Privy Council Appeal No. 34 of 1962

Charles Morgan – – – – – – – – *Appellant*

v.

Najlo A. Khyatt – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH MARCH 1964

Present at the Hearing:

VISCOUNT SIMONDS
LORD EVERSHED
LORD MORRIS OF BORTH-Y-GEST
LORD GUEST
LORD DONOVAN

[*Delivered by* LORD EVERSHED]

The appellant before their Lordships, Mr. Charles Morgan, was the defendant in an action brought against him in April 1960 by the respondent, Mrs. Najlo Angeline Khyatt. By her action the respondent claimed damages for the injury done to her property (namely a concrete wall and the stormwater and sewage drains thereon leading from her house) by the roots of 4 Pohutukawa trees upon the appellant's property; and an injunction to prevent the appellant from continuing the nuisance occasioned by his tree roots. The action was tried before the late Leicester J. who by his judgment awarded to the respondent £626 as damages and ordered that the appellant " within a period of 3 months from the date of this order . . . remove from upon and alongside the boundary of the two properties the Pohutukawa trees and that he remove from the land of the [Respondent] the roots of such trees or otherwise destroy or render them impotent ". The appellant appealed to the Court of Appeal of New Zealand but that Court on 7th May 1962 affirmed in all respects the judgment of Leicester J. and dismissed the appellant's appeal.

As appears from the form of the Order which has been cited the appellant and the respondent are in fact neighbours, being the owners and occupiers respectively of property known as 314 and 316 Oriental Parade at Wellington. The appellant acquired and has lived in his property since 1939 and the respondent became his neighbour in April 1955. It is unfortunately apparent that since the date last mentioned the relations between the appellant and respondent have been far from " neighbourly " as that word is commonly understood; for had things been otherwise it is very probable that with some sensible co-operation between them this unhappy litigation need never have taken place.

Before their Lordships Mr. Morgan conducted his case in person. He had taken great trouble in its preparation and put his argument to their Lordships with great clarity and courtesy. In substance his argument was a challenge to the relevant law adopted and applied by both Courts in New Zealand and also involved the submission that in fact when the respondent acquired her property in 1955 she was and must have been well aware that her drainage was already substantially damaged by the roots of his trees which were indeed naturally attracted by the damaged condition of the drains and the fluids therein.

As regards the law applicable in such a case as the present, their Lordships can feel no doubt that it was correctly applied by both Courts in New Zealand. It is sufficient therefore for present purposes to say that it has in their Lordships opinion long been established as a general proposition that an owner of land may make any natural use of it; but also (and by way of qualification of the general rule) that if an owner of land by growing or permitting the growth on his land in the natural way of trees whose roots penetrate into adjoining property and thereby cause and continue to cause damage to buildings upon that property, he is liable for the tort of nuisance to the owner of that adjoining property. It was found both by Leicester J. and by the Court of Appeal in New Zealand that such were the facts in the present case; that is to say, that the roots of Mr. Morgan's 4 Pohutukawa trees had penetrated into the adjoining property now owned by the respondent and to his knowledge had long been damaging the wall and drains therein and would (unless somehow prevented) inevitably and increasingly continue so to do.

It has long been the rule of their Lordships' Board (save in very special circumstances which do not arise in the present case) not to disturb concurrent findings of fact in two Courts and it must follow in accordance with this rule that Mr. Morgan's appeal cannot be sustained, but their Lordships must not be taken to be suggesting any reason for casting doubt upon any of the facts found in the present case.

It was pointed out by the late Cleary J. who delivered the judgment of the New Zealand Court of Appeal that in certain respects the respondent could not be (and was not by the trial judge) treated as an entirely truthful witness—a fact which, as Cleary J. observed, formed some justification for the " strictures made by the appellant " and which invites some degree of sympathy for the appellant. But Leicester J., after a most careful analysis of the evidence, came to the conclusions, in which the Appeal Court concurred,

(1) that the damage to the Respondent's drains had been done since her purchase of the property in 1955 and

(2) that the amount of £556 (part of the total sum of £626 awarded as damages) spent by the Respondent in repairs done to her drainage since the commencement of the action was properly so expended by her and therefore recoverable by her from the Appellant.

The balance (namely £70) of the total damages awarded was found by the trial judge to represent that part of the total damage done to the respondent's wall which had occurred since her purchase of her property; and in this finding the Court of Appeal also concurred.

It therefore follows according to the principles already stated that Mr. Morgan's appeal against the award of damages against him must fail. Their Lordships have also no doubt upon the same principles that there is no ground upon which the grant of a mandatory injunction for the removal of the trees can be assailed. Nevertheless their Lordships have felt some concern in regard to that part of Leicester J.'s order (quoted at the beginning of this judgment) that the appellant " remove from the land of the [Respondent] the roots of such trees or otherwise render them impotent ". Their Lordships confess to feeling some disquiet lest, having regard to the unhappily hostile relations plainly subsisting between the appellant and the respondent, strict compliance with the terms of this part of the order may further exacerbate the existing hostility and lead, it may be, to greater trouble. As their Lordships have understood the evidence, it should well be possible for the appellant, if he properly removes his 4 trees, to render further infiltration by their roots into the respondent's property practically impossible—or at least for the respondent to be enabled at negligible cost to herself to render impotent such roots as remain upon her land. Their Lordships express the hope that these two neighbours may now be capable in this regard of some degree of co-operation. In the circumstances (and in this hope) their Lordships would therefore vary the form of order made by Leicester J. by inserting therein immediately after the words " . . . the Pohutukawa trees and that " the brackets and words " (if required so to do by the Plaintiff within 6 months after the removal of the trees or of the last of them) ".

Subject to the variation of the order of Leicester J. which their Lordships have formulated in the hope of improving the future relations of the two parties to these proceedings, their Lordships will humbly advise Her Majesty that the appellant's appeal should be dismissed. The respondent's costs of the appeal must be paid by the appellant.

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In the Privy Council

CHARLES MORGAN

v.

NAJLO A. KHYATT

DELIVERED BY
LORD EVERSHED

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