Sewer installation

94-899
SECHELT

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA - SMALL CLAIMS

THOMSON v DISTRICT OF SECHELT - REASONS FOR JUDGMENT

Mr. & Mrs. Thomson, the Claimants, initially sued for the commuted value of sewer taxes on their property, for a period of some twenty years. The Defendant filed a Reply objecting inter alia that this Court has no jurisdiction to grant declaratory or anticipatory relief. At the hearing, the Claimants abandoned this claim and instead sought the sum of $3000.00 in damages forthe cost to them of installing a septic system on their property, and $1000.00 for the expected cost of removal of their septic tank and hookup to the Defendant's sewer system. This hookup will be mandatory as at March 14, 1996. The Defendant not objecting, I allowed the claim to proceed as revised.

The allegations in the Reply which remain relevant after the Claim was amended are: (A) a denial of any misrepresentation; (B) that the Claimants knew or ought to have known that the Defendant was considering the construction of a sewer system; (C) that in any event the Claimants could not have used their property without constructing a septic system as the sewer system did not become operational until July 1994 and they built before that time; and (D) that the claim is statute barred in any event, pursuant to the provisions of section 755 of the Municipal Act dealing with notice.

The hearing of this matter took place on September 18 and December 04, 1995. Judgment was then reserved.

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EVIDENCE

Mr. Thomson testified as follows:

1. The Claimants purchased their property west of Sechelt Inlet in or about September 1992. There was at that time no sewer system in the area.

2. In the spring or summer of 1992 they had been advised by their real estate agent that the Defendant had no current plans to instal a sewer. (This evidence is not of assistance to the Claimants as it is hearsay, and the agent was not shown to have been an agent of the Defendant, nor did she hold herself out as such).

3. On or about August 11, 1992, he telephoned John Wright, then the Defendant's building inspector, who he says would not tell him anything about the Defendant's future plans for sewer but simply outlined current building requirements and referred him to the Defendant's Planning Department.

4. On or about August 12, 1992, he spoke to Mr. Buchan of the Planning Department, who would not make any commitment that the Defendant would ever provide sewer hookup in the area.

5. His first application for a building permit, in September, 1992, was refused as he had no septic field.

6. He had a septic field installed in late 1992 or early 1993 at a cost of $3000.00.

7. In the summer of 1993, the Defendant appeared to be doing preliminary work on the neighbouring foreshore, to construct a sewer line.

8. In April, 1994, he was notified of a Court of Revision sitting with respect to taxes for a proposed sewer system.
9. On May 12, 16 & 28, 1994, he wrote the Defendant (Ex. 1,2 & 3) objecting inter alia to notice of sewer system tax, and alleging negligence in that the Defendant knew at the time of his inquiries in August 1992 that there were plans for a sewer system; and requesting exclusion from the system by way of variance.
10. His letters of May 12 & 16 were acknowledged in a May 19, 1994, letter from Art Lew, then Administrator for the Defendant. (Ex. 4), but his objections were not addressed.

Defendant's evidence was to the following effect:
1. Mr. Wright testified he does not keep records of casual conversations, and has no recollection of any conversation with Mr. Thomson. Mr. Buchan was the Planning Director in August 1992, and neither Planning nor Building departments dealt with sewer installations. Therefore Mr. Thomson was in effect in touch with the wrong people. In the summer of 1992 a Notice of Intention to expand the sewer system was published in a local paper, and affected property owners were allowed to petition against proceeding. (Mr. Thomson did not own his property at that time, and was visiting the area only on a part time basis - he testified he did not know of that publication, which is Ex. 7.) As at the time Mr. Thomson purchased his property, provincial regulations required a septic

field or sewer system, and Mr. Wright would not have approved occupancy without. The building code and the plumbing by-law both required hookup to a public or private system.

Mr. Wild was an engineering technician with the Defendant in August, 1992. He testified he has no recollection of any communication from Mr. Thomson about sewer systems. As at June 1992 when the Notice of Intention was published, it was not certain that any expansion of the existing sewer system would in fact take place. By-laws had to be passed; the property owners affected could have blocked the plan; tenders had to be satisfactory. The plan was a proposal only and there were many contingencies. The Claimants' septic field permit would have been granted by the Province(Ministry of Health), not the Defendant, and the Defendant therefore would not have known of it.

THE ISSUES

A. Does Section 755 of the Municipal Act bar the claim?

That Section is as follows:

> "The municipality is in no case liable for damages unless notice in writing, setting forth the time, place and manner in which the damage has been sustained, is delivered to the clerk within 2 months from the date on which the damage was sustained. In case of the death of a person injured the failure to give notice required by this section is not a bar to the maintenance of the action. Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes there was reasonable excuse and that the defendant has not been prejudiced by it in its defence."

This case does not constitute a claim for damages in the usual sense. There is no physical injury or property damage, such, for example, as flooding, alleged. The damage if any is financial. The Claimants were put to expense in installing their septic field, and as at March 1996 that field will be of no further use to them.

The first written communication from the Claimants to the Defendant about this situation appears to have been the letter of May 12, 1994, directed to the Tax Depertment, and the first claim to the Clerk is contained in the letter of May 16, 1994. Clearly the Notice was not given within 2 months of the time the expense was incurred.

However, I do not consider Section 755 of the Municipal Act a bar to this claim. The cost to the Claimants is not fixed in time, but continues to this date. In that sense, I consider the Notice was not late. However, even if it were, then there was reasonable excuse and the Defendant has not been prejudiced by the delay.

I am not persuaded that a Claimant must plead reasonable excuse and lack of prejudice. The Defendant's counsel cited TELLER v SUNSHINE COAST REGIONAL DISTRICT 43 BCLR (2d) p. 376, BCAC, for that proposition, but Madam Justice Southin, who delivered the judgment of the 5-person Court, specifically said (p. 379) that she was not deciding whether such a plea is ordinarily necessary.

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Mr. Thomson did not say that he was ignorant of the provisions of Section 755. If he were, that would be one of the factors to be taken into account in deciding whether there was reasonable excuse, again on the authority of TELLER. In this case, the compelling factor, which was established to my satisfaction, was that the Claimants did not know with any degree of certainty of the Defendant's intention until April of 1994. The Defendant cannot rely on the newspaper Notice or any notice to owners in June of 1992, as the Claimants were not then owners nor did they reside on the Sunshine Coast. Nor can the Defendant rely on the preliminary foreshore work in the summer of 1993 as notice. That work did not reasonably convey to the Claimants that they would be obliged to hook into a sewer system. The Claimants then have reasonable excuse within the meaning of Section 755.

On the evidence as a whole, there is no prejudice to the Defendant from the timing of the first written communication from the Claimants. Mr. Buchan has left the Defendant's employ and was apparently not available to testify, but Mr. Thomson's evidence of what Mr. Buchan told him is not in my view damaging to the Defendant. Mr. Buchan did not say a sewer system would or would not be constructed in the future - he simply declined to make any commitment. The other Defence submission that other employees' memories have become eroded by the passage of time is not supported by the evidence.

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B. Was the Defendant negligent in what its servants, agents or employees told or failed to tell Mr. Thomson when he made inquiries as to the possibility of a sewer system installation in his area?

I have concluded on the evidence that the Defendant was not negligent. Mr. Thomson was simply told that the Defendant could not commit to ever providing a sewer system in his area. This was an accurate statement of fact as at August of 1992, and did not constitute any misrepresentation. There is no evidence that the Claimants then had any less information than other home owners in their area, given the uncertainties of the sewer system Proposal as outlined by Mr. Wild.

The Defendant therefore cannot be fixed with any responsibility for the Claimants' expenses in relation to the septic field, and the Claim is dismissed without costs.

If I had held against the Defendant, the damage award would have been less than claimed. The septic field was in use for some 3 years; the Claimants do not have to remove their septic tank; and the expense of hookup to the sewer system would have been incurred in any event.

DATED at Sechelt, B.C. this 22nd day of January, A.D. 1996.

S.E. Giroday, PCJ