

File No: C34273
Registry: Penticton

In the Provincial Court of British Columbia
Civil Division

BETWEEN:

488519 B.C. LTD.

CLAIMANT

AND:

CORPORATION OF THE VILLAGE OF KEREMEOS

DEFENDANT

**REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE KOTURBASH**

COPY

Appearing for the Claimant:

**N. Tilbury
S. Tilbury
(Company Representatives)**

Counsel for the Defendant:

M. Chorlton

Place of Hearing:

Penticton, B.C.

Date of Judgment:

December 5, 2013

[1] THE COURT: Mr. and Ms. Tilbury are the directors of 488519 B.C. Ltd., which owns a commercial building in the Village of Keremeos.

[2] In 2008, Mr. Stanley, a village employee in charge of the water system in Keremeos, informed Mr. Tilbury that the water line to the Pizza Shop connected to the village water line at the front of Tilbury's building and ran along the sidewalk to the pizza shop. Although Mr. Stanley was aware that the pizza shop line trespassed underneath the Tilbury's building, he did not tell him. I apologize, ma'am, if I refer to it as Mr. Tilbury. He did most of the speaking in the case but when I do say that, I mean the two of you collectively.

[3] In 2009, the Pizza Shop and the Tilburys connected their water to a new village service line at the rear of the building. Both parties abandoned their old water line which remained connected to the village line at the front of their building.

[4] At the time the Pizza Shop abandoned their old line, the maintenance of the water system had been contracted to the Keremeos Water District. Mr. Barber, an employee of the water district, recalled shutting off the curb stop to the line abandoned by the Pizza Shop.

[5] In 2010, the line abandoned by the Pizza Shop began to

leak and caused a flood underneath Mr. Tilbury's building. It was determined that the curb stop to the abandoned line was on. Either it had been shut off improperly in 2009 or it was turned back on by someone. What I mean by improperly, either it was not turned off or it was turned off improperly.

[6] The Tilburys argue that the village owed them a duty of care and that the Village of Keremeos failed in that duty by:

- (1) negligently misrepresenting the configuration of the Pizza Shop line;
- (2) failing to inform them about the trespass and the poor condition of the line;
- (3) failing to turn the water off to the trespass line or failing to ensure that the line could not be charged with water after it was abandoned; and
- (4) misrepresenting the need for the Tilburys to connect to the new service line at the rear of the building.

[7] The Tilburys claim the following damages:

- (1) \$3,807.46, the cost of the restoration work the 2010 flood;
- (2) \$500 for the cost of attending Keremeos to deal with that 2010 flood;
- (3) \$3,000 for the cost of connecting to the new village service line and the future costs to seal off the abandoned water line from the old village service line: and
- (4) \$4,000 for the increased cost of insurance premiums.

That latter claim has been withdrawn by the Tilburys.

[8] The issues before me are:

- (1) Did the village owe a duty of care to the Tilburys' company?
- (2) Did Mr. Stanley negligently misrepresent the configuration of the Pizza Shop water line and if so, did the Tilburys rely on that representation to their detriment?
- (3) Did the village have a duty to tell the Tilburys about the trespass water line and its condition?
- (4) Did the village negligently misrepresent to the Tilburys that they needed to connect to the new village water service line?
- (5) Is the village vicariously liable for the actions or inactions of the Keremeos Water District?
- (6) If the village was negligent, did the negligence cause the damage sustained by the Tilburys?

[9] Dealing first with the water line configuration. In 2008, water was supplied to the Tilburys' property and the Pizza Shop beside them from the village service line that ran in front of the buildings. Initially it was believed that the Pizza Shop and the Tilburys' building were connected to the same line and a single curb stop. However, in 2013, Mr. Tilbury excavated and confirmed that each building was connected to its own separate curb stop. The curb stops are beside each other. The Tilburys' line was connected to the curb stop to the west and the Pizza Shop to the curb stop to

the east. The Pizza Shop's water line travelled from the curb stop underneath the claimant's property and to the Pizza Shop.

[10] Mr. Barber, an employee of the Keremeos Water District confirmed that the line configuration had not been altered since 2008.

The 2008 water leak.

[11] In 2008 there was a water leak at the northwest corner of the Tilburys' building. At that time the water system was managed by the Village of Keremeos. Bob Stanley and Jordy Bosscha, employees of the village attended. They excavated, found and repaired the leak. For part of the work Mr. Tilbury and his wife were in attendance.

[12] Mr. Tilbury knew Mr. Stanley as a friend.

[13] Mr. Tilbury questioned Mr. Stanley about a leak that occurred at the Pizza Shop a few years earlier. Mr. Stanley told Mr. Tilbury that the water line to the Pizza Shop ran along the front of the Tilburys' building on the city property to the Pizza Shop. Although he knew that the line trespassed underneath the Tilburys' he did not say anything. Mr. Stanley told Mr. Tilbury that the village service line was beginning to fail and would eventually need to be replaced.

[14] Unfortunately, Mr. Stanley is currently a serving prisoner in France and was not able to testify. However, Mr.

Bosscha was available and did testify about his recollection of the events.

[15] According to Mr. Bosscha, when he and Mr. Stanley dug up the line in front of Mr. Tilbury's building, they dug it up on the village side. They did, however, find an illegal connection to the Tilburys' line. It was described as a tee connection that had been cut into the line and also went under Mr. Tilbury's building.

[16] Mr. Bosscha testified that he did not know that configuration at that particular time as to where the other portion of the tee went. Mr. Bosscha did not know where the illegal line went to and was not sure how his partner, Mr. Stanley, would have known that it went to the Pizza Shop. He speculated that perhaps Mr. Stanley knew based on the fact that the Pizza Shop was also without water when the curb stop was shut off to the line that they were working on. Mr. Bosscha recalled Mr. Stanley saying he planned to talk to Mr. Tilbury about the illegal connection and tell him to hook up to the new village service line at the back of the building.

[17] Mr. Barber was also present during this repair. He also saw the illegal tee connection to the line connected to the east curb stop.

[18] Mr. Barber said he knew the line to the Tilburys'

building was shut off while Mr. Stanley and Bosscha worked. At that time he did not know where the other line went. At some point he learned that the trespass line went underneath the Tilburys' building to the Pizza Shop. He was under the impression that the east curb stop controlled both the Pizza Shop and the Tilburys' water systems. He believed the west curb stop controlled an abandoned water line to another business to the west of the Tilburys' property.

Stanley's Report

[19] Following the repair of the leak, Mr. Stanley prepared a report for the village. In the report, Mr. Stanley tells the village that the Pizza Shop line trespassed under the Tilburys' building. He said that both the Pizza Shop and the Tilbury lines were old, rotten and needed replacing. He suggested that, at a minimum, the Pizza Shop should connect to the newer service line at the back of the building.

[20] Following Mr. Stanley's report, the village decided to inform both the Pizza Shop owners and the Tilburys about the new service line at the rear of the property and urged the Pizza Shop owners to connect to the new service line to alleviate the underground trespass. According to Mr. Tilbury, they received no information from the village regarding the trespass or the need to connect to the new service line. Mr.

Tilbury postulates that the reason that Mr. Stanley and the village did not disclose the existence of the trespass line and its condition was because they knew that if they did, the Tilburys would demand that the Pizza Shop water line be turned off immediately, causing a serious disruption to their business.

[21] I agree with Ms. Chorlton that there is no evidence of any conspiracy on the part of the village to purposely not disclose that information to the Tilburys.

The Keremeos Water District

[22] In January 2009, the village determined that the Keremeos Water District was better equipped to operate the village water system and contracted with the district to assume responsibility for its water system.

The 2009 Water Leak

[23] In April 2009, there was a second water leak. Mr. Barber attended on behalf of the Keremeos Water District. He shut off the curb stop to the Tilburys' property. He said that he was able to determine from the sound coming from the curb stop that the leak was on the Tilburys' property and, therefore, their responsibility.

[24] The Tilburys hired an independent contracting company called Dutchie's to repair the leak for them. Dutchie's

decided to connect both the Tilburys and the Pizza Shop to the new service line at the back of the building. Dutchie's connected the Tilburys' original line and connected a new line to the village service line at the rear of the building. Mr. Tilbury was uncertain why they connected to a new service line.

[25] Although no one from Dutchie's testified, Mr. Tilbury confirmed through his observations that before hooking up the new line, Dutchie's closed the shut off to the old line underneath his building, cut the line and then folded it back. Mr. Barber was questioned about the possibility that he never turned off the east curb stop connected to the Pizza Shop. He said that although he was acting under the mistaken belief that both businesses were connected to the same curb stop, he is certain that the water to both businesses was shut off, so he must have turned off both curb stops.

[26] After shutting off the curb stops, the district did not turn them back on.

The 2010 Leak

[27] In September 2010, the Tilburys had another leak under the building. The Tilburys travelled up from Mission to inspect the leak. Mr. Barber also attended. While he was under the building trying to locate the source of the leak,

Mr. Tilbury discovered the trespass water line. He told Mr. Barber to turn off the curb stops on the old village service line at the front of the building. Knowing that both businesses were now connected to the new service line at the rear of the building, Mr. Barber said it would not make a difference. Mr. Tilbury persisted. Mr. Barber turned the first curb stop and nothing happened. When he turned the second, the leak stopped.

[28] Ms. Tilbury, who was standing beside Mr. Barber, heard him say something to the effect of, "Oops. That should have been shut off already," or something to the effect of, "This shouldn't have been on." She said that he seemed surprised that it had not been turned off.

[29] Mr. Barber said that he turned the east curb stop off because he believed the west curb stop went to the Branding Iron. When he turned the east curb stop off it was on full. He could not explain why it was on, other than to say someone else must have turned it on.

[30] Mr. Tilbury examined the trespass line and found the line to be corroded and having pinholes. He determined the line to be the source of the flood. There were no signs of leaking from his line which had been shut off, folded and crimped.

[31] The Tilburys' insurance company hired a restoration

company to clean up the damage.

[32] Mr. Tilbury cut out a portion of the trespass line, folded the end back and crimped it. There is not shut off valve for the trespass line on Mr. Tilbury's property. The line remains connected to the main service line at the front of their building.

The Future of the Village Service Line

[33] The Village of Keremeos currently has plans to abandon the original service lines because of the costs in repairing it. They have not been able to do so. However, they do plan to do it over a five year period. Mr. Barber said that if he were allowed to make the decisions on what should happen to the old village service line, he would disconnect the abandoned lines from the old village service line and plug the old village line to prevent any future problems.

[34] Mr. and Ms. Tilbury were credible and reliable.

[35] Mr. Bosscha and Mr. Barber, although credible were clearly not reliable on some of their evidence. It is clear that both Mr. Bosscha and Barber were wrong about the configuration of the water lines. The Tilburys' property and Pizza Shop were not connected to the same curb stop. Instead, they were connected to separate stops. Mr. Barber testified and I accept that the configuration of the lines has not

changed since 2008. I suspect that Mr. Barber's misunderstanding of the configuration led him to believe in 2009 that he only needed to turn off one curb stop for both properties and that he turned the west curb stop off and left the east Pizza Shop curb stop open and the Pizza Shop line fully charged. However, even if Mr. Barber's actions in failing to turn off the curb stop did amount to negligence, the village cannot be held vicariously liable for his actions.

[36] At the time of his actions, Mr. Barber was employed by the Keremeos Water District. The village had already delegated the responsibility of the water service to the district. According to *Whistler Resort Municipality v. Hewson* [2006] B.C.J. No. 3690, a B.C. Supreme Court decision, where a municipality delegates the maintenance of its water system to another party it is not vicariously liable for the negligence of that party. However, that does not end the matter.

[37] In 2008, when the village was responsible for the maintenance of the water service, Mr. Stanley, an employee of the village, told Mr. Tilbury that the Pizza Shop line ran along the sidewalk in front of the Tilburys' building to the Pizza Shop. Despite being aware of the trespass, he did not inform Mr. Tilbury of it. What he told Mr. Tilbury was clearly false. Mr. Stanley owed Mr. Tilbury a duty of care to

accurately describe the configuration of the Pizza Shop line when asked by Mr. Tilbury, especially in light of the trespass.

[38] The Tilburys relied on what Mr. Stanley told them, to their company's detriment. If Mr. Tilbury had been properly informed he could have taken steps to have the line removed or properly capped before it encroached onto his property. If he had not done so immediately, he surely would have taken steps to do so in 2009. The fact that he did not take steps to do anything with respect to his building's own abandoned line is irrelevant. In the case of his own line there is a second shut off valve situated underneath his building. No such valve exists for the abandoned Pizza Shop line before it trespasses onto his property.

[39] By persuading the Pizza Shop to connect to the new service line, the village did not eliminate the risk being posed by the trespass line. Had the village been more transparent and informed the Tilburys of the trespass and the condition of the line, they could have absolved themselves of any future liability flowing from Mr. Stanley's misrepresentation.

[40] The village argues that even if there was a negligent misrepresentation the Tilburys ought to have known about the

trespass line before the 2010 flood. It is argued that because Dutchie's connected both the Pizza Shop and the Tilburys to the new service line that Dutchie's would have known about the trespass line and, therefore, the court should impute that knowledge to the Tilburys. I do not agree.

[41] Dutchie's was hired to connect the property to the new service line and not investigate the configuration of the lines. It would be speculation on the part of the court to conclude that they were even aware of the trespass. It is entirely possible that when Dutchie's did the work for the Pizza Shop, if they followed the same procedure as they did with the Tilbury property by shutting off the valve underneath the building, disconnecting the old line from the building and connecting the new one, doing so would not have required Dutchie's to follow the path of the Pizza Shop line back to the old village service line.

[42] After considering all the factors set out in *P.S.D. Enterprise Ltd. v. New Westminster* [2011] B.C.S.C. 436, I am satisfied on a balance of probabilities that the village did owe a duty of care to the Tilburys and that they did breach that duty of care by misrepresenting the configuration of the Pizza Shop water line.

[43] I accept Mr. Tilbury's evidence that had he been properly

informed that there was a trespass line underneath his building he would have taken steps to have removed it or have it properly capped. Because he relied on what Mr. Stanley told him, Mr. Tilbury left himself exposed when Mr. Barber either failed to turn off the Pizza Shop line or someone else turned it on.

[44] However, I am not satisfied on a balance of probabilities that the village misrepresented the condition of the old village water line to Mr. Tilbury. I do not find that the village is liable for the costs incurred by the Tilbury's in connecting to the new service line.

[45] With respect to damages, I am awarding 488519 B.C. Ltd., the following in damages.

[46] Five hundred dollars for the deductible that they paid to their insurance to cover the costs of the restoration. I am declining to award the damages for the remainder of the restoration because those costs were borne by the insurance company who is not a party to this action.

[47] I am also awarding \$315 for the costs related to their trip to Keremeos in 2010 to deal with the flood. That total is based on the following.

[48] Mileage. I have calculated mileage of 430 kilometres round trip from Mission to Princeton and I am awarding 50

cents per kilometre for a total of \$215.

[49] With respect to meals and other incidental expenses, I am awarding \$100 to cover the costs of both parties who attended.

[50] I am also directing and ordering that the village pay the filing and service fees of \$176.

[51] I do not have the jurisdiction to order costs related to the Tilburys' preparation and attendance in court and I am declining to make that order.

[52] Finally, I am satisfied that, given the fact that the trespass line remains connected to the village line, that it still poses a risk for potential flooding. I am, therefore, ordering that within 90 days the village disconnect the Pizza Shop line from the old village service line and plug and properly cap it, as Mr. Barber indicated they could. If the village chooses not to do that, the village must then pay the Tilburys \$500 so that they can have the work done themselves.

[SUBMISSIONS]

[53] I will grant costs in the amount of \$500 for today's appearance. When I am making that order of costs, I want to make it abundantly and absolutely clear that those costs, in no way, are reflecting upon you, Ms. Chorlton, because I understand your --

[54] MS. CHORLTON: Thank you. I appreciate that.

[55] THE COURT: I understood your awkward situation and that you were not informed of that fact, so --

[56] MS. CHORLTON: Thank you. And I accept that those costs should be awarded, but because you're imposing a 90 day deadline, I just want to make sure --

[57] THE COURT: I can --

[58] MS. CHORLTON: -- I have the wording of that correct.

[59] THE COURT: -- make it -- I should ask you for submissions on that. I can make it longer if you think the city might need a longer period of time to get --

[60] MS. CHORLTON: Well, because it's wintertime, I'm not sure -- I don't know what the parameters are around disconnecting that. So --

[61] THE COURT: Why don't we say by May the 1st that it is to be disconnected. If they do not have it connected by May the 1st and properly capped, then they have to pay \$500.

[62] MS. CHORLTON: May 1, 2014?

[63] THE COURT: May 1, 2014. Yes.

[64] MS. CHORLTON: And that's just the Pizza Shop line?

[65] THE COURT: I am directing that they disconnect both

lines.

[66] MS. CHORLTON: Both lines.

[67] THE COURT: Because they are going to be there --

[68] MS. CHORLTON: That's fine.

[69] THE COURT: -- let's get it done, put it to rest.

[70] MS. CHORLTON: I just want to make sure I've got it right, so both lines?

[71] THE COURT: Yes.

(REASONS FOR JUDGMENT CONCLUDED)