

Server backup

Canada
Province Of British Columbia
In the Provincial Court of British Columbia
(SMALL CLAIMS DIVISION)

(Before the Honourable Judge Cowling)

No. C29474

05 June 2001

Nanaimo Registry

Nanaimo, B.C.

BETWEEN:

PARKSVILLE JEWELLERS LTD.

CLAIMANT

AND:

CITY OF PARKSVILLE

DEFENDANT

EXCERPT FROM TRIAL

(Reasons for Judgment)

APPEARANCES:

Robert Liddicoat

agent for Parksville Jewellers Ltd.

Kismet T. Bhandar

for the City of Parksville

Judgment (Cowling PCJ)

04 June 2001
Nanaimo, B.C.

(EXCERPT FROM PROCEEDINGS)

1
2
3
4
5
6 THE COURT: This is a claim by Parksville Jewellers
7 Limited, which is a family-owned company that has
8 been in business for many years in an older
9 section of downtown Parksville, for nuisance and
10 negligence arising from a sewer backup situation
11 which took place on May 27th, 2000.

12 The defendant municipality has, amongst other
13 things, pled the provisions of section 288 of the
14 *Local Government Act*, which gives to a local
15 government immunity from action based on nuisance,
16 or on the rule in *Rylands v. Fletcher* [phonetic]
17 for damages arising directly or indirectly out of
18 the breakdown or malfunction of the applicable
19 part of the legislation, here being a sewer
20 system. It appears from the evidence that the
21 claimant's building, which was constructed in
22 1918, is at the low point, or close to the low
23 point of the Parksville sewer system, and as such
24 is more vulnerable than other sections might be to
25 blockage and backup situations.

26 There was a previous incident in 1992 which
27 did not give rise to litigation, where the
28 believed cause was a dumping of grease from a
29 nearby restaurant that has since gone out of
30 business. That blockage or the resultant backup
31 was more severe than in this case, though even in
32 this case the damages appear to approach in excess
33 of the jurisdiction of this court.

34 Due to time constraints, and for other
35 reasons, I did not hear evidence on quantum in
36 this portion of the trial, but restricted the
37 evidence to that of liability with the provision
38 that if there was a ruling in favour of the
39 claimant there would be an assessment, a hearing
40 at a later date.

41 This decision is restricted to the issue of
42 liability. The claimant is unrepresented. Ms.
43 Bhandar has appeared as counsel for the defendant
44 municipality and has assisted the court with case
45 law, copies of which have been provided to Mr.
46 Liddicoat, from the decisions of *Port Alberni v.*
47 *Moyer* [phonetic] and *Moffat v. Whiterock*.

Judgment (Cowling PCJ)

1 As in 1992, the May 2000 backup appears from
2 the evidence to once again be due to a grease
3 blockage in the twelve-inch main. While
4 everything is hindsight in these situations, from
5 the reports that were obtained after the blockage
6 was determined and some pipe video was obtained,
7 it is thought that perhaps an eighty percent
8 blockage of the twelve-inch main occurred, and
9 during certain flow conditions this would back the
10 sewage up in the mainline connection. The backup
11 would eventually, as it reached a certain level
12 above the level of the claimant's property,
13 pressurize the system around that property. This,
14 in fact, took place, and raw sewage oozed and
15 flowed into the building, including backing up
16 through the clean-out beside the building.

17 The city maintenance people were called -
18 this took place on a Saturday. Temporary steps
19 were taken to reduce the blockage, and later steps
20 were taken to remove it. The main had been
21 cleaned pursuant to regularly scheduled
22 maintenance in September of 1999, approximately
23 nine months before.

24 The evidence indicates, although nothing can
25 be known for sure, but strongly suggests that an
26 improper and/or illicit dumping of grease upstream
27 from the claimant's property, or up-line from the
28 claimant's property, caused the May blockage, that
29 this was from a different restaurant than the 1992
30 offender. The city requires restaurants to
31 maintain and have grease traps, but is not in a
32 position to police, so to speak, their proper use.

33 The city would face similar burden of proof
34 issues, as would the claimant, in trying to fix an
35 offending restaurant as opposed to ones that were
36 in compliance. It would theoretically be open to
37 Mr. Liddicoat to pursue the suspected culprit for
38 the grease dumpage.

39 The situation with respect to the claimant's
40 building is exacerbated because it is, as I said
41 earlier, a 1918 construction, albeit with many
42 renovations since then. I am told by Mr.
43 Liddicoat that it is a non-conforming use and that
44 its perimeter foundation is beneath a sidewalk,
45 and possibly even street level. The building
46 abuts directly to the municipally-owned sidewalk,
47 and the entire arrangement makes it very difficult

Judgment (Cowling PCJ)

1 and/or expensive to ascertain if there is some
2 engineering or old piping issue that may be
3 exacerbating the situation if and when a backup
4 occurs.

5 Because of the 1992 and 2000 incidents, Mr.
6 Liddicoat's business is now facing a possible
7 denial of coverage issue, and certainly increased
8 expense for coverage, if he can obtain it, for
9 sewage backup.

10 Mr. Liddicoat is concerned that his business,
11 if he is not able to obtain insurance, and if
12 there is a further backup situation, will face a
13 loss that it cannot overcome and put him out of
14 business with consequent loss, not just of
15 renovation expense, but loss of the business and
16 the income flow. In that case and in that event
17 the economics of litigation might weigh more in
18 favour of pursuing the person or persons who
19 caused any such blockage, and/or an investigation
20 to determine the actual state of the soil and
21 piping around the building for a possible
22 revisitation of the negligence issues against the
23 city.

24 But at this time the court is not able to
25 speculate on whether there is some aspect of old
26 lines that would possibly give rise to a claim
27 against the city that is not barred by section
28 288. The best that the court can do with respect
29 to the situation at this time is put down on
30 record it's understanding of the situation that
31 exists in case that is of some possible assistance
32 in the history of this thing in the future.

33 The particular incident that the court is
34 dealing with on May 27th, 2000, does appear to
35 fall within the definition of malfunction as cited
36 in *Moffat v. Whiterock*, as opposed to the type of
37 situation in the *Moyer* decision. As it is a
38 malfunction as considered in *Moffat*, it is subject
39 to the bar to the action that section 288
40 provides.

41 The resolution of the matter on that basis
42 can be understood by a third party, perhaps, on a
43 policy basis, but the residual unfairness of it as
44 it applies to Mr. Liddicoat and his company cannot
45 be ignored either.

46 The claim is dismissed as barred by section
47 288, Mr. Liddicoat. My inclination in this matter

Judgment (Cowling PCJ)

1 is just to dismiss it without costs.
2 I appreciate that the city will probably have
3 a submission. I will hear from you if you wish.
4 MS. BHANDAR: Your Honour, I'll just simply ask for
5 costs.
6 THE COURT: They will be declined under the
7 circumstances. All right, thank you.
8 MS. BHANDAR: Thank you, Your Honour.
9 THE COURT: If you need any of the documents back, Mr.
10 Liddicoat, there is a form Madam Clerk can give to
11 you. And I certainly claim no expertise on this
12 area of the law. There is an appeal procedure
13 that is available to you, as was exercised
14 in -- well, the city used that in the *Port Alberni*
15 case. But in some ways your litigation dollar
16 might be better spent in exploring your options
17 against the people who put the grease in there.
18 It is an unusual area of law, the nuisance
19 provisions, but there is some -- for the city to
20 go against those people in a criminal prosecution
21 they have a right to remain silent. In a civil
22 action you have a right to discovery, you have
23 access to the city information about what they
24 found when they went to that line, and an
25 inference could be drawn from that as to what
26 happened with your situation. But you would have
27 to get legal advice about that. It might not be
28 cost-effective litigation because of the amount
29 involved, but it might be something to have a
30 lawyer write a warning letter to someone about it.
31 All right. Okay, thank you.

32
33 (PROCEEDINGS CONCLUDED)
34
35
36
37
38
39
40
41
42
43
44
45
46
47