IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2008-027-000210

	BETWEEN	IGOR ALEXANDROVICH MIKITASOV Plaintiff
	AND	BERNARD JOHN COLLINS First Defendant
	AND	IMMIGRATION PARTNERS LIMITED Second Defendant

Hearing: 16-17 November 2009

Appearances: S D Henderson and J Browne for Plaintiff
No appearance for Defendants

Judgment: 27 November 2009 at 4:00 pm

RESERVED JUDGMENT (3) OF COURTNEY J

This judgment was delivered by Justice Courtney
on 27 November 2009 at pm 4:00 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date…….

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Introduction

[1] In 2004 Mr Mikitasov purchased a house at 28 Binnie Street, Paihia, from Mr Collins, the first defendant and the adjoining vacant section (Lot 2) from the second defendant, then called Pacific View Properties Limited (PVP). PVP also owned a section adjoining Lot 2 on which Mr Collins built a house for himself (Lot 3). Mr Mikitasov alleges that Mr Collins and/or PVP undertook substantial work associated with Lot 3 which did not have the requisite building consent and adversely affected Lot 2, namely:

a) Installing piping and gardens on Lot 2, which constituted a trespass;

b) Constructing a driveway on Lot 3 in a way that caused excessive amounts of rainwater to flow onto Lot 2, constituting a nuisance;

c) Installing a storm-water manhole and piping on Lot 2 without consent, constituting a breach of the contractual warranty in the agreement for sale and purchase of Lot 2;

d) Making plans available to Mr Mikitasov for his use in developing Lot 2, which wrongly showed the location of the manhole and piping as being on Lot 3 when they were, in fact, on Lot 2 this being negligent misrepresentation;

[2] In addition, Mr Mikitasov alleges that Mr Collins breached a warranty in the sale and purchase agreement relating to Lot 1 by failing to complete works connected with the swimming pool on that property, thereby causing the swimming pool overflow to drain onto both Lot 1 and Lot 2.

[3] Mr Collins did not appear at the trial and the matter proceeded by way of formal proof. Since the trial it has been confirmed that Mr Collins was adjudicated bankrupt on 11 November 2009. In my judgment 26 November 2009 I made an order under s 76(2) Insolvency Act 2006 allowing the proceeding to continue.

Trespass – garden and stormwater piping

[4] Sometime between late 2004, when Mr Mikitasov agreed to buy Lot 2, and 2006, when he moved to New Zealand, Mr Collins built his house on Lot 3 and undertook substantial landscaping around it. Piping was installed linking the stormwater drainage from his house to a manhole on Lot 2 (this manhole is the subject of a separate cause of action).

[5] A surveyor, Mr Donaldson, produced a plan showing that a substantial portion of the landscaping connected with Lot 3 and the stormwater pipes from Lot 3 to the manhole had been placed on Lot 2. Mr Mikitasov alleges that this placement (whether intentional or unintentional) amounted to a trespass. The tort of trespass is described in *The Law of Torts in New Zealand*[1] at p447:

> An unjustified direct interference with land in the possession of another is trespass and is actionable *per se* without proof of actual damage. The purpose of the tort is not simply to compensate for actual harm suffered; the action also serves to mark out and vindicate the right to citizens to be free from direct interference with their possession of land and to punish and deter wilful acts of interference.

[6] I accept that, on the state of the evidence, the garden encroached onto Lot 2 by about two metres. The stormwater pipes also clearly encroached, beyond the two metres of garden. I accept that the acts of placing the gardens and piping on Lot 2 constituted a trespass. I also find that Mr Collins was responsible for the placement of the garden and pipes and that his actions were authorised by PVP, as the owner of Lot 3.

[7] Mr Mikitasov claims, first, the cost of removing the garden and piping of $1,656, which I allow. Mr Mikitasov also claims the professional fees connected with investigating the trespass ($7,601.30). The position of the pipes and garden was discovered when Mr Mikitasov's contractor, Siteworx, was commencing work installing a retaining wall. Siteworx accidentally drilled through the pipes that were later identified as the stormwater pipes, which had been installed from the house on Lot 3 to the manhole on Lot 2. Siteworx had to cease work and investigate. I accept

[1] Todd et al (3rd ed 2001)

that Mr Mikitasov had no option but to cease work and investigate the placement of the pipes and these costs should also be allowed.

[8] Mr Mikitasov also claims the additional costs of construction of a retaining wall. He gave evidence that when pegging the line for a retaining wall on the boundary between Lots 2 and 3 the manhole was the only physical feature present on all plans. In addition, he and his contractor, Siteworx, assumed that the garden on Lot 3 ended at the boundary. As a result of the misapprehension as to the boundary caused by the position of the manhole and the garden, the retaining wall was pegged some two metres deeper into Lot 2 than it should have been. After locating the pipes the retaining wall was re-aligned to lie outside the pipes which increased the cost by $11,925 (GST inclusive). I accept that Mr Mikitasov's decision to re-align the retaining wall was necessary and allow this cost as well.

[9] Mr Mikitasov also claims the cost of a fence between Lot 2 and 3 to prevent further trespasses. However, although an understandable step, it is not a cost caused by the trespass in a legal sense.

[10] Mr Mikitasov seeks general damages of $10,000. I accept that there was a degree of stress and inconvenience but the situation was able to be rectified and did not interfere with day-to-day life. A modest award of $1,000 is appropriate.

Nuisance

[11] This cause of action concerns the substantial driveway located on Lot 3 which services both Lots 2 and 3. The cesspit located on the eastern side of the driveway collects very little of the water running down the driveway. As a result the ground on Lot 2 near the driveway became saturated by the rainwater flowing off the driveway. Mr Mikitasov constructed a drain on his land to catch the excess water and claims that cost.

[12] Although resource consent for the formation of the driveway was obtained by PVP as part of the subdivision there was no building consent obtained. The evidence was that, as a result of the gradient of the driveway, rainwater was likely to flow onto

Lot 2. I accept that the construction of a driveway in a manner that channels excessive water onto a neighbouring property may constitute a nuisance and did so in this case. The cost of creating a drain on Lot 2 of $9,877 is recoverable as the cost of remedying the nuisance.

[13] Mr Mikitasov also seeks general damages of $5,000. However, there is no evidence of any significant distress or inconvenience that would justify an award of general damages under this cause of action.

Breach of contract

[14] The third cause of action is breach by PVP of cl 6.2(5) of the sale and purchase agreement for Lot 2 under which PVP warranted that:

> (5) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
>
> (a) The required permit or consent was obtained; and
>
> (b) The works were completed in compliance with that permit or consent…

[15] Mr Mikitasov alleges three breaches of the warranty, namely installation of the manhole and piping (as an alternative to the claim in trespass), construction of the driveway (as an alternative to the claim in nuisance) and failure to provide a visible water pipe for connection.

Manhole and piping

[16] I have already referred to the construction of the retaining wall on Lot 2 and the discovery by Mr Mikitasov of a stormwater manhole and piping located on Lot 2. The evidence showed that when PVP obtained approval from the Far North District Council to subdivide the land that became Lots 2 and 3, the plans that were approved in August 2003 and August 2004 showed a stormwater system and manhole located on Lot 3.

[17] Siteworx, the contractor who built the retaining wall, had been engaged in 2003 by Mr Collins (for PVP) to install the stormwater system. Evidence was given by Mr McCaughan, a director of Siteworx, that Siteworx had no part in the placement of the manhole; when he arrived on site the position of the manhole had already been marked by pegs. Further, Mr Collins and his engineer were present on the site when the manhole was being installed and did not express any concern. However, in 2007 Mr Collins and PVP issued proceedings against Siteworx and against the engineer. Mr McCaughan says that for economic reasons the defendants settled the claim but stood by his evidence that he had installed the manhole where it had been pegged.

[18] Mr Mikitasov alleges that the placement of the manhole on Lot 2 was done without consent because the only approved position for the manhole and stormwater system was on Lot 3. I accept that this is the effect of the evidence and find that PVP was in breach of its warranty under cl 6.2(5) in allowing the stormwater system and manhole to remain on Lot 2 at the time of the sale to Mr Mikitasov.

[19] I have already noted that before commencing work on the retaining wall Mr Mikitasov and Siteworx pegged out the line of the retaining wall. They based this on the position of the stormwater manhole shown on the plans because this was the one physical feature present on all the plans that would indicate the position of the boundary. Siteworx actually discovered the wrong placement of the manhole and stormwater system when drilling holes for the posts of the retaining wall. It struck a stormwater pipe and it was the investigation into that pipe that led to the discovery that the stormwater system and manhole had been wrongly placed on Lot 2. The result, as already discussed, was that the retaining wall had to be re-aligned so as to lie outside the pipe and this was undertaken at an additional cost to Mr Mikitasov.

[20] It was not until some months later that Mr Mikitasov, having had his requests to Mr Collins to move the stormwater system and manhole ignored, undertook that work himself. He now claims for the costs of $20,841.30 connected with re-aligning the retaining wall and moving the manhole stormwater pipes. I allow these costs but

note that this claim is in the alternative to the costs claimed under the trespass cause of action.

Driveway

[21] Mr Mikitasov also seeks the cost of building a drain to catch excess water running off the driveway, which I have previously discussed in relation to the nuisance issue. However, cl 6.2(5) is limited to work done or caused or permitted to be done on the property which is the subject of the sale and purchase agreement. The driveway is, of course, located on Lot 3 and was not the subject of the sale and purchase agreement. This aspect of the claim, therefore, cannot succeed under a cause of action for breach of contract.

Water pipe

[22] The third aspect of alleged breach of contract relates to the water pipe supplying water to Lot 2. Under the resource consent for the subdivision Lot 2 was entitled to have a potable water connection. Mr Mikitasov has said that when he took possession of the property the water pipe had been buried and there was nothing visible to connect to. A plumber was required to locate the pipe and add a riser which would allow for a water connection. The modest amount of that cost was $431.80. I accept that the failure to provide a connection was a breach of the sale and purchase agreement and the cost of remedying it is recoverable.

Negligent misrepresentation

[23] Mr Mikitasov alleges negligent misrepresentation by Mr Collins in relation to plans supplied by him to Mr Mikitasov at the time of the sale which wrongly showed the stormwater manhole as being located on Lot 3.

[24] To the extent that the claim relates to the costs of re-aligning the retaining wall, it is an alternative cause of action to the claim for breach of contract and, in light of my earlier conclusion I do not need to consider it. However, Mr Mikitasov also seeks compensation for the loss of use of five square metres of land on Lot 2

because the platform created by the retaining wall was placed in a less than optimum position. The claim is calculated as being a percentage of the purchase price and the amount claimed is $3,885. However, there was no valuation evidence indicating any overall diminution in value as a result of the loss of use of this small piece of part of the land. I cannot find any loss which would support a claim for special damages on the calculation presented. Nor has there been any evidence that would support a claim for general damages.

Breach of contract – swimming pool

[25] This cause of action relates to the sale and purchase agreement for 28 Binnie St, the house adjoining Lot 2 which Mr Mikitasov purchased to live in. Clause 14 provided that:

> The vendor warrants to complete the heated swimming pool in a workmanlike manner prior to settlement as agreed with the purchaser.

[26] During late 2004-2005 Mr Collins completed the swimming pool on Lot 1, including drainage works that resulted in the overflow channelled to a cesspit on Lot 3. However, the drainage works did not have an associated easement to drain water on to Lot 3 and the water pipe was simply left lying on the surface of the ground. In 2007, against a background of disputes between the parties on various aspects of the properties, Mr Collins disconnected the overflow drain and left the pipe to drain on to the land surface at 28 Binnie Street and Lot 2.

[27] Mr Mikitasov spent $750 re-aligning the pool overflow drain and connecting it to the drain he had built to capture excess water running off the driveway. I accept that the state in which Mr Collins left the pool overflow drain was not good and workmanlike and Mr Mikitasov is entitled to recover the cost of rectifying that defect.

Result

[28] There will be judgment against the first defendant as follows:

a) On the trespass cause of action $21,182.30 special damages and $1,000 general damages;

b) On the claim for breach of contract in relation to 28 Binnie Street, special damages of $750.

[29] There will be judgment against the second defendant as follows:

a) On the trespass cause of action, special damages of $21,182.30 and $1,000 general damages;

b) On the nuisance cause of action, special damages of $9,877 and general damages of $1,000.

c) On the claim for breach of contract special damages of $20,841.30 (as an alternative to the judgment on trespass) and $431.80 (the water connection).

[30] Interest will run at the rate of 8.4% from the date of judgment.

[31] No issue as to costs arises; because this proceeding was determined together with the related, and more substantial proceeding, I have (at the plaintiff's suggestion) made a single award of costs in the related proceeding only.

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P Courtney J