part of the drainage system; the Court must look at the system as a whole, not whether the channels overflowed, the culvert overflowed, or the flume failed, in isolation.

[78] That submission would extend the concept of excavation beyond that accepted in the New Zealand authorities. No authority was given that would support a finding that such an extension of the concept is appropriate.

[79] Mr Gudsell further submitted that there had been an excavation in that the channels had been dug to form part of the system, facilitating movement of water down the flume structure, to erode the toe of the slope, leading to excavation of the toe by erosion.

[80] The proposition put forward by Mr Gudsell has some similarity to the fact situation in *Rouse v Gravel Works Ltd*.[8] In that case, the plaintiff owned a field that adjoined the defendant's property. The defendant excavated its property to extract gravel. Water filled the excavated hole, and a pond formed near the plaintiff's boundary. Over time the water, by erosion from the shore and by being blown against it by the wind, removed quantities of earth, sand, and gravel from the

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7 "Matters agreed by experts", 3 November 2008.

8 *Rouse v Gravel Works Ltd* [1940] 1 KB 489 (UK Court of Appeal).

plaintiff's field, depriving it to some extent of lateral support. On appeal, it was held that the plaintiff had no cause of action for removal of support.

[81] In *Blewman*, at 211, Cooke J summarised the Court's reasoning:

> In *Rouse's* case the excavation of the defendant's land had not directly deprived the farmer's field of support; it was the water which collected in the excavation from rain and percolation which caused erosion when blown by wind.

[82] When strict liability may ensue, it is not appropriate to extend the concept of excavation in the manner put forward by Mr Gudsell. I am not satisfied that there was, in this case, an excavation.

[83] Even if it were found that there was an excavation, a further difficulty arises for Mr and Mrs Brouwers, in that at the time such excavation was undertaken, Mr Street owned all the land. It was done prior to the subdivision and sale to Mr and Mrs Brouwers. This was the issue addressed by the Court of Appeal in *Blewman*, as noted by Cooke J at 209:

> The present appeal … raises the question whether the principle applies if the person excavating owned all the land at the date of the excavation but has since subdivided it. Can the owner for the time being of one of the lots in the subdivision sue the original excavator if the lot now subsides in consequence of the excavation?

[84] As expressed by Richardson J at 212-213:

> The question in issue in this appeal is whether the principle applies where, at the time the excavating owner carried out the work, all the land was in his ownership and the damage occurred only after he had subdivided the land and sold the section subsequently affected by the original excavating.

[85] The Court held that:

> … at any rate where it is manifest that sections in a subdivision have been created by excavation, the subdividing owner is not under a strict non-contractual duty to a subsequent owner of a section on which subsidence occurs because of the excavation; but that the principles of negligence will apply.[9]

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[9] At 212, per Cooke J.

[86] In this case, the channels, culvert, and flume were "manifest" when Mr and Mrs Brouwers bought the section created by Mr Street's subdivision. Thus (if it were held that there was an excavation) *Blewman* may be said to apply so that there should be no finding of strict liability for removal of support, and liability would fall to be considered under the law of negligence.

[87] When this was put to him, Mr Gudsell submitted that *Blewman* must be confined to its specific fact situation of an urban hillside subdivision created by excavation, which is "typical in this country and slips and other subsidences such commonplace hazards".[10] Mr Gudsell distinguished *Blewman* from *Greenfield*: the former was patently an excavated section, the latter, he submitted, was (like the present case) simply "a line drawn on a plan", where support for the land was apparent. He submitted that the refusal to hold that there was strict liability in *Blewman* was for "social policy" reasons – a concern at the social consequences of imposing strict liability.

[88] With respect, Mr Gudsell's submissions failed to deal with the essential point that at the time the excavation was done, it was confined solely within Mr Street's land. In *Greenfield* there was no suggestion that the road cuttings that slipped into the plaintiffs' property had been undertaken at a time when the land on which the road was created, and the land subsequently owned by the plaintiffs, were in single ownership.

[89] In their judgments, each of the members of the Court of Appeal in *Blewman* discussed relevant authorities, which included "urban" and other examples. It is not necessary to discuss the judgments in detail. It suffices to observe that rural New Zealand is as hilly and as prone to flooding and land slides as urban New Zealand.

[90] It would be inequitable to allow only negligence-based liability in urban subdivisions where there is excavation on land in single ownership, subsequently subdivided, while applying strict liability in a rural context. For the reasons set out above, the plaintiffs' first cause of action fails.

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[10] At 212, per Cooke J.

**Second cause of action: negligence**

[91] This cause of action was pleaded at paragraphs 23-27 of the statement of claim. Mr and Mrs Brouwers alleged that Mr Street owed them a duty not to do or permit to be done any action that would interfere with the natural support of their land, and that the slip was caused by negligence on the part of Mr Street.

[92] They set out the particulars of the alleged negligence at paragraph 25 as follows:

> 25.1 Altering and diverting the outlet of the swamp from the position it was previously.
>
> 25.2 Altering and diverting the outlet of the swamp without obtaining the prior approval or consent of the Taranaki Regional Council.
>
> 25.3 Failing to install a culvert under the Defendant's driveway of sufficient diameter to carry at all times discharge from the swamp.
>
> 25.4 Failing to construct the open drain running parallel to the Plaintiffs' Lands, in such a manner which would have prevented the Plaintiffs' Land and the Bank to become saturated by reason of overflow from the channel.
>
> 25.5 Designing and constructing the flume and trestles in a manner and with materials in which he knew or ought to have known that the flume and trestles would be insufficient and unfit to carry discharge from the swamp at all times.
>
> 25.6 Constructing a flume which they knew or ought to have known was unsafe and inadequate for the purpose of discharging water from the swamp outlet all times.
>
> 25.7 Failing to take any or any adequate precautions to ensure that in the event of the failure of the channel and the flume, discharge from the swamp would not saturate and scour the Bank providing support to the Plaintiffs' Lands.

[93] They also relied, as evidence of negligence, on the fact that the open channel and the flume caused the Bank to become saturated with water and scour, resulting in subsidence and the slip. They then alleged that they suffered damage and loss by reason of Mr Street's negligence.

[94] In his opening on behalf of Mr and Mrs Brouwers, Mr Gudsell summarised this cause of action as follows:

> The defendant owed the plaintiffs a duty of care not to do or permit to be done any action which would interfere with the natural support and enjoyment of the plaintiff's lands. This is admitted. The defendant's duty was to exercise reasonable care for the protection of the plaintiff's land when diverting water from the swamp and discharging water onto the defendant's bank. He is answerable in negligence. Here, the defendant was well aware of flooding/erosion problems in this locality. He breached his duty to avoid a slip in failing to exercise reasonable care in all the circumstances of this case. Loss resulted.

[95] In his amended statement of defence Mr Street admitted the alleged duty of care, but denied that the slip was occasioned by negligence and/or breach of duty on his part, or anyone on his behalf. Mr Street also denied having caused damage and loss.

[96] Ms Hughes submitted that even if the court were to find that the February flume failed, causing water to saturate and scour the bank, the failure of the flume was not caused by negligence on the part of Mr Street. This was because the construction of the flume met design standards, but could not reasonably be expected to handle the extreme storm event of 28 February 2004.

[97] It is appropriate to go through the issues raised in the particulars pleaded at paragraph 25 of the statement of claim, in turn. A preliminary issue, however, is determining what is the applicable standard of care.

*What standard of care applies?*

[98] Mr Gudsell commenced his submissions in relation to the second cause of action by referring to the judgment of the House of Lords in *Corporation of Greenock v Caledonian Rail Co*.[11] He submitted that that judgment was authority for imposing a "very high standard of care" in the present case where, he submitted, Mr Street had, by diverting a swamp outlet and constructing the February flume, interfered with a natural watercourse, creating a danger to the Brouwers' land.

[99] The factual situation considered in *Greenock* was that a stream (the West Burn) originally flowed from hilly ground to the south-west of the town of Greenock and entered the town at a park area in a little valley. There it was channelled through

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[11] *Corporation of Greenock v Caledonian Rail Co* [1917] AC 556.

a deep channel, well below a road on its north bank. The Corporation filled up the channel and replaced it with a culvert below the surface of the park which was then raised, by depositing material on top of the culvert, to above the surface of the road. A children's playground was built on the raised area.

[100] The Corporation also constructed works at the mouth of the culvert (a concrete paddling pond, a dam across the Burn, and pipes carrying overflow from reservoirs) which had the effect of seriously obstructing (by about one-half) the free flow of water. Following very heavy rain the culvert overflowed and the resulting flow of water caused the collapse of retaining walls owned by the railway company, and damage to buildings and their contents.

[101] Mr Gudsell referred to the judgment of Lord Finlay LC at 572:

> It is the duty of anyone who interferes with the course of a stream to see that the works he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. Such damage is not in the nature of a damnun fatale, but is the direct result of the obstruction of a natural watercourse by the defenders' works followed by heavy rain.

[102] Mr Gudsell also referred to the judgments in *Kerr v Earl of Orkney*[12] and *Tennent v Earl of Glasgow*.[13]

[103] Mr Gudsell did not refer to any case in which *Greenock* has been applied in New Zealand. The Court's own research reveals that it has been referred to *obiter* in the context of rivers and hydro-electric dams.[14] I have concluded that the factual circumstances in *Greenock* are not applicable to those in the present case.

[104] Further, there has been much development in the law of negligence since *Greenock*, in particular the judgment of the House of Lords in *Donoghue v Stephenson*[15]. The preferable course is to apply the conventional principles as to

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12 *Kerr v Earl of Orkney* (1857) 20 Dunl (Ct of Sess) 298.

13 *Tennent v Earl of Glasgow* (1864) 2 Macph (Ct of Sess) (HL).

14 See *Alexandra District Flood Action Society Inc & Anor v Otago Regional Council* Environment Court CHCH C102-05, 20 July 2005 (Judge Jackson, M Oliver and R Grigg) at [162].

15 *Donoghue v Stephenson* [1932] AC 562.

standard of care and breach of duty, and to apply a "reasonable person" standard, albeit noting: [16]

> Although the legal standard of care is that of the reasonable and prudent person, the degree of care needed to satisfy the standard is infinitely variable. Great care may be needed or only a little, but there are no 'high' or 'low' standards. Whether the standard of the reasonable person has been attained must be determined ultimately in the light of what is being done and in what particular circumstances it is being done.

[105] Applying the "reasonable person" test requires consideration of, first, whether the reasonable person would have foreseen a risk of injury to the plaintiff and secondly, whether the defendant took reasonable care. In the present case the focus was, appropriately, on the question whether Mr Street took reasonable care.

[106] It can be accepted that the "reasonable person" test has to be applied in the light of the particular circumstances of the present case, as noted by Mason J in *Wyong Shire Council v Shirt*:[17]

> In deciding whether there has been a breach of duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved the risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.

[107] It will be recalled that in this case the Brouwers, in their statement of claim, pleaded that Mr Street was negligent in:

> Failing to install a culvert under the Defendant's driveway of sufficient diameter to carry *at all times* discharge from the swamp. (Paragraph 25.3);
>
> Designing and constructing the flume and trestles in a manner and with materials in which he knew or ought to have known that the flume and trestles would be insufficient and unfit to carry discharge from the swamp *at all times*. (Paragraph 25.5);

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16 Todd et al *The Law of Torts in New Zealand* (4 ed 2005) at 7.2.01.

17 *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-48 (HCA).

> Constructing a flume which they knew or ought to have known was unsafe and inadequate for the purpose of discharging water from the swamp outlet *at all times*. (Paragraph 25.6).
>
> [Emphasis added]

[108] I do not accept that the standard of care to be applied in this case required that the culvert and flume be sufficient to carry discharge from the swamp *at all times*. To accept such a standard of care would be to impose absolute liability, not the law of negligence. Further, it would open up the possibility of a claim against any person who creates a water diversion (whether a private individual or local or regional authority) in the event of even small-scale flooding. A duty of such a potentially wide scope should be rejected, on policy grounds.

[109] However, it can be accepted that the standard of care to be applied must take into account that the channels, culvert and February flume were constructed to convey water in a high-rainfall area.

[110] I therefore turn to consider the pleaded particulars of negligence, bearing in mind that Mr and Mrs Brouwers are required to prove them on the balance of probabilities.

*"Altering and diverting the outlet of the swamp from the position it was previously"*

[111] The case for the Brouwers in respect of this allegation rested on the proposition that by moving the point at which the outlet from the (former) pond or (later) swamp crossed his driveway, Mr Street moved it *uphill*, thus raising the pore water pressure of the ground in the swamp area, immediately adjacent to the Brouwers' land, and in the bank that subsequently slipped.

[112] Mr Street accepted that he moved the point where the outlet crossed the driveway, but said that it was at the same vertical elevation and that the trench he dug for the channel was deeper then the original drainage system. He had then excavated the former cattle track to create his driveway.

[113] Ms Hughes submitted that there was no evidence that Mr Street's diversion of the outlet crossing caused an increase in pore water pressure. As she put it, if there were such an increase, why did the photographic evidence demonstrate a reduction in the water in the area (from a "pond" to a "swamp")?

[114] Mr McKay said in evidence that the effect of moving the outlet to the pond to a higher level would be to raise the level of the water, thus raising pore water pressure in the ground. However, in cross-examination he accepted that if the level of the pond were lowered, then pore water pressure would be reduced.

[115] Mr Browne said in evidence that water "on the surface" represents the water table. Thus if water is seen, it means that drainage is impeded. He accepted in cross-examination that drainage of the pond may add to its stability, but said because of the shallow depth of the pond, drainage would not have relieved pore water pressure to any significant extent.

[116] I accept Ms Hughes' submission that if the effect of Mr Street's diversion of the outlet had been to increase pore water pressure then that would have been reflected in more water being present in the area behind the outlet. In fact, the effect was the reverse: whereas there had been a "pond" prior to the diversion there was, by 2004, a "swamp". The effect of Mr Street's diversion was to decrease the amount of water behind the outlet.

[117] I am not, therefore, satisfied that Mr Street's altering or diverting the outlet of the swamp from the position it was previously increased pore water pressure in the area adjacent to the Brouwers' land, or the bank that subsequently slipped.

*"Altering and diverting the outlet of the swamp without obtaining the prior approval or consent of the Taranaki Regional Council"*

[118] Ms Hughes submitted that no evidence had been adduced on behalf of the Brouwers to support this pleading. Mr Dyer (Consents Officer for the Taranaki Regional Council at the relevant time) gave evidence that in his opinion a resource consent was not required for any alteration or diversion of the outlet of the swamp. That was supported by Mr McKay who, in cross-examination, was asked whether he

was suggesting that Mr Street needed a resource consent. His response was that his understanding was that a resource consent was not required.

[119] Accordingly, I am not satisfied that this particular of negligence has been proved.

*"Failing to install a culvert under the defendant's driveway of sufficient diameter to carry at all times discharge from the swamp"*

[120] It is noted, first, that the Court does not accept that the appropriate standard of care is that the culvert be sufficient to carry the discharge of water *at all times*.

[121] In any event, there was no evidence that the culvert had not carried the water required to pass through it on 28 February 2004. To the contrary, as noted earlier, the expert witnesses agreed that the culvert had "in all probability coped with" the flow of water.[18]

[122] In the circumstances, I am not satisfied that this allegation of negligence has been proved.

*"Failing to construct the open drain running parallel to the plaintiff's lands in such a manner which would have prevented the plaintiff's land and the bank to become saturated by reason of overflow from the channel"*

[123] The same comment applies to the channels on either side of the culvert. It was accepted by the expert witnesses that there was no evidence that the channels were inadequate to carry the flow of water, and they agreed that the channels had "in all probability coped" with the flow of water as had the culvert.

[124] Further, Mr Chapman accepted in cross-examination that photographs of the channels taken shortly after 28 February 2004 showed no distress to vegetation, indicating that they were of sufficient capacity for the flow of water. Mr McKay said, in his evidence in chief, that the channel had "taken the [water] flow quite easily" from the culvert.

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[18] "Matters Agreed by Experts" 3 November 2008.

[125] Accordingly, there is no basis on which the Court can find this particular to be proved.

*"Designing and constructing the flume and trestles in a manner and with materials in which he knew or ought to have known that the flume and trestles would be insufficient and unfit to carry discharge from the swamp at all times"*

[126] Again, it has to be noted that the standard to apply is not that the February flume be sufficient "at all times".

[127] Mr Street's description of his construction of the February flume has been set out at [25] above. Mr Brouwers described the flume construction as "shoddy" and "weak".

[128] Mr Gudsell submitted that the Court should find that the February flume was of shoddy construction, lacking engineering input. Then, Mr Gudsell submitted, the Court should start from the point that Mr Street admitted that the flume collapsed and that with that collapse, the outlet of the swamp discharged directly from the channel onto the bank. He submitted that (because of its shoddy construction and Mr Street's failure to maintain it) the flume failed first, and the resulting flow of water from the channel onto the bank caused the slip.

[129] The gravity of the risk posed by the presence of water was clear to Mr Street, Mr Gudsell submitted, because he had observed slippage in the past. Mr Street was, therefore, aware of the destructive power of water from the swamp. He had diverted the outlet from the swamp to avoid further damage to his own land and in so doing created a danger to Mr and Mrs Brouwers' land.

[130] Mr Gudsell submitted that it is no defence for Mr Street to say that he "took all pains which were thought necessary and sufficient" or that his construction "would have (or has) stood against all ordinary rains".

[131] Where Mr Gudsell submitted that it was "no defence" if the February flume met minimum standards, Ms Hughes submitted that to meet minimum standards was

a defence. Where Mr Gudsell submitted that there was a large body of evidence that the February flume was negligently constructed, Ms Hughes submitted that there was no such body of evidence.

[132] Further, Ms Hughes submitted that the effectiveness of the February flume was demonstrated by the passage of eight years and the storm events the flume would have dealt with, in that period of time. Further, she noted that Mr Brouwers had acknowledged in cross-examination that he had not expressed any concerns regarding the effectiveness of the flume, or its maintenance, to Mr Street.

[133] It was accepted by the expert witnesses called by Mr and Mrs Brouwers that there are many flumes in operation in the Taranaki region, made up of corrugated iron, wood, concrete, and the like. For example, Mr Chapman said in cross-examination:

> The majority of flumes are usually constructed from purpose-made materials for the job quite often a common form is corrugated half pipe which is bolted together to form a flume.

[134] Mr McKay responded to a question in cross-examination as follows:

> In your experience do you agree there are given the topography of Taranaki and the frequency of rain many flumes throughout Taranaki ? .... I don't know we use flumes to carry water from our roadside drains and they would be the flumes that I would be aware of but it wouldn't surprise me that farmers use them.

[135] In the evidence and submissions on behalf of Mr and Mrs Brouwers as to the construction of the February flume, much emphasis was placed on the September flume. This flume, constructed in March 2004, failed during the storm on 13 September 2004. It was submitted that the two flumes were of identical construction, and it could be inferred from the failure of the September flume that the February flume was of inadequate construction, and that the failure of the February flume resulted from its inadequate (that is, negligent) construction.

[136] However, Mr Street's evidence was that the September flume was not identical to the February flume. This was put to Mr McKay as follows:

> If there is evidence before the court or will be evidence before the court [in relation to the February flume] the [culvert] pipe was 800mm that the flume was supported on tanalised posts, was constructed of corrugated iron which was affixed to wooden structure with nails and #8 wire there's nothing that you would disagree with from what you did see ? .... that sounds about right
>
> The September flume had a 600ml pipe was created in an emergency situation to draw water away from the bank, sheets of iron werent fixed to the framing, and there was no concrete used in that flume ? ... yes
>
> Do you agree it would be a less robust structure than what I describe of the February flume ? .... yes
>
> We've heard evidence the February flume had a steeper gradient than the September flume do you accept the steeper the gradient the more readily water is evacuated ? .... yes
>
> Do you agree the bigger the circumference of the pipe the greater the quantity of water able to be accommodated ? .... yes
>
> There's two further regards would you accept the February flume was a better structure ? .... yes if how you describe it definitely yes

[137] I am not satisfied that the September flume was identical to the February flume, or that any inferences can be drawn from the failure of the September flume as to the construction of the February flume.

[138] I accept Ms Hughes' submission that the February flume met Taranaki Regional Council's minimum standards. That is clear from the evidence of Mr McKay, who is well familiar with the applicable standards.

[139] In re-examination Mr McKay was asked to comment on various New Zealand Standards (as to subdivisions and stormwater drainage). He responded to a question from Mr Gudsell, in relation to the design and construction of the February flume:

> Given the channel [and] the [flume] system [were] built before a house was to be put there probably we could accept that what was done was acceptable.

[140] That answer, in my judgment, supports Ms Hughes' submission that the February flume met Taranaki Regional Council's minimum standards. Those standards are as to the conveyance of water and must be taken to have been formulated against a background of knowledge as to the prevailing weather, topographical, and geological conditions.

[141] The appropriate standard against which to measure the construction of the February flume is the minimum standard set by the local Council. As the Supreme Court of Canada said in *Ryan v Victoria (City)*[19]:

> The weight to be accorded to statutory compliance in the overall assessment of reasonableness depends on the nature of the statute and the circumstances of the case. It should be determined whether the legislative standards are necessarily applicable to the facts of the case. Statutory compliance will have more relevance in "ordinary" cases -- i.e., cases clearly within the intended scope of the statute -- than in cases involving special or unusual circumstances.

This is an ordinary case of a drainage system created in compliance with council minimum standards. Only when "special circumstances" are present will the standard of care in negligence "extend beyond reasonable compliance with the … [minimum] standard".[20] There are no such special circumstances in this case, and so no justification for the creation of a different and inconsistent standard of care from that of the minimum standards. As Mr McKay agreed that the February flume did meet that standard, there is no basis on which I can concluded that it was negligently constructed.

[142] Accordingly, I do not find this particular of negligence proved.

*"Constructing a flume which they knew or ought to have known was unsafe and inadequate for the purpose of discharging water from the swamp outlet at all times"*

[143] It follows from my discussion of the previous particular that I accept that the construction of the February flume met Council's minimum standards. Accordingly, I do not find this particular of negligence proved.

*"Failing to take any or any adequate precautions to ensure that in the event of the failure of the channel and the flume, discharge from the swamp would not saturate and scour the bank providing support to the Plaintiffs' lands"*

[144] This particular follows from the previous particulars, as to the channels and the construction of the February flume. With respect to the channels, it will be

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19 *Ryan v Victoria (City)* [1999] 1 SCR 201 (SCC) at [39].

20 See *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA) at [61].

recalled that it was agreed by Mr Chapman and Mr McKay that there was no evidence that the channels failed or were otherwise inadequate to convey water from the swamp.

[145] With respect to the February flume, there was considerable dispute between the expert witnesses as to the "order of failures". Mr Chapman and Mr McKay contended that the flume had failed first, resulting in water being discharged directly onto the bank, causing it to be scoured (by the "sluicing" effect of the force of water hitting the bank) and then triggering the slip. Mr Barbarics contended that the flume failed at the same time as the bank. Mr Barbarics said there was no evidence of "sluicing". While Mr Chapman agreed that the photographs did not demonstrate sluicing, he responded to a question put to him in re-examination that evidence of sluicing would be hidden or eliminated by the subsequent slip.

[146] Having considered the evidence, I am unable to conclude, on the balance of probabilities, that the channels and February flume failed first, causing the bank to be scoured, resulting in subsidence and the slip. Accordingly, I cannot find this particular of negligence proved.

[147] At paragraph 26 of the statement of claim it was recorded that Mr and Mrs Brouwers would "further rely" upon the fact that the open channel and the February flume caused the bank to become saturated with water and scour, resulting in subsidence and the slip, as evidence of negligence. It will be evident that that allegation reflects the particular considered at [144] - [146]. Mr and Mrs Brouwers have not proved, on the balance of probabilities, that it was the open channel and flume that caused the bank to become saturated with water and scour, resulting in subsidence and the slip.

[148] I have not found any of the alleged particulars of negligence proved on the balance of probabilities. The consequence is that the second cause of action fails. A considerable amount of the evidence before the Court was devoted to possible causes of the slip, and whether rainfall during the month of February 2004 (and on 28 February in particular) was "exceptional". However, in the circumstances it is not necessary to make a finding on either matter.

**Third cause of action**

[149] The third cause of action is pleaded at paragraphs 28-30 of the statement of claim. It is alleged that the alteration and diversion of the outlet of the wetland was a "diversion of water" and in breach of s 14 of the Resource Management Act 1991. It is further alleged that, "by reason of" Mr Street's breach, Mr and Mrs Brouwers have suffered damage and loss, and are entitled to an award of damages.

[150] Section 14 of the Resource Management Act provides, as relevant:

> 14 **Restrictions relating to water**
>
> (1) No person may take, use, dam, or divert any -
>
> (a) water (other than open coastal water); ...
>
> ...
>
> unless the taking, use, damming, or diversion is allowed by subs (3)
>
> ...
>
> (3) A person is not prohibited by subs (1) from taking, using, damming, or diverting any water, heat, or energy if –
>
> (a) the taking, use, damming, or diversion is expressly allowed by a rule in a regional plan [and in any relevant proposed regional plan] or a resource consent; or
>
> ...

[151] Mr Gudsell submitted that it is "clear" that Mr Street had diverted water. He submitted that Mr Street's diversion was contrary to s 14, unless the diversion came within the exception created by s 14(3)(a). Accordingly, he submitted, the Court is required to determine whether the diversion was either:

a) Allowed by a rule in a regional plan or proposed regional plan; or

b) Allowed by a resource consent.

He submitted that in the present case the "diversion" was not allowed by a resource consent and not allowed by any rule in the applicable regional plan.

[152] Ms Hughes submitted that Mr McKay and Mr Dyer were agreed that there was no requirement to obtain Taranaki Regional Council consent for the construction of the flume. Mr Dyer said in his evidence in chief that the reason consent was not required was that at the time of the original alteration of the drainage from the pond (the "diversion" of water) in about 1996, it would have been in compliance with the General Authorisations of the then applicable Transitional Regional Plan. The Taranaki Regional Council's General Authorisation No. 50, applicable at the relevant time, was produced as an exhibit. That Authorisation (headed "Construction of New Drainage Channels and Associate Diversions") provided:

> That the diversion and discharge of natural water, associated with the drainage of land be authorised, subject to the following conditions:
>
> ...
>
> (e) The structures used to divert the flow shall be designed, constructed and installed in such a way as to minimise erosion; and
>
> ...

[153] In cross-examination Mr Dyer was challenged as to his evidence that the diversion came within the General Authorisation. In essence, his response was that if a structure was intended to minimise erosion then it came within the Authorisation. Mr Gudsell submitted that Mr Dyer's evidence was not credible and that the flume structure had not minimised erosion. He submitted that it had increased erosion significantly. Accordingly, he submitted, the flume structure was not expressly allowed by a rule in the applicable plan and was therefore in breach of s 14.

[154] As Mr Dyer was the consents officer for the Council at the time, his evidence is deserving of considerable weight. However, even if I were to find that the diversion was contrary to s 14, I would still be required to consider whether that breach would entitle Mr and Mrs Brouwers to common law damages.

[155] As to the availability of common law damages for breach of a statutory duty, in *X & Ors (Minors) v Bedforshire County Council*[21] Lord Browne-Wilkinson said at 731-732:

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[21] *X & Ors (Minors) v Bedfordshire County Council* [1995] 2 AC 633.

> Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being past for the benefit of those individuals but for the benefit of society in general. ... The cases where a private right of action for breach of statutory have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions.

[156] In relation to the Resource Management Act, Fogarty J said, in rejecting an argument for damages following a breach of provisions of the Act in *Mawhinney v Waitakere City Council*[22] at [46] – [49]:

> [46] ... I am quite satisfied that the comprehensive character of the processes and remedies within the RMA precludes the need for the Court to identify any additional remedy by way of common law damages. It is not necessary to go into detail. ...
>
> [47] There is no policy vacuum within which there is a need to identify a common law liability of damages. There can be such a vacuum where the Court judges that unless the liability for damages is recognised there might not be sufficient incentive for the statutory duty to be applied.
>
> [48] Another compelling consideration is that essentially the responsibility the RMA casts on territorial authorities to make plans and then act as consent authorities are duties coupled with discretions as to how the duties are to be discharged. ...
>
> [49] There is no tenable argument for a cause of action for breach of statutory duty available to the plaintiff.

[157] A similar approach was taken by the Court of Appeal in relation to a claim brought under the predecessor to the Resource Management Act, the Town & Country Planning Act 1953. In *Craig v East Coast Bays City Council*[23] Tompkins J held, at [105]:

> The appellant in his pleadings alleged not only negligence, but also breach of a statutory duty by the respondent. That contention was not pursued in the High Court or in this Court. Nor could it have succeeded.

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22 *Mawhinney v Waitakere City Council* [2007] NZRMA 173.

23 *Craig v East Coast Bays City Council* [1986] 1 NZLR 99.

[158] In both *Mawhinney v Waitakere City Council* and *Craig v East Coast Bays City Council* the proceeding was brought against a local authority. To that extent, those cases are distinguishable from the present case. However, the general principle still applies in the present case. The judgments in those cases are reasoned in general terms, and there is no suggestion in that reasoning that a different principle is to be applied if the defendant is not a local authority. Further, the detailed enforcement procedures in the Resource Management Act, in particular in relation to the powers granted to Councils and the Environment Court, indicate that Parliament did not intend common law remedies to apply in the event of a breach of the Resource Management Act.

[159] Accordingly, I find that this cause of action fails.

**Result**

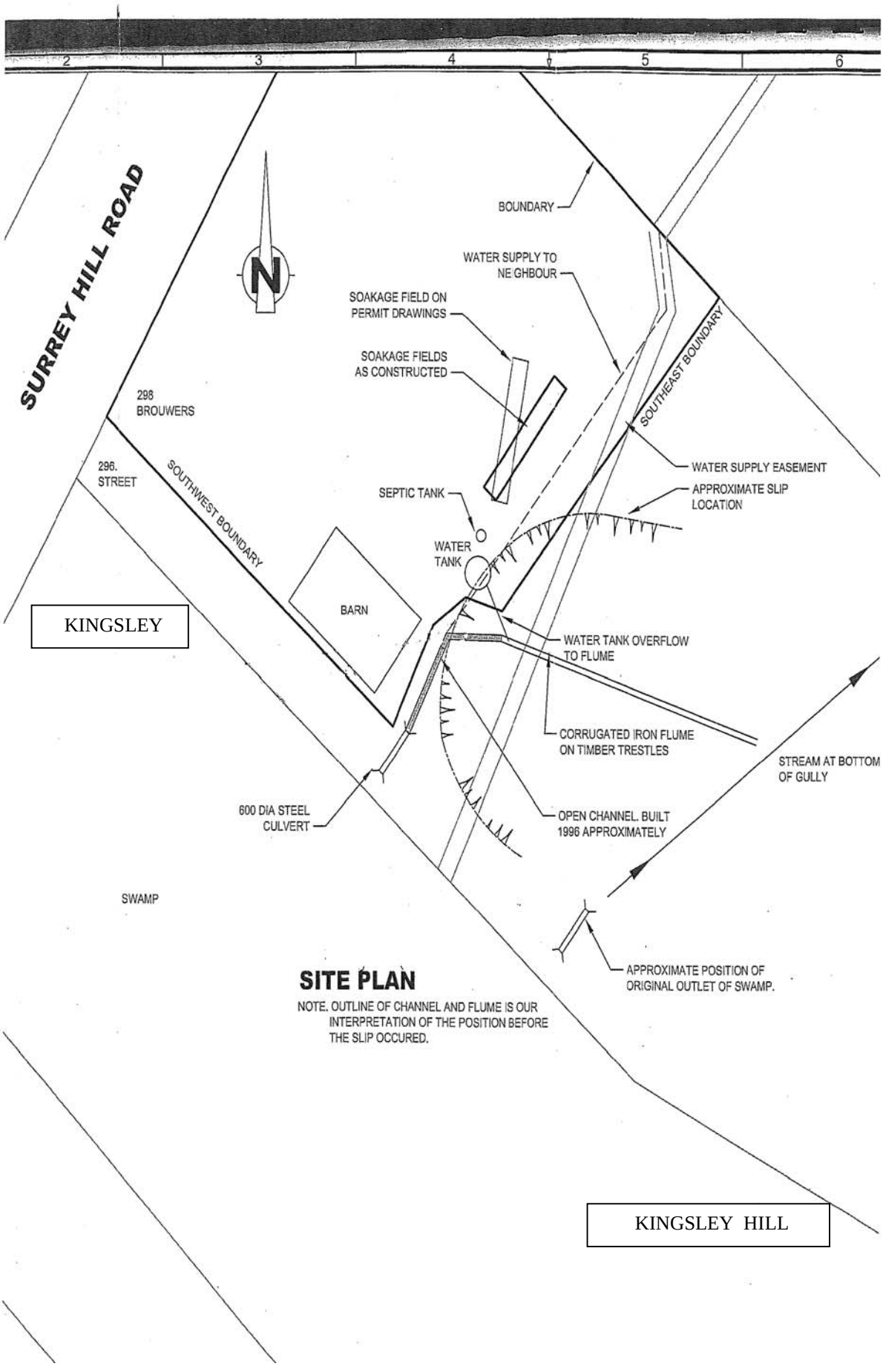
[160] I have found that Mr and Mrs Brouwers have not succeeded on any of the three causes of action pleaded against Mr Street. Accordingly, there will be judgment for Mr Street.

[161] Mr Street is entitled to costs on a 2B basis. If the parties are unable to agree as to costs then memoranda may be submitted, that for Mr Street within 21 days of the delivery of this judgment and that for Mr and Mrs Brouwers within a further 21 days. Counsel should indicate if a hearing is required, or if the matter may be dealt with on the papers.

_____

Andrews J

# APPENDIX


2
3
4
5
6
SURREY HILL ROAD
N
BOUNDARY
WATER SUPPLY TO NEIGHBOUR
SOAKAGE FIELD ON PERMIT DRAWINGS
SOAKAGE FIELDS AS CONSTRUCTED
298 BROUWERS
SOUTHEAST BOUNDARY
WATER SUPPLY EASEMENT
APPROXIMATE SLIP LOCATION
296. STREET
SOUTHWEST BOUNDARY
SEPTIC TANK
WATER TANK
BARN
KINGSLEY
WATER TANK OVERFLOW TO FLUME
CORRUGATED IRON FLUME ON TIMBER TRESTLES
STREAM AT BOTTOM OF GULLY
600 DIA STEEL CULVERT
OPEN CHANNEL. BUILT 1996 APPROXIMATELY
SWAMP
APPROXIMATE POSITION OF ORIGINAL OUTLET OF SWAMP.
SITE PLAN
NOTE. OUTLINE OF CHANNEL AND FLUME IS OUR INTERPRETATION OF THE POSITION BEFORE THE SLIP OCCURED.
KINGSLEY HILL