Date of Release: December 2, 1992

NO. C914525
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: CLINTON MOFFAT AND LILIAN MOFFAT PLAINTIFFS AND: CORPORATION OF THE CITY OF WHITE ROCK DEFENDANT	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE B.D. MACDONALD

Peter J. Roberts	Counsel for the Plaintiffs
Pamela S. Boles	Counsel for the Defendant
Dates & place of hearing:	November 23, 24 & 25, 1992 Vancouver, B.C.

The plaintiffs claim damages in nuisance or in negligence, arising out of a partial flooding of the finished basement (and the furnishings therein) of their home in White Rock on January 1, 1991, caused by a sanitary sewer back-up.

Mr. Moffat died on August 13, 1992. An order was made, by consent, at the opening of trial to appoint Mrs. Moffat as *administratix ad litem* of his estate for the purposes of this action.

THE BACKGROUND

The Moffats moved to White Rock in 1985. They were an elderly couple, Mr. Moffat having retired some years earlier. Mrs. Moffat was 79 at the date of trial. They purchased a home at 15510 Russell Avenue from Mike Mitty, who had lived there since it was built (in large part with his own labour) in 1976.

Mr. Mitty did his own plumbing work, and obtained municipal permits therefore, with one significant exception. In 1980, there was a "small flood" in his basement. He found water seeping out of the shower drain in the basement, wetting the rug which had been put down when the basement was finished.

It was a period of heavy rainfall. He checked the manhole to the sanitary sewer line which runs in a municipal easement across the back of this property and adjoining lots. That manhole is located on the lot immediately to the west of 15510 Russell Ave. It was overflowing. He concluded that the sewer line in the easement must be blocked, so he called the municipality. Eventually, as there were many demands because of the heavy rain, somebody arrived on the scene with drain cleaning equipment and removed a plug of roots and other material about one foot long from the sewer line in the easement.

Mr. Mitty, who had stemmed the flow (of what appeared to be clear water) from his shower stall by stuffing the top of the shower drain, decided to install a bathtub in its place. That would provide not only a slightly higher drain outlet, but also a large receptacle to hold any future back-up that might occur.

Mr. Mitty did something else as well. He installed what he described as an "overflow" or crossover between the sewer line leading from his house and the sump which collected water from his perimeter drain tile and roof down spouts. That water was pumped by a sump pump into the storm sewer which runs along Russell Avenue in front of the house. Mr. Mitty's idea was that if his sump pump ran for too long, he would be warned that the sewer had backed up.

Such a cross-connection is illegal, and Mr. Mitty knew it. He did not apply for a permit. White Rock would not have permitted such a modification because it had the potential to divert raw sewage into the storm system from where it would be discharged without treatment. Nor did he tell the Moffats of the cross-connection when he sold the house to them in 1985.

In September of 1989, before the fall rains began, the Moffats became aware that their sump pump was running continuously. They called the city. When the maintenance foreman attended in response to their call, he removed the top from the sump and saw raw sewage.

He knew immediately that there was an illegal cross-connection to the sanitary sewer. He called in the building department, which verified the illegal cross-connection by smoke and dye tests.

Whether or not White Rock again unblocked the sewer line in the easement at that time, and whether it knew or should have known that there was or had been a blockage of that line for a second time (the first being in 1980) are the crucial facts on which the outcome of this case will turn.

The back-up which gives rise to this action occurred in the early morning hours of January 1, 1991. The Moffats had stayed up late to watch the New Year come in on television. An hour or two after retiring, Mrs. Moffat heard noises, described in her diary (Exhibit 1, Tab 13, p. 2) as "snow dropping down", and in her evidence at trial as "noises in the basement, maybe a small animal". She put some lights on, but did not go into the basement. She had a hip joint replacement only months earlier. She did not wake her husband as he was in poor health.

At 8:00 a.m., Mr. Moffat got up, heard dripping in the basement, and went down to discover at least 8" of raw sewage floating around the basement. The Moffats were insured under a replacement cost policy which covered this loss. This is a

subrogated claim for $14,906.97, the amount paid out by their insurer to settle the claim.

THE ISSUES

1. Is the claim in nuisance barred by s. 755.3 of the *Municipal Act*, R.S.B.C. 1979, c. 290?

2. Is White Rock liable in negligence for failing to adequately maintain the sewer line in the easement?

3. If there is liability on either basis, what is the measure of the plaintiff's damages?

4. Are the plaintiffs contributorily negligent for failing to investigate earlier and thus limit the extent of the damage?

NUISANCE

Section 755.3 of the *Municipal Act* provides:

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

The evidence establishes that the sewer line in the easement was cleared of a blockage on January 1, 1991. That blockage was described by the man who removed it as a double handful of roots and plastic bags. I reject the argument of the plaintiffs that such a blockage was not a malfunction within the meaning of s. 755.3. The decisions in *Medomist Farms v. Surrey* (1990) 1 M.P.L.R. (2d) 46 (B.C.S.C.) at p. 65, and *Kerlenmar Holdings v. Matsqui* (1989) 40 B.C.L.R. (2d) 230 (B.C.S.C.) at p. 266, are clearly distinguishable on the ground that in both those cases the systems were functioning as designed.

I find that s. 755.3 is a bar to the plaintiffs' claim in nuisance.

NEGLIGENCE

White Rock has a policy of preventative maintenance for all sewer lines in easements over private land, such as the one along the back of the plaintiff's lot. Approximately once each year they are cleaned with the aid of a root cutter, to avoid just such a blockage as occurred on January 1, 1991. The issue is whether White Rock is negligent in failing to adopt a more frequent maintenance program in this location. There is one location in White rock where similar maintenance is done every six months.

If White rock should have known, at the time of the 1989 incident when the illegal cross-connection was discovered, that a back-up had occurred, I would be prepared to find that it was obliged to afford special treatment to this particular easement. However, I have reached the opposite conclusion.

The 1980 incident which prompted Mr. Mitty to install the illegal cross-connection occurred in circumstances of heavy precipitation which somehow made its way into the sanitary system. It was necessary to remove a blockage at that time. Any repetition of such an occurrence would be sufficient to put White Rock on notice that this was a problem area.

Was what occurred in September of 1989 another such occurrence? I think not, for these reasons:

1. There was no back-up of sewage into the basement in 1989. Admittedly, that was possibly due to the illegal cross-connection, which served well the purpose for which Mr. Mitty installed it, if indeed there was a back-up at all.

2. White Rock had no idea of the configuration of the cross-connection where it joined the sewer line from the house until it was uncovered in the process of removal some days later.

3. The dye test resulted in water flushed from the toilets in the house showing up in the sump at a time when there was no back-up in the sewer line. Thus, it was not unreasonable for White Rock to conclude that no back-up had occurred on that occasion.

4. I am satisfied on all the evidence that Mrs. Moffat is mistaken about when the sewer line in the easement was cleaned. That is done annually from the manhole in the next yard. The evidence of the defendant's witnesses, which I accept, is unanimous to the effect that the line in the easement was not cleaned on that day in September, 1989 as Mrs. Moffat now says. She must be confusing that event with one of the times when the sewer line in the easement received its regular maintenance.

In the result, based on the evidence that the White Rock maintenance program was as good or better than that of other Lower Mainland municipalities, I am not prepared to find it in breach of its duty of care to the plaintiffs. Of course, now that a second incident has come to its attention (the back-up which gives rise to this action) the position has changed. The evidence suggests that White Rock recognizes that change. A television camera was run though the sewer line in question here only weeks before this trial.

The claim in negligence is dismissed.

DAMAGES

While it is unnecessary for me to assess damages, I should say that I would not have awarded the full amount claimed had the result on liability been different. The only reduction would have occurred in respect of the first 5 items on the Schedule of Loss which were replaced with new furniture at a cost of $3845.44. I would have allowed a total of only $500.00 as the value of those items at the date of their loss, resulting in a reduction of $3345.44 in the claim.

I would also find that the amounts paid to Bill and Sylvia (the Moffat's children) saved at least that amount in expenses which would otherwise have been incurred through contractors.

CONTRIBUTORY NEGLIGENCE

I would have dismissed this claim, had I found it necessary to deal with it, on the grounds that Mrs. Moffat's hip operation justified her own lack of investigation and that her husband's health excused her decision not to rouse him. What could have been done promptly at 3:30 a.m. on New Year's morning?

JUDGMENT

The action is dismissed. There will be liberty to apply with respect to costs if counsel are unable to resolve that issue.

December 2, 1992
Vancouver, B.C.

"B.D. MACDONALD, J."