COURT OF APPEAL FOR ONTARIO

CITATION: Huang v. Fraser Hillary's Limited, 2018 ONCA 527
DATE: 20180608
DOCKET: C63576 and C63592

Hourigan, Benotto and Fairburn JJ.A.

BETWEEN

Eddy Huang

Plaintiff

(Appellant/Respondent)

and

Fraser Hillary's Limited and David Hillary

Defendants

(Respondents/Appellant)

Michael S. Hebert and Cheryl Gerhardt McLuckie, for the appellant/respondent, Eddy Huang

Jonathan O'Hara and Michael Rankin, for the appellant/respondent, Fraser Hillary's Limited

Christopher Reil and Jeremy Rubenstein, for the respondent, David Hillary

Heard: May 2, 2018

On appeal from the judgment of Justice Pierre E. Roger of the Superior Court of Justice, dated March 6, 2017, with reasons reported at 2017 ONSC 1500.

Hourigan J.A.:

Introduction

[1] There are two appeals from the judgment of the trial judge following an eight-day trial. The primary issue for determination at trial was liability for the remediation of the environmental contamination of real property owned by Eddie Huang.

[2] The trial judge held Fraser Hillary's Limited ("Fraser") liable in nuisance and pursuant to s. 99 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the "*EPA*"). He awarded over $1.8 million in damages for the remediation of Mr. Huang's properties. The action against David Hillary was dismissed.

[3] On appeal, Fraser submits that the trial judge erred in finding it liable, both in nuisance and under the *EPA,* for the remediation costs. Mr. Huang also appeals. His primary submissions are that the trial judge erred in failing to find Fraser negligent, in failing to find Mr. Hillary liable in nuisance or in negligence, and in his assessment of damages.

[4] For the reasons that follow, I would dismiss both appeals.

Facts

[5] Fraser owns 1235 Bank Street in Ottawa. It is a commercial property and Fraser has operated a dry cleaning business there since 1960. Mr. Hillary is the president and sole director of Fraser. He is also the owner of 36 Cameron Avenue, a residential property that abuts 1235 Bank Street.

[6] Mr. Huang is the owner of 1255 and 1263 Bank Street. 1235, 1255, and 1263 Bank Street are adjacent to one another, in that order. 36 Cameron Avenue does not abut any of Mr. Huang's lands.

[7] Fraser does not dispute that during the period 1960 to 1974, solvents used in its dry cleaning operations spilled onto the ground. Tetrachloroethylene ("PCE") and trichloroethylene ("TCE") were ingredients in the dry cleaning solution that Fraser used during this time. The environmental danger caused by these chemicals was unknown at that time. In 1974, Fraser purchased new dry cleaning equipment, which along with new practices significantly reduced the amount of PCE and TCE used. It also virtually eliminated the potential for spills.

[8] Mr. Hillary purchased 36 Cameron Avenue in 1986. He was unaware of any contamination at that property or at 1235 Bank Street at the time.

[9] In 2002, Mr. Huang entered into a 20-year lease with Tim Horton's for 1263 Bank Street. There is also a long-term lease in place on 1255 Bank Street that expires in 2024. Despite the existence of these long-term leases, Mr. Huang wanted to develop his properties. In 2002, he approached his bank about arranging financing for the project. As part of the financing process, a Phase I environmental report was obtained. That report concluded that the properties were likely contaminated.

[10] A Phase II environmental report of Mr. Huang's properties confirmed that the soil and groundwater have a concentration of TCE that exceeds the Ministry of the Environment and Climate Change ("MOE") standards. Fraser's dry cleaning operations at 1235 Bank Street are the source of the contamination. The report recommended that the contaminated soil be removed, with remediation to be done at Fraser's property. Failing remediation of Fraser's property, the report called for a barrier system to be installed along the common property boundary. The report also recommended remediation of the groundwater.

[11] It is common ground that the dry cleaning solvents have created a source zone that contains free phase (undissolved) PCE. The source zone is located on parts of 1235 Bank Street, 36 Cameron Avenue, and 1255 Bank Street. When groundwater flows through the source zone it spreads the contaminant particles. The general direction of the groundwater is southeast from 1235 Bank Street and 36 Cameron Avenue toward Mr. Huang's properties and onward to the Rideau River.

[12] In January 2003, Mr. Huang put Fraser on notice about the contamination of his properties. Fraser retained an engineering firm that prepared a remedial action plan in February 2004, but it was not immediately implemented.

[13] The MOE began communicating with Fraser in 2006. There followed various interactions between the MOE and Fraser over the next seven years. By 2013, the

MOE concluded that it was not receiving significant communications from Fraser and that its remedial efforts to date did not appear to have had a significant impact on the contamination. Consequently, the MOE issued a Provincial Officer's Order on April 15, 2013, which required Fraser to retain a qualified person and submit a detailed work plan to remediate the contamination.

[14] A further Provincial Officer's Order was issued on July 23, 2014. That order provided that by August 31, 2015, Fraser was to produce a report addressing the interpretation of soil vapour monitoring results, interpretation of groundwater and soil monitoring results, and identification of the proposed measures for ongoing assessment and remediation. Fraser did not comply with that order and the MOE initiated enforcement proceedings against Fraser under the *EPA*.

Issues

[15] These appeals raise the following issues:

1. Did the trial judge err in finding Fraser liable in nuisance?
2. Did the trial judge err in not finding Mr. Hillary liable in nuisance?
3. Did the trial judge err in finding Fraser liable under s. 99 of the *EPA*?
4. Did the trial judge err in not finding Fraser and/or Mr. Hillary negligent?
5. Did the trial judge err in not finding Fraser liable in trespass?
6. Did the trial judge err in his assessment of damages?

Analysis

(1) Nuisance - Fraser

[16] Fraser makes a very narrow point on this ground of appeal. Its argument is that the trial judge erred in law by failing to consider whether the environmental damage was reasonably foreseeable as part of his nuisance analysis. The trial judge found Fraser liable in nuisance, having rejected Fraser's arguments that (1) Mr. Huang had not established either physical damage to his property or interference with the enjoyment of his land, and (2) any interference with the use of Mr. Huang's land was not unreasonable in the circumstances: see paras. 118-43.

[17] According to Fraser, foreseeability of harm is a constituent element of the tort of nuisance. Counsel for Fraser concedes two things in oral argument: (a) he did not ask the trial judge to find that reasonable foreseeability is an element of nuisance; and (b) there is no authority binding on this court that supports that proposition. He relies instead on statements made in Canadian tort texts that foreseeability is required. Specifically, he cites Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 10th ed. (Markham: LexisNexis Canada, 2015) at p. 638; Lewis N. Klar and Cameron S.G. Jefferies, *Tort Law*, 6th ed. (Toronto: Thomson Reuters, 2017) at pp. 755, 876; and Philip H. Osborne, *The Law of Torts*, 5th ed. (Toronto: Irwin Law, 2015) at p. 416.

[18] I note that where the texts rely on judicial authorities, they cite cases from England and New Zealand in support of their contention regarding foreseeability. Reasonable foreseeability of harm has been accepted as part of British law in respect of nuisance and in the *Rylands v. Fletcher* context: *Cambridge Water Company v. Eastern Counties Leather plc*, [1994] 2 A.C. 264 (H.L.); *Transco plc v. Stockport Metropolitan Borough Council*, [2003] UKHL 61, [2004] 1 All E.R. 589; and *Northumbrian Water Ltd. v. Sir Robert McAlpine Ltd.*, [2014] EWCA Civ 685. The *Northumbrian Water* decision may go so far as to require foreseeability of the escape itself: Maria Hook, Reasonable Foreseeability of Harm as an Element of Nuisance (2016), 47 VUWLR 267 at p. 269.

[19] There has been mixed acceptance of the reasonable foreseeability requirement in this country.[1] In *Smith v. Inco*, 2011 ONCA 628, 107 O.R. (3d) 321 this court declined to decide whether foreseeability is a requirement under *Rylands v. Fletcher*. The court did observe, at paras. 109 and 110, that while to require foreseeability of the escape itself would be to merge the rule in *Rylands v. Fletcher* with liability in negligence, compelling reasons exist to require foreseeability of damage as a necessary element.

---

[1] There is some Superior Court jurisprudence in this province that has held or suggested that foreseeability is an element of the tort of nuisance: see for example, *Durling v. Sunrise Propane Energy Group Inc.*, 2013 ONSC 5830, 315 O.A.C. 246; *Sorbam Investments Ltd. v Litwack*, 2017 ONSC 706, 276 A.C.W.S. (3d) 852 (appeal dismissed on unrelated grounds: 2017 ONCA 850, 288 A.C.W.S. (3d) 677). The reach of these cases is arguably limited to their specific circumstances, and in any event they are not binding on this court.

[20] In *Windsor v. Canadian Pacific Railway Ltd.*, 2014 ABCA 108, 371 D.L.R. (4th) 339, the Alberta Court of Appeal followed the *Inco* decision in upholding the decision of the case management judge to dismiss a class proceeding claim under the doctrine in *Rylands v. Fletcher* because the element of foreseeability could not be established. Like the present appeal, TCE had been used in accordance with best practices at the time. The court noted, at para. 21, that the appellant's evidence that it was not foreseeable that the migration of TCE would cause harm to neighboring lands was uncontradicted on the record. Yet, without discussing whether foreseeability was a necessary element of the nuisance claim, the court permitted certain of the class claimants to pursue their nuisance claims.

[21] The Supreme Court of Canada recently considered the elements of private nuisance in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594. Justice Cromwell, writing for the unanimous court, answered that question as follows, at para. 18: "[A] nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable." The court characterized this as a two-part test. Nowhere in its analysis did the court indicate that foreseeability is part of the tort.

[22] While I acknowledge the divergence in British law and the fact that the law may be evolving in this country, in the absence of any binding Canadian authority I conclude that foreseeability is not a necessary part of the tort of nuisance in Canada.

[23] I also fail to see the policy imperative for importing this additional requirement into our test for nuisance. The tort is a useful tool in the prosecution of environmental claims and is consistent with the Supreme Court of Canada's espousal of the principle that the polluter must pay: see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 80. The addition of a foreseeability requirement blurs the distinction between negligence and nuisance. If we were to accept Fraser's submission, the utility of the tort would be compromised. I would therefore reject this ground of appeal.

(2) Nuisance - David Hillary

[24] At the outset of the analysis of the potential personal liability of Mr. Hillary, it is important to recognize that he was sued only in his capacity as the owner of 36 Cameron Avenue and not as an officer or director of Fraser. The fact that he holds those positions is of no relevance to this case as pleaded. It is also important to note that 36 Cameron Avenue is enveloped by 1235 Bank Street and does not abut Mr. Huang's properties.

[25] The theory of Mr. Huang's case against Mr. Hillary is that Mr. Hillary is liable in nuisance for the contamination emanating from 36 Cameron Avenue, even though that contamination does not travel directly from 36 Cameron Avenue to Mr. Huang's properties. In other words, Mr. Huang's position is that Mr. Hillary should be liable in nuisance by reason of the fact that he is an up-gradient polluter.

[26] The trial judge noted that the claim against Mr. Hillary was based on his inaction since becoming aware that 36 Cameron Avenue was within the source zone. He found that Mr. Hillary became aware of this fact in 2007. The trial judge concluded that there was no evidence that the need for remediation at Mr. Huang's properties had become any worse since 2007. In addition, the trial judge found that there was nothing Mr. Hillary could have done at 36 Cameron Avenue that would change the fact that Mr. Huang's properties continue to be contaminated by PCE and TCE originating from Fraser's property. In these circumstances, he dismissed the nuisance claim against Mr. Hillary on the ground that Mr. Huang had not established that any inaction on Mr. Hillary's part caused any substantial interference with Mr. Huang's properties: see paras. 144-55.

[27] Mr. Huang submits that the trial judge erred in his analysis. He argues that he has met the test for nuisance, as he has suffered an interference with his use and enjoyment of his land that is both substantial and unreasonable. In his submission, the tort is one of strict liability and Mr. Hillary as a polluter of his land must be held liable.

[28] I would not give effect to this ground of appeal. The trial judge's finding that 36 Cameron Avenue is not the source of the contaminant is entitled to deference. In my view, there was no error in the trial judge's conclusion that causation had not been established and that Mr. Hillary did not subject Mr. Huang to an unreasonable

interference with his use and enjoyment of his properties. Accordingly, I would deny this ground of appeal.

(3) Section 99 of the *EPA*

[29] Fraser's submission is that the trial judge erred because he retrospectively applied Part X of the *EPA*. That part of the legislation deals with liability and other obligations as a consequence of spills. Fraser notes that Part X was not proclaimed into force until 1985. Because the spills on its property ceased in 1974, Fraser submits that the *EPA* can have no application. I would not give effect to this ground of appeal.

[30] The relevant sections of the *EPA* to consider in analyzing this submission are as follows:

> 93(1) The owner of a pollutant and the person having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect shall forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.
>
> * * *
>
> 99(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,
>
> (a) for loss or damage incurred as a direct result of,
>
> (i) the spill of a pollutant that causes or is likely to cause an adverse effect,

> (ii) the exercise of any authority under subsection 100(1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or
>
> (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;
>
> (b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,
>
> from the owner of the pollutant and the person having control of the pollutant.

[31] In my view, the trial judge did not retrospectively apply the *EPA*. Time does not freeze in 1974 for the purposes of liability under s. 99(2). Accepting for the purposes of this argument that the spills ceased in that year, there was an ongoing obligation under s. 93 of the *EPA* to remediate the damage. That remediation has not been done. Therefore, there is liability under s. 99(2)(a)(i) and (ii) because Fraser has not fulfilled a duty imposed on it under Part X of the *EPA*. In short, while the spills may have occurred before Part X of the *EPA* was enacted, Fraser's obligations under that part of the legislation are ongoing.

[32] Fraser relies upon this court's decision in *McCann v. Environmental Compensation Corp.*, 1990 CarswellOnt 213 (C.A.) in support of its submission that spills that occurred prior to 1985 cannot be the subject of a claim under Part X of the *EPA*. In my view, the circumstances of *McCann* are distinguishable from the case at bar. In *McCann*, the issue for the court was whether fresh evidence should be admitted in order to assert a claim against a compensation fund for

allergic reactions resulting from a spill. In the court's short endorsement, there is no reference to an ongoing obligation to remedy a spill by the polluter as is present in the current case. That ongoing obligation renders this case distinguishable from *McCann*.

(4) Negligence

[33] With respect to negligence, the trial judge found that Fraser and Mr. Hillary did not breach the standard of care until 2013: see paras. 165 and 168. This was a finding of mixed fact and law available to him on the evidence. I cannot identify any palpable and overriding error in the trial judge's analysis and thus it is owed deference by this court.

[34] The trial judge then reviewed the evidence regarding the contamination of Mr. Huang's properties. He concluded that there had been no appreciable increase in contamination since 2013: see paras. 168-69. This was also a factual finding open to him on the evidence and there is no basis for appellate interference.

[35] The trial judge concluded that causation had not been established given that there had been no increase in contamination during the relevant time that would have any impact on the requirement for remediation or its associated costs. This conclusion flowed logically from his findings regarding the date of the breach and the absence of increased damage. I would not disturb his conclusion.

(5) Trespass

[36] In his factum, Mr. Huang submits that the trial judge erred in not finding Fraser liable in trespass. Mr. Huang's counsel did not vigorously press this argument in his oral submissions. In any event, I would not give effect to this ground of appeal.

[37] The trial judge correctly identified that a direct physical intrusion onto Mr. Huang's properties was required in order to establish a trespass. He found that the intrusion was not direct because the contaminant entered into the ground at 1235 Bank Street, filtered down and was then carried to Mr. Huang's properties in the groundwater: see paras. 49-56. This was a finding of mixed fact and law open to the trial judge.

(6) Damages Assessment

[38] Mr. Huang's experts, David Reynolds and Brian Byerley, provided the court with eight different remediation strategies for the purposes of assessing damages. Neither Fraser nor Mr. Hillary filed any expert evidence on damages.

[39] Generally, the scenarios presented by Mr. Byerley were far more costly than the estimates provided by Dr. Reynolds. The trial judge preferred the scenarios of Dr. Reynolds. He noted that Dr. Reynolds had superior qualifications and testified in a fair and impartial manner that should be a model for all expert witnesses: see paras. 194-95.

[40] The trial judge considered all of the remediation strategies and rejected those that called for the remediation of all of the surrounding properties. He found that those strategies were impractical because they would rely on Fraser to remediate its property and would also require remediation of properties belonging to non-parties to the litigation: see paras. 177-79.

[41] The trial judge also rejected Mr. Huang's preferred strategies that called for excavation of contaminated soil during the redevelopment process. He was not satisfied that the redevelopment could begin before the expiry of the last lease in 2024. In his view, these strategies would overcompensate Mr. Huang, as they were not discounted for time. The trial judge also expressed concerns regarding whether the proposed underground parking structure would occupy the entire site: see para. 191.

[42] The remediation strategies that most appealed to the trial judge were the ones that involved isolating Mr. Huang's properties. He found that these were the most likely to place Mr. Huang in the position he would have been in had the contamination not occurred. The trial judge selected remediation strategy GS-2 proposed by Dr. Reynolds. Its cost was $1.21 million and it called for the installation of a ZVI barrier, ZVI injections, bioremediation of the down gradient plume on Mr. Huang's lands, and on-going monitoring. It required eight to ten years to fully implement, which was consistent with Dr. Reynolds' evidence that a longer remediation timeframe is appropriate where there is no immediate health and

safety threat. The trial judge found that there was no evidence that this strategy would interfere with the redevelopment of the properties: see paras. 180, 187-92.

[43] In costing the GS-2 strategy, Dr. Reynolds assumed that Mr. Huang's properties would retain their commercial zoning. He therefore used a commercial standard of remediation, which is less expensive than a residential standard. The trial judge concluded that there should be an adjustment because the evidence was that the properties' highest and best use would be a commercial and residential mix. He increased the cost of the GS-2 strategy by $222,500 to reflect a residential standard. In addition, he added a $200,000 contingency for the repair or replacement of the barrier, and $201,726.71 for the costs already expended on experts and engineers. The final amount awarded was $1,834,226.71: see paras. 196-209.

[44] Mr. Huang submits that the trial judge erred in his damages assessment because he chose a remediation strategy and then adjusted it without an evidentiary basis. According to Mr. Huang, this resulted in the trial judge accepting a remediation strategy that was not advanced at trial.

[45] Trial judges are owed considerable deference in their assessment of damages. Appellate interference with a damages award is limited to situations "where the trial judge made an error in principle, misapprehended the evidence, failed to consider relevant factors, considered irrelevant factors, made an award

without any evidentiary foundation, or otherwise made a wholly erroneous assessment of damages": *TMS Lighting Ltd. v. KJS Transport Inc.*, 2014 ONCA 1, 314 O.A.C. 133, at para. 60.

[46] In the case at bar, the trial judge carefully considered the evidence and determined what he felt was the appropriate figure for damages. He was entitled to reject the damages scenarios that he felt were unsuitable in the circumstances.

[47] This was not a case where the trial judge assessed damages without regard to the evidence at trial or based on a misapprehension of the evidence. His assessment was grounded in Dr. Reynolds' testimony and the trial judge did not err in accepting the GS-2 scenario. The experts were examined and cross-examined regarding the cost adjustments that would have to be made in order to target different standards of remediation in their various scenarios. It was open to the trial judge to simply adopt the GS-2 cost of $1.21 million and make no adjustment for the increased costs to remediate to a residential standard. He chose, instead, to increase the cost based on evidence about upward adjustments for other similar remediation alternatives in order to compensate Mr. Huang for the increased costs of remediating to a residential standard. I see no palpable and overriding error in that analysis.

[48] In summary, I am not satisfied that there is any basis for appellate interference with the trial judge's assessment of damages.

Disposition

[49] I would dismiss both appeals. Given the divided success between Fraser and Mr. Huang, I would not award costs to either party. Mr. Hillary has been entirely successful on the appeals and is entitled to his costs of the appeals payable by Mr. Huang. I would fix those costs in the all-inclusive sum of $10,000.

Released: “CWH” JUN 8 2018

“C.W. Hourigan J.A.”
“I agree. M.L. Benotto J.A.”
“I agree. Fairburn J.A.”