

COURT OF APPEAL FOR ONTARIO

CITATION: Biskey v. Chatham-Kent (Municipality), 2012 ONCA 802

DATE: 20121121

DOCKET: C53321

Sharpe, Rouleau and Hoy JJ.A.

BETWEEN

Brian Paul Biskey and Rita Marie Biskey

Plaintiffs (Respondents)

and

The Corporation of the Municipality of Chatham-Kent, Benedykt Kaminski,
Grayna Kaminski, Peifer Realty Inc., carrying on business as Royal LePage
Peifer Realty and Ghassan Najjar

Defendants (Appellants)

Colin Stevenson and Daniel McConville, for the appellant the Corporation of the
Municipality of Chatham-Kent

Matthew Todd, for the respondents

Heard: October 30, 2012

On appeal from the judgment of Justice Steven Rogin of the Superior Court of
Justice, dated January 27, 2011, with reasons reported at 2011 ONSC 413.

By the Court:

FACTS

[1] The Biskays, plaintiffs in the action and respondents on the appeal, asserted a claim for damages arising from their purchase of a property formerly owned by the appellant municipality, Chatham-Kent. The property had been

previously used by Chatham-Kent and local residents as a dump. After declaring the property surplus and conducting an environmental site assessment in 2000 (the “Jagger Hims Report”), Chatham-Kent sold the property, zoned for agricultural use, to Mr. and Mrs. Kaminski for \$35,000 in early 2002. Ten months later, the Kaminskis re-sold the property to the respondents for \$80,000. The Biskeys purchased the property intending to build their “dream home”.

[2] Chatham-Kent disclosed the Jagger Hims Report to the Kaminskis but the Kaminskis did not disclose that report to the Biskeys and Chatham-Kent took no steps to bring the report to the attention of subsequent purchasers.

[3] When the Biskeys applied for a building permit in November 2003, their contractor discovered problematic soil conditions related to the prior use of the property as a dump. Before any construction was commenced and before Chatham-Kent issued a building permit in November 2004, the Biskeys were given the Jagger Hims Report. Through a freedom of information request, they obtained the Golder Report commissioned by Chatham-Kent in relation to the Biskeys’ application for a building permit. The Biskeys also commissioned and obtained their own engineering report, the Atkinson Davies Report, to support their application for a building permit. As we will explain below, these reports contained detailed information regarding the former use of the property as a dump and its suitability as a building site.

[4] In June 2004, before Chatham-Kent issued a building permit and before the Biskeys commenced construction, the Biskeys commenced this action. The Biskeys asserted a claim for \$350,000 in damages, against Chatham-Kent for negligence, nuisance, and negligent misrepresentation, as well as \$100,000 for aggravated, exemplary and punitive damages. The statement of claim was later amended, increasing the damages claim to \$2 million and adding two more causes of action including breach of contract and breach of the *Environmental Protection Act*, R.S.O. 1990, c. E-19. The claim for damages was based on the cost of assessing the environmental condition of the property, the cost of clean-up, the increased costs the Biskeys would incur related to the construction of their home and the cost of diminution in the value of the property reflected by the “stigma” attributable to the prior use as a dump.

[5] In September 2004, after the statement of claim was issued, the Kaminskis offered to re-purchase the property from the Biskeys for \$80,000, equal to what the Biskeys had paid. The Biskeys refused that offer and decided instead to keep the property and proceed with construction.

[6] The building permit issued by Chatham-Kent in November 2004 required the Biskeys to comply with the reports of their own engineers, Atkinson Davies.

[7] In October 2007, after the house had been constructed, Biskeys settled their claim against the real estate agent and agency that had acted on the purchase from the Kaminskis for \$100,000.

TRIAL JUDGMENT

[8] The trial judge rejected the Biskeys' evidence that, prior to the commencement of construction, in the course of discussion about the building permit, a Chatham-Kent official had undertaken on behalf of Chatham-Kent to cover any additional construction costs incurred by the Biskeys on account of the state of the site.

[9] However, the trial judge held that Chatham-Kent was liable to the appellants in negligence and awarded damages in the amount of \$386,142.82, plus prejudgment interest and costs. The damages award was based on the trial judge's assessment of \$188,459.82 for the additional cost of construction faced by the Biskeys on account of the condition of the property, \$64,249.00 in additional costs the Biskeys would face to deal with environmentally related costs, \$8,434.00 in miscellaneous costs related to the additional delay caused by the condition of the property and \$225,000 for diminishment in the value of the property attributable to the "stigma" due to its prior use as a dump, less the \$100,000 the Biskeys had already recovered in their settlement with the real estate agent.

ISSUES

[10] Chatham-Kent raises three grounds of appeal. It argues that:

1. the trial judge erred in finding that Chatham-Kent owed the Biskeys a duty of care;

2. the trial judge erred in finding that Chatham-Kent breached that duty of care; and
3. the trial judge erred in finding that the losses claimed by the Biskeys were attributable to or caused by the negligence of the appellant.

ANALYSIS

[11] In the light of our conclusion with regard to the damages issue, we find it unnecessary to deal with the first two issues. However, for the sake of clarity, we make the following observations with respect to the issue of duty of care. The precise basis upon which the trial judge found a duty of care is unclear to us. It appears to rest, in part, on the proposition that in its capacity as owner and vendor, Chatham-Kent owed a duty to the Biskeys as subsequent purchasers and in part upon the Chatham-Kent's responsibilities in relation to building permits. As the appeal can readily be disposed of on the third ground, we make no comment on the trial judge's conclusion as to a duty of care and nothing in these reasons are intended to affirm the finding that Chatham-Kent owed the Biskeys a duty of care in negligence.

[12] We now turn to the damages issue.

[13] It is clear from the trial record that before the Biskeys commenced construction, they knew that the property they had purchased had formerly been used as a dump and that, as a consequence, they were bound to encounter additional construction costs, that other environmental issues, including methane

gas, could involve costs in the future, and that the value of the property with a constructed dwelling would be diminished from what it would otherwise have been because of the “stigma” attached to the prior use of the property as a dump.

[14] Information regarding the property was disclosed to the Biskeys in the Jagger Hims, Golder, and Atkinson Davies Reports as well as from the preliminary work done by their contractor. Any doubt as to what the Biskeys knew is removed by the Biskeys affirmative response to Chatham-Kent’s request to admit prior to trial and by the assertions they made in the statement of claim long before the commencement of construction.

[15] The Biskeys admitted before trial that prior to the issuance of the building permit and prior to the commencement of construction in November 2004, they knew:

- The Jagger Hims Report showed that the site had been frequently used as a waste disposal site and: that there “was potential for environmental concerns relating to historical waste disposal, uncontrolled dumping, the presence of fill materials of unknown composition and origin”; that the waste fill materials ranged to a depth of at least 1.2 m below grade and that the fill consisted of construction debris including concrete fragments; and

that there was some indication that waste fill material might also occur at greater depths;

- The Golder Report indicated that boreholes drilled in the fill area of the site showed organic material, sand and gravel, pieces of concrete, trace gravel, pieces of metal wire, clay tile cloth and concrete. That report also revealed “combustible gas readings” indicating the presence of combustible gas in the subsoil. The report concluded that the considerable quantities of fill and organic material “made these materials unacceptable as a suitable founding medium, for supportive conventional building foundations”;
- The Atkinson Davies Report revealed fill and organic soils to a depth of 3.3 m, that there were fragments of wood, concrete, asphalt and other construction debris, and that due to the potential for large ongoing settlement all fill and organic soils had to be removed from the planned building location to a depth of 3.3 m and that a specially engineered pad would be required. That report also advised the respondents that there was a potential for the generation of methane gas from the

film and organic soils and that soil gas abatement measures should be provided in accordance with the Ontario Building Code.

[16] Further indication of the Biskeys' awareness of the significant added costs they were bound to incur is provided by the action they launched several months prior to commencing construction, claiming a total of \$450,000 in damages. The statement of claim reveals that the Biskeys were fully aware that if they were to proceed with the construction of a home on this site, in addition to added construction costs, there would be a diminution in the value the property would otherwise have because of the "stigma" affect attributable to the prior use of the property as a dump.

[17] As we have noted, several months before the Biskeys embarked upon the construction of their home, the Kaminskis offered to take the property back and refund the entire purchase price. Mr. Biskey testified that at that point, he estimated his damages to be approximately \$25,000.

[18] We agree with Chatham-Kent's submission that the trial judge erred in law by awarding damages for additional costs related to the condition of the site, added construction costs and diminution in value attributable to the "stigma" effect.

[19] We fail to see how, prior to construction, the Biskeys could claim more from Chatham-Kent than the diminution in value of the property attributable to its

former use as a dump, in other words the difference between the price the Biskey's paid for the property and the value the property actually had given its history and condition. The Biskeys had the opportunity to satisfy substantially that claim when, before construction commenced, the Kaminskis offered to take the property back for the price the Biskeys had paid. The \$100,000 subsequently recovered in the settlement with the other defendants more than covered the Biskeys remaining claim for the \$25,000 in damages sustained to that point.

[20] When the Biskeys decided to reject the Kaminski offer and to proceed with construction in the knowledge that they were building on a dump site and that they would incur added costs, any causal link with the alleged negligence of Chatham-Kent was broken. Simply put, from that point forward, the Biskeys were on their own. They had no legally enforceable right to require Chatham-Kent to reimburse them for the risk they decided to run in constructing a home on the site they knew to be contaminated on account of its former use as a dump.

[21] We fail to see how the negligence of Chatham-Kent, as found by the trial judge, could possibly give rise to the equivalent of a promise or contract-like duty to provide the Biskeys with the full cost and value of their dream home on this site as if it had never been used as a dump.

[22] The Biskeys point to passages in the trial judgment where the trial judge appears to find that before construction commenced, the Biskeys reasonably believed that the added costs would be in the range of \$30,000 to 40,000. In our

view, that finding is simply impossible to reconcile with the information disclosed in various reports and with the claim the Biskeys themselves were advancing for \$450,000 against Chatham-Kent before construction commenced.

DISPOSTION

[23] Accordingly, we allow Chatham-Kent's appeal, set aside the trial judgment and dismiss the action. Chatham-Kent is entitled to its costs of the appeal fixed at the agreed amount of \$15,000 inclusive of disbursements and taxes. Chatham-Kent is also entitled to its costs of the trial. As agreed by the parties, we use the trial judge's costs award in favour of the Biskeys as a guide and with a modest adjustment to reflect the fact that Chatham-Kent was defending the action, we fix the those costs at \$150,000 inclusive of disbursements and taxes.

"Robert J. Sharpe J.A."

"Paul Rouleau J.A."

"Alexandra Hoy J.A."

Released: November 21, 2012