Issue date: Dec.3/91

No. C883150
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
DORION PIZZA and STEAK HOUSE LTD.	REASONS FOR JUDGMENT
PLAINTIFF	OF THE HONOURABLE
	MR. JUSTICE B.D. MACDONALD
AND:	
DISTRICT OF MATSQUI	
DEFENDANTS	

H. Dell Feller & R. Samtani	Counsel for the plaintiff
Rodrick H. MacKenzie	Counsel for the defendant
Dates & place of trial:	November 26, 27 & 28, 1991

The plaintiff sues for damages arising from the flooding of its restaurant on January 14, 1988 as the result of a 6" municipal water main breaking. Matsqui counterclaims for the estimated cost of repairing the broken main. The plaintiff also seeks the return to it of $12,100.00, being the estimated cost of such repair, which it was obliged to post as security for Matsqui's claim when it sold the restaurant in July of 1988.

The Background

In 1962, Matsqui obtained an easement for a water line along a 6' strip of Lot B adjacent to the south boundary thereof. Lot B adjoins Lot C which is located to the north. The restaurant is located on Lot C and Lot B is the site of a residence. Lot B is irregular in shape and extends to the east of Lot C as well as to the south. The eastern portion of Lot B is utilized as the parking lot for the restaurant. Historically, Lots B and C have had the same owner, the residence on the former being used as the residence of the operators of the restaurant on Lot C.

The southernmost portion of Lot B, over which the easement is registered and in which the water main has been located since 1962, is a steep bank some 25' in height. Some 25' or so to the east of the rear of the house, the bank curves to the north for some distance before turning east again. That configuration leaves a relatively flat area between the rear of the house and the toe of the bank to the south and east, with the water main running near the top of the bank to the south.

The easement agreement contains this indemnity clause:

> The GRANTEE...covenants with the GRANTOR, its heirs and assigns to protect and indemnify the GRANTOR, and save it harmless against any damages or expenses in connection with the

> execution of the powers hereby granted [to install and maintain a water main] and from and against all...claims...by third persons...

The plaintiff purchased both lots in 1986, spent the balance of that year renovating the restaurant, and opened for business on January 1, 1987. In September or October of that year, in order to make the area to the rear of the residence more suitable for parking the family car, it arranged with a customer in the contracting business to level the area by removing a mound of gravel which had apparently accumulated over the years, in part at least due to erosion from the bank to the south and east. Two truckloads of material were removed by a tracked excavator and deposited on the opposite side of the parking lot.

Matsqui alleges that such work undermined the bank and led to its collapse and the rupture of the pressurized water main which caused the flooding of the plaintiff's restaurant on the adjoining Lot C. The plaintiff and the contractor who removed the material deny that the "clean-up" of the area behind the house went up to the toe of the bank. They testify to a gradual erosion of the bank and increasing exposure of the pipe.

Following two weeks of freeze/thaw conditions during early January of 1988, there was a particularly heavy rainfall (40.4 mm) in the morning hours of January 14, 1988. At approximately 10

a.m., the bank around the pipe collapsed and slid into the area behind the residence, causing the water main to break and resulting in the flooding of the restaurant on Lot C.

The plaintiff claims under the indemnity clause in the easement and in negligence. Matsqui defends on the basis that the plaintiff cannot sue, in his capacity as the owner of Lot C, under the easement which indemnifies only the owner of Lot B. Insofar as the claim in negligence against it is concerned, Matsqui first points to s. 755.3 of the *Municipal Act*, R.S.B.C. 1979, c. 290:

> 755.3 A municipality...is not liable in any action based on nuisance or on the rule in *Rylands v. Fletcher* where the damages arise, directly or indirectly, out of the breakdown or malfunction of...
> (b) a water...system.

and then to s. 755 of that *Act*:

> 755. The municipality is in no case liable for damages unless notice in writing...is delivered...within 2 months from the date on which the damage was sustained.

The parties were able to agree before trial that if Matsqui was liable to the plaintiff to any degree, judgment should go on the basis that the plaintiff's damages were $20,000.00. There was

no agreement on the cost of repairing or replacing the broken water main which work has still not been done by the defendant.

The Claim for Indemnity

Even though the owner of both Lots B and C was the same person in 1962 when the easement was registered (as was the case when the water main broke in 1988 and caused the damage to Lot C), it was the owner of Lot B alone who had the benefit of the indemnity clause. While the owner of Lot B may have an unlimited right of recovery under that clause for any damage caused to that lot by the water main, in the absence of conduct on its part which caused that damage, I find that such rights do not extend to the owner of Lot C, even where it also owns Lot B.

The plaintiff argues that the owner of Lot C would have a claim against the owner of Lot B in these circumstances if they were different persons, and that it is ridiculous to suggest that such a right over has gone because the owners are the same and the plaintiff cannot sue itself. Such a claim, the plaintiff contends, is covered by the indemnity clause. I disagree.

In the absence of authority for the proposition that, without any negligence on the part of the owner of Lot B, he could be liable to C because Matsqui's water line in the easement on Lot B

ruptured, I would not be prepared to so find. Matsqui is the owner of the pipe and installed it. To permit such a claim would be to circumvent s. 755.3 of the *Municipal Act* wherever the offending pipe was located in an easement or right-of-way on private lands, because an indemnity clause is standard in such agreements.

Before the enactment of s. 755.3, the owner of Lot C would have had a cause of action against the municipality under *Rylands v. Fletcher* [1861-73] All E.R. 1 (H.L.), which is the culmination of a line of cases that makes an occupier of land liable for the escape therefrom of an inherently dangerous thing if he keeps such on the land. Matsqui was the "occupier" of the easement and the person who installed and kept the water main thereon. Section 755.3 of the *Municipal Act* takes away that cause of action.

The Action in Negligence

The evidence before me established that Matsqui has no program for the regular inspection of underground water lines. There is no practical means of inspecting them once they are buried. Leaks and breakages are repaired as they occur and are reported. I find it unnecessary to determine whether that is a policy or an operational decision within the meaning of *Just v. British Columbia* (1990) 41 B.C.L.R. 350 (S.C.C.), and whether the failure of Matsqui to regularly inspect a pressurized water main located at the edge of

a steep bank was negligent, because I have concluded that the plaintiff's action is barred by its failure to give notice of its claim within 2 months pursuant to s. 755 of the *Municipal Act*.

Teller v. Sunshine Coast (Regional District) (1990) 48 M.P.L.R. 292 (C.A.), deals with the saving clause in s. 755 which reads:

> Failure to give the notice...is not a bar...if the court...believes there was reasonable excuse and that the defendant has not been prejudiced by it in its defence.

While there was no prejudice to Matsqui in this case, in that it knew of the occurrence at once and investigated all aspects of it in developing its own claim which led to the $12,100.00 demand against the plaintiff for repair costs, I find that there was no reasonable excuse for the plaintiff's failure to give the required notice.

I accept that the plaintiff was ignorant of its obligation to do so, but that is the only factor in its favour. It looked solely to its insurer for the recovery of its loss and devoted its energies, so far as Matsqui was concerned, to resisting the municipality's claim for the cost of repairs to the pipe. Indeed, if Matsqui had not advanced such a claim (and later insisted on extracting $12,100.00 from the sales proceeds of Lot C as security

for its claim) I suspect that this action would never have been commenced.

The adjuster who was handling the plaintiff's insurance claim was well aware of the 2-month notice requirement. He dealt with Matsqui during that period, but only in respect of Matsqui's claim (which may have impacted on the liability coverage in the plaintiff's policy). He concluded, although the plaintiff is in no way bound by the actions of the insurer's agent, that no claim lay against Matsqui because of s. 755.3. Insofar as a claim in nuisance or under the rule in *Rylands v. Fletcher* is concerned, I agree. He was not aware of the indemnity clause in the easement agreement, but I have decided no such claim by the owner of Lot C exists in any event.

Insofar as the plaintiff may have been able to establish a claim in negligence (and in the absence of expert evidence to that effect I would be most reluctant to so find), the failure to give a s. 755 notice shields Matsqui in this case because I find there was not a reasonable excuse for that failure.

The Counterclaim

I find, on a balance of probabilities, that the collapse of the bank which led to the breaking of the water main was caused by a gradual erosion of the bank and precipitated by the extremely heavy rainfall on the morning of the collapse. Despite the evidence of Mrs. Embley, who described a cut at the base of the bank after the work which was done in the fall of 1987, the defendant has not established on a balance of probabilities that such work had any connection with the eventual collapse of the bank more than 3 months later.

Mrs. Embley was unable to say just how close to or how far into the toe of the bank the cut was located. Her vantage point was an awkward one from which to determine that fact. I accept the evidence of Mr. Hilton, who did the clean-up work as a favour to the plaintiff, that he did not cut into the toe of the bank.

Thus, the counterclaim of Matsqui must be dismissed. I should add that if I had reached the opposite conclusion, I would have assessed Matsqui's damages at $3,500.00 rather than the $12,100.00 claimed. In my view, Matsqui would be entitled only to the cost of putting the pipe and the bank back the way they were. What Matsqui proposed was a considerable upgrading of the installation, and the

cost of so-doing should not be charged to the plaintiff, even if it were liable for the collapse.

There is one further reason why the counterclaim must fail. I am far from satisfied on the evidence that Matsqui will ever replace this water main in that inherently dangerous location. It has not done so over the almost 4 years since this event. The 6' wide easement does not enable the work to be done from the easement itself, and the current owner of Lots B and C will likely be reluctant to help re-establish a situation which caused so much grief to the plaintiff. In the absence of acceptable proof that the work has been or will be done, Matsqui is not entitled to recover.

The $12,100.00 Security

In light of the dismissal of Matsqui's counterclaim, there will be a declaration that it has no claim to the $12,100.00 held as security by Mr. John Kaminsky, who will now be free to deal with those funds in accordance with the undertakings and trust conditions on which those monies are held. There will be liberty to apply in that regard if any further order is required.

Costs

Since Matsqui's demand for security was the trigger to this litigation, I consider it appropriate that the plaintiff recover some costs. However, because the plaintiff's main claim was dismissed, those costs will be assessed on Scale 1.

Judgment

1. The plaintiff's claim for damages is dismissed.

2. The defendant's counterclaim is dismissed.

3. The plaintiff is entitled to a declaration that the defendant has no claim to the $12,100.00 held as security for the cost of repairing the water main.

4. The plaintiff will have the costs of its action and of defending the counterclaim, to be assessed on Scale 1.

Vancouver, B.C.
December 3, 1991 "Mr. Justice B.D. MacDonald"