Date of Release: October 15, 1992

NO:20163
PRINCE GEORGE REGISTRY



# IN THE SUPREME COURT OF BRITISH COLUMBIA

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| BETWEEN: | ) | |
| JOHN HARRIS and MARGARET HARRIS | ) | REASONS FOR JUDGMENT |
| PLAINTIFFS | ) | OF |
| AND: | ) | |
| CROFT HARTWELL, CLIFF TURNER, ROBERT LORETH and REGIONAL DISTRICT OF FRASER-FORT GEORGE | ) | THE HONOURABLE MR. JUSTICE MEIKLEM |
| DEFENDANTS | ) | |

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| Counsel for the plaintiffs: | Roger Haines |
| Counsel for the defendants: | J. D. Truscott |
| Place and Date of Trial: | Prince George, B.C. October 5, 6,& 7, 1992 |

**THE FACTS**

The Plaintiffs' house, constructed in 1979 in the Foreman Flats area near Prince George, was damaged by the flooding Fraser River in June 1990. The flood waters filled the basement to a depth of 4.5 to 5 feet and destroyed the personal property of the plaintiffs stored in the basement and elsewhere on the plaintiffs' lands to a value of $ 19,568.27. The residence itself was damaged, requiring repairs valued at $ 31,278.61. The Plaintiffs have

received $19,903.25 in compensation from the Provincial Government in respect of their loss.

The Plaintiffs contend that their property is not saleable, other than at a fraction of its value, and seek to recover damages for diminution of market value.

The Plaintiffs bring this action against the defendant Regional District in negligence, claiming the Regional District breached a duty owed to the Plaintiffs at the time it received their applications for building permits, in 1979 for the residence, and in 1989 for an outbuilding, to warn the plaintiffs that they proposed to build in a flood area and claiming negligence by the Regional District in failing to ensure that the application and the construction conformed to the applicable By-laws of the Regional District relating to construction in a flood area.

The personal defendants are employees of the Regional District, and the action has been discontinued against them.

Building By-law No:143 of 1973 provided, in section 12(5)

> No building shall be erected in a flood area unless the lowest floor of the building is three feet above the high water mark.

The Building By-law 143 was amended subsequent to the construction of the Plaintiffs' residence, but the building by-law

in effect at the time Mr.Harris applied for and obtained a permit to build his outbuilding in 1989 (Building By-Law 431) contained a similar provision, (section 8.11) varied only by the substitution of "one meter" for "three feet".

Coextensive with the Building By-law 143, 1973 were Zoning Regulations,enacted by Regional District by-laws, which provided, inter alia:

> 2.1.2. (1) For the purpose of this section, the following definitions shall apply:
>
> "Natural Boundary"-means the visible high-water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual and so long continued in all ordinary years, so to mark upon the soil of the bed of the lake, river, stream, or other body of water, a character distinct from that of the bank therof, in respect to vegetation, as well as in respect to the nature of the soil itself.
>
> 2.1.2. . . .
>
> (2).....no building shall be constructed.....
>
> (c) with the underside of the floor system of any area used for habitation, business, or storage of goods damageable by floodwaters; or in the case of a mobile unit, the ground level on which it is located, lower than five (5) feet above the natural boundary of a lake or watercourse in the immediate flood hazard area.

Coextensive with the Building By-law 431, as amended, in 1989 were Zoning Regulations, enacted under By-law No. 833, which provided that a "building or structure shall not be sited such that

the underside of the floor system" is lower than 5 m [16.4 ft.] above the NATURAL BOUNDARY of the Fraser River."

Mr. Harris testified that he was not aware, at the time of his purchase of the land, in 1977, nor at the time he applied for a building permit in 1979, nor by the time he moved into the house that the site was in a flood area. He says that the natural growth prevented him from being able to see the "lay of the land" or to asses its proximity to the nearby Fraser River. He stated in his testimony that he was relying on the Regional District to ensure compliance with all building requirements. There is no evidence as to whether the plaintiffs directed their minds to the possible flood hazard at any time prior to the flood actually occurring.

I accept the evidence of Mary Armella, with whom Mr. Harris dealt on the purchase of his land, and find that he was informed, prior to purchasing the land, that it had flooded in 1948 and 1972. She advised him that he should therefore build on the highest elevation on the property and discussed with him which areas on his land and the neighbouring parcel owned by Newtons had previously flooded. Mrs. Armella is also a neighbour who lives in the Foreman Flats area. She subdivided her large farm acreage to create the subject parcel and others. She had a further conversation with Mr. Harris in 1979 when his house site was being worked on with a machine, in which she suggested to him that he should build on the hill and bring in fill, rather than cut the hill down. Mr. Harris

replied to the effect that his driveway to that site would be too long.

I also accept the evidence of the plaintiffs' neighbour, Mrs. Iris Newton that she had a conversation with Mr. Harris during the time the foundation footings were being constructed in which she informed him that she and Mrs. Armella had canoed across the site he was building on during the 1972 flood and perhaps he should choose another location. Mr. Harris replied that he thought his land was as high as hers.

I find that Mr. Harris knew or ought to have known that he was building in a flood area. It is therefore not necessary for me to determine whether the scope of the duty of care owed by the defendant to the plaintiff extended to warning the plaintiff that his land was in a flood area. There can be no causal connection to the plaintiffs' loss arising from any failure in such duty on these facts.

The discovery evidence read in by the plaintiff established that the Regional District had no procedures to enforce section 12(5) of the Building By-law and relied upon owners to inform the Building Department of the existence of flood potential.

Entered into evidence by agreement of counsel was a letter from a B.C.Land Surveyor reporting that the top of the concrete

floor of the basement of the plaintiffs' house was 1.53 meters (5.02 feet) above a point on the bank of the Fraser River which they determined to be the Natural Boundary as defined by the Land Act. (I will be commenting on the weight of this evidence later).



**THE DUTY OF CARE**

The plaintiff relies on the following cases on the scope of the defendant's duty of care to the plaintiff in ensuring compliance with the applicable by-laws and regulations:Corporation of City of Vernon et al v. Manolakos et al (1990) 1 C.C.L.T. 2nd 233 (SCC); Rothfield v. Manolakos 20 B.C.L.R. (2d) 85 (BCCA); Kamloops v. Nielsen,Hughes&Hughes [1984] 5 W.W.R.1 (SCC); Dha v. Ozdoba (1990) 39 C.L.R.248 (BCSC)(Finch,J.)

In my view, the plaintiffs clearly were owed a duty of care by this defendant to exercise reasonable care in ensuring that the plaintiffs' planned construction complied with the by-laws and regulations that the defendant had enacted and undertaken to enforce through its Building Department. This duty was not abrogated by the concurrent duty upon the plaintiffs to comply with the building by-law which they are, of course, also deemed to be aware of.

**DID THE DEFENDANT FAIL TO DISCHARGE ITS DUTY?**

The plaintiffs can only succeed if there was noncompliance with the applicable by-laws.The plaintiffs' case relies, for its success, upon a construction of Building By-laws 143 and 431 to the effect that the phrase " high water mark" used in section 12(5) of By-law 143 and section 8.11 of By-law 431 shall be taken to mean the "high water mark of the flood area".

The defendant contends that the phrase " high water mark" is synonymous with the phrase "natural boundary", and points out that "Natural Boundary" is defined in the zoning regulations that were in effect at the same time as meaning "the visible high water mark....."(see the full text quoted above on page 3).

The plaintiff argues that if the Regional District had intended high water mark to mean the natural boundary they would have used the defined term as they in fact did in the zoning by-law. Further, it is submitted, they could not have intended the two enactments to set out different requirements in regard to the necessary elevation, which is the result if the defendant's interpretation is applied.The plaintiff urges me to look to the plain and natural meaning of the words used in section 12(5) in concluding that the high water mark of the flood area is the intended point of reference.

Accepting the interpretation of the plaintiff does not resolve the conflict between the two by-laws, so that submission is not

persuasive. Although I agree that it is more natural and more logical from a grammatical point of view to complete the meaning of section 12(5) by notionally adding the words "of the flood area" than by adding the words necessary to equate high water mark with natural boundary as defined in the Land Act and in the zoning by-law, I have concluded that the interpretation sought by the plaintiffs cannot have been intended by the Regional District when they enacted this provision.

The interpretation suggested by the plaintiff begs the question: "The high water mark of which flood?" It is clear that the subject property was flooded in 1948 and 1972, but no one observed or recorded any high water marks on that property and even as late as June 1979 when the building permit was issued the Regional District had no relevant data on file as to historic flood levels. The 1990 flood left its high water mark on the plaintiffs' house, but it is clear from the evidence of Glen Davidson, a professional engineer employed by the Water Rights Branch of the provincial Ministry of the Environment, that flood plain mapping is a current provincial project, that no maps even yet exist for the area where the plaintiffs' property is.

I find that the interpretation suggested by the plaintiff could not have been intended because with such meaning no high water mark was observable nor could one be reasonably ascertained in respect of any particular property. With such meaning the

provision would be incapable of enforcement. I note that the ongoing provincial flood plain mapping project is proceeding on the basis of computer assisted models starting from theoretical volumes of water in the watershed on a statistical basis of what is expected to occur once in each 200 years. New municipal regulations requiring 5 meters clearance above natural boundaries of the waters subject to flood are being recommended and implemented to protect against damage from such floods. The current Regional District By-law 833 seems to conform to this trend and is based on the natrual boundary as an ascertainable, empirical point of reference, as common sense would dictate.

Although the 3-foot criteria in By-law 143, 1973 is significantly less protective and less restrictive than the current zoning by-law, it appears more probable to me that the Regional District intended their by-law to be enforceable by reference to known elevations than to marks that had never been recorded and would presumably only be ascertainable by theoretical calculations supported by reference to the only known source of historical data, being the gauging station on the Fraser River at Shelley.

Since the plaintiffs' residence was constructed in compliance with the building by-law as I have interpreted it, it follows that the Regional District did not fail in its duty to ensure compliance with that by-law. There remains for consideration the siting requirement in the zoning regulations enacted by the by-law and

referred to above. Compliance with these provisions is required because of section 6(1) of Building By-law 143 and it is the Building Inspectors who are empowered to ascertain compliance with the zoning regulations. The plaintiffs' argument turned on the provisions of the building by-law rather than the zoning regulation, in any event, but I think it prudent to comment on the latter aspect.

The zoning regulation makes reference to the underside of a floor system. The evidence before me gives a difference in elevation from the natural boundary as determined by the surveyor to the top of a concrete floor of 5.02 feet. There is no specific evidence of the thickness of the floor, nor any reference to a floor system. The surveyor's letter encloses photographs of the river bank depicting the location of the stake he planted and a sketch showing the point along the river that was chosen for the purpose of finding and marking a natural boundary. It is apparent to me from a perusal of these documents that there is some arbitrariness and opinion involved in deciding exactly where to determine the natural boundary to be , as defined by the Land Act. In view of the lack of scientific precision in that exercise and the apparent substantial compliance with the zoning requirement, I do not consider this evidence of sufficient weight to establish noncompliance with the zoning regulation.

**DAMAGES**

If I am wrong in my interpretation of the by-laws and my resulting finding that the defendant did not fail to discharge its duty to the plaintiffs, I hold that there was a complete failure on the part of Mr. Harris to mitigate the damage to his goods and chattels. He was offered effective assistance by a ten-man search and rescue crew that would probably have totally eliminated his losses in the basement. He stubbornly refused this help and asked these people to leave his property. He was the author of his own misfortune in failing to move his motor vehicles from his property, and attempts to rationalize this by explaining that one was not licensed, and in any event he did not expect the water to rise as much as it did ( and that he had been advised it would) and he felt a vehicle could handle three feet of water.

My assessment of damages under the head of diminution of value would be limited to the cost of moving the house and the agricultural building and incidental improvements and not include the cost of a replacement lot, since the purchase of the land was not a consequence of the defendant's acts or omissions. On the evidence tendered this head would total $51,600.00.

My assessment on damage to the house itself would be $11,375.36 after deduction of the flood relief payment received from the provincial treasury.

Lastly,in the event that I had found liability on the part of the defendant, I would have apportioned liability 80% to the plaintiffs and 20% to the defendant.

The plaintiffs' claim is dismissed. Costs were not addressed specifically in counsel's submissions, but will follow the event unless there is something that should be spoken to.

"Ian C. Meiklem, J."
Ian C. Meiklem, J.

Prince George, B.C.
October 15, 1992