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COURT OF APPEAL FOR ONTARIO

CARTHY, ABELLA AND MOLDAVER JJ.A.

B E T W E E N:	
TRIDAN DEVELOPMENTS LIMITED and OTTAWA MOTOR SALES (1987) LIMITED	**Robert P. Armstrong, Q.C. and Laurence A. Pattillo For the appellant**
Plaintiffs (Respondents)	
- and -	
<u>SHELL CANADA PRODUCTS LIMITED</u> and SHELL CANADA LIMITED	**Michael S. Hebert and R. Paul Marshall For the respondents**
Defendant (Appellant)	
	Heard: November 13, 2001

On appeal from the judgment of Justice Kenneth C. Binks dated May 17, 2000, reasons reported at (2000), 35 R.P.R. (3d) 141.

CARTHY J.A.:

[1] This is an appeal from an assessment of damages.

[2] This appeal concerns the measure of damages arising from the contamination of the respondents' property by a gasoline spill from the appellant's neighbouring gas station. For reasons reported at (2000), 35 R.P.R. (3d) 141, Binks J. assessed the damages and granted judgment against Shell Canada Products Limited as follows:

(a) $550,000 for costs of remediation,

(b) $350,000 for loss of property value due to stigma associated with the contamination,

(c) $25,000 plus prejudgment interest for mortgage financing costs,

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(d) $20,000 for business interruption loss,

(e) a direction that the appellant remediate its own property or in default pay the respondents $85,000 as the cost of a barrier between the properties to prevent further leakage,

(f) dismissing a counterclaim asking that the recovery be paid into court and used only for reparation of respondents' property,

(g) prejudgment interest on (a) and (b) in the amount of $442,012.81, and

(h) the costs of the proceeding.

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[3] The appeal is against items (a), (b), (e), (f) and (g). In descriptive terms, the appellant says that the trial judge set too high a standard for remediating the soil, should not have found any residual loss in property value after remediation, should not have made a mandatory order against the appellant, should have protected the appellant against the respondents' potential failure to use the damages award for reparation, and should not have awarded prejudgment interest.

The Facts

[4] I will refer to the appellant as Shell and the respondents as Tridan. Shell has for some years operated a service station on Bank Street in Ottawa adjacent to a car dealership operated by Tridan. In September 1990, 9,000 liters of gasoline leaked from an underground fuel line on Shell's property. At first it was not known that fuel had in part escaped into the soil under Tridan's property. Shell undertook a remediation on its own property in accordance with government standards applicable at the time. Shell did not remove all of the contaminated soil and the evidence indicates that about 3,000 liters of fuel were unaccounted for. In 1991, Tridan discovered that some of the gasoline had migrated into its soil, forming a plume about 14 feet below grade. Shell accepts responsibility for the required cleanup.

[5] For reasons that have no bearing upon the issues on appeal, the dispute over the extent of cleanup that was appropriate and the consequent costs and damages did not come to trial until October 1999, nine years after the spill. In the meantime, the car dealership carried on profitability but its mortgage financing was threatened by the decreased mortgage value occasioned by the pollution. Tridan faced increased interest charges and Shell, in an effort to minimize its exposure to a claim for damages on that account, executed an indemnity agreement with the mortgagee undertaking to pay for any necessary cleanup on demand by the mortgagee. The interest rate was consequently reduced to the normal rate and that element of potential loss was avoided.

[6] While the parties were wending their way to trial there were changes occurring in oversight by the Ministry of Environment (MOE).

[7] Several sets of MOE guidelines were in place during the period between the spill and trial, but the two sets that are most commonly referred to by the witnesses are the "Interim Guideline for the Remediation of Petroleum Contamination at Operating Retail and Private Fuel Outlets in Ontario", dated 1992 ("1992 MOE guideline"), and the "Guideline for Use at Contaminated Sites in Ontario", revised February 1997 ("1997 MOE guideline").

[8] The 1997 MOE guideline currently applies. Its stated purpose is to provide,

> … advice and information to property owners and consultants to use when assessing the environmental condition of a property, when determining whether or not restoration is required, and in determining the kind of restoration needed to allow continued use or reuse of the site. The ministry has provided the guideline, along with the supporting documentation, to assist landowners in making decisions on soil and/or groundwater quality for proposed or existing property uses.

[9] Under the 1997 MOE guideline, the level of permissible pollutants varies depending on whether the property is used for agricultural, residential or commercial purposes. The relevant criteria for land used for commercial purposes is set out in Table B. Within Table B, permissible concentration levels vary depending on whether the groundwater is used for drinking purposes and on whether the soil at the contaminated site is fine, medium or coarse. Lower concentration levels of pollutants are permitted for course grain soil, since pollutants can travel more easily through course soil than fine soil.

[10] No one suggests that the guidelines supplant the common law standard of compensation for injury to land. However, Shell asserts that the MOE guideline represents a reasonable standard to apply to commercial lands that are contaminated but unaffected for the purpose being served. The difference in cost between meeting the 1997 MOE guideline and achieving a site which is clean of all contaminants, referred to in the evidence as a pristine site, is approximately $250,000, mostly referable to the amount of soil that must be removed and replaced.

Damages for Reparation of the Tridan Property

[11] The trial judge found that the plaintiffs were entitled to have their property remediated to pristine condition and assessed the cost of doing so at $550,000. Normally the assessment would be as of the date of the injury, but in the circumstances of this case the trial judge chose to assess damages as of the date of

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trial. No one contested that approach because no work toward reparation had taken place, the business of Tridan had continued throughout and current MOE guidelines were being asserted as the standard. Thus, it made sense for the trial judge to look to current costing information to arrive at an assessment.

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[12] The trial judge might have relied upon those expert witnesses supporting the MOE guidelines as a reasonable measure of reparation and thus the damages suffered. This is a commercial property on a busy thoroughfare and unlikely to ever be a site for residential use. It might be concluded that in a practical sense Tridan is not likely to need or want to clean its soil at depth of every particle of pollutant. However, in the circumstances of this case I cannot say the trial judge erred in deciding that Tridan was entitled to reparation to a pristine state. Where a product that may cause mischief escapes to a neighbour's property there is responsibility "for all the damage which is the natural consequence of its escape." See *Rylands v. Fletcher*, [1861-73] All E.R. 1 at 7 (Ex. Ch.), cited with approval at p. 13 (H.L.). Of course, they must be reasonable. On all the evidence it is fair to conclude that the damages would not be eliminated by reparations to the point of the MOE guidelines. There would be residual loss of value, referred to as stigma, which would be reduced, as the trial judge found, or eliminated, as I am about to find, by remediation to the pristine level.

Stigma

[13] An analysis of all the evidence brings me to the conclusion that there is no support for the trial judge's conclusion that there is a residual reduction of value in a pristine site caused by the knowledge that it was once polluted. It would appear that the trial judge simply misapprehended the evidence of the two principal witnesses for Tridan.

[14] Mr. Gordon Taylor from Royal LePage was qualified as an expert in commercial real estate by the plaintiffs. He testified as to stigma attaching to previously polluted sites and estimated a reduction of 17% to 18% of fair market value for this site if cleaned up to MOE guideline standards. His testimony was that there would be no impact if in pristine condition. He is consistent throughout but the point is emphasized in cross-examination [Emphasis added]:

> Q. … [M]y understanding, sir, is that your opinion with respect to the stigma that would attach to the property is based on the fact that the property would be cleaned up to what you call Level II [under the relevant MOE guideline]
>
> A. That's correct.

Q. But your view is that even if you cleaned it up, beyond that, if there was any hydrocarbons on the property, it would still affect the value; correct?

A. As opposed to being in pristine condition, you mean?

Q. Right?

A. Yes, it could.

Q. But here you are just looking at it from the purposes of cleaning it up to the Level II?

A. Yes, I was asked to report what is the impact market value [*sic*] between the Level II and pristine condition.

Q. So, if it is pristine, no impact?

A. That would be correct.

[15] The trial judge also relied upon another Tridan witness, Mr. Peter Boddy, a qualified appraiser, who testified that even after a cleanup there would be a 17% to 18% reduction in market value of the property. However, his report and oral evidence makes it clear that he was assessing a cleanup to MOE standards. In evidence he stated [Emphasis added]:

Q. And then having said that, you then proceed to express an opinion of what you think the stigma will be to the Donnelly site even after it is cleaned up?

A. Yes.

Q. And your opinion is based on the fact that it will be cleaned up to the applicable guidelines; is that correct?

A. Yes.

Q. And by that, we are talking about the Ministry of the Environment guidelines?

A. Yes.

[16] The references by the trial judge at pp. 158 and 159 of his reasons to the evidence of Shell's expert, Mr. Steven Granleese and the concessions he made in cross-examination, do not suggest that stigma would attach to a site cleaned to pristine condition. Indeed, they make no mention of a pristine site and make equal sense if it is assumed that the witness is referring to a cleanup to MOE standards. Granleese was called to refute Tridan's evidence that stigma attaches when the cleanup is to the MOE guideline level. He was not dealing with this specific

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property and whatever concession he may have made against his original position, it cannot supplant the Tridan witnessses' primary assertion that there would be no impact on the value of this property if it was cleaned to the pristine level.

[17] In sum, the evidence compels me to conclude that there is no stigma loss at the pristine cleanup level. This conclusion also makes sense of the trial judge's holding that cleanup to the pristine standard was justified in this case. If the trial judge's assessment of stigma damage at $350,000 is taken as the diminution in value at cleanup to the guideline standard, then the more economical route is to proceed to the pristine level at an additional cleanup cost of $250,000 with no stigma damage.

[18] In my view, the only reasonable conclusion from the totality of the evidence is that a pristine site has no residual loss of value and that paragraph 1 of the judgment should be amended to reduce the amount awarded by $350,000.

Shell to remediate its own property

[19] There was evidence that if Tridan excavated and replaced the soil on its site, a barrier would be required to prevent further migration of the gasoline that remains on the Shell site. If both sites were cleaned at the same time, the barrier would not be needed. This led the trial judge to direct Shell to remediate at the same time as Tridan or pay a further sum of $85,000, being the estimated cost of a barrier. There is no basis for a mandatory injunction against Shell and no reason to complicate Tridan's remediation by joining it with that on the Shell site. It must be kept in mind that these damage recoveries may never be invested on remediation. They are based on costs but are the equivalent of a diminution in property value. A purchaser of the Tridan property in its present form would probably reduce the offering price by, among other things, $85,000 for a barrier when remediation is undertaken.

[20] Paragraph 6 of the judgment should be amended so that it reads as a simple obligation to pay $85,000 and paragraph 7, providing for the notice of intention to effect remediation, should be deleted.

Counterclaim for payment into court

[21] In order to avoid a substantial and ongoing claim for increased mortgage interest charges occasioned by the pollution, Shell signed an indemnity in favour of Tridan's mortgagee undertaking to effect reparation on demand. Its present concern is that if the judgment award is paid to Tridan it may not be used for remediation and Shell may have to pay twice should the mortgagee issue a demand. To protect its position Shell asks that the reparation costs be paid into

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court and released only as reparation is undertaken. Shell certainly has a problem, but it is with a non-party to this litigation and a contract that is not before the court for adjudication. An order for payment into court would not only abridge Tridan's right to deal with its damages as it sees fit, but would also place the court in the position of overseeing the reparations and the satisfaction of the requirements of the indemnity.

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[22] Shell's obligations to the mortgagee will have to be resolved in other proceedings. I would dismiss the appeal from this aspect of the trial judgment.

Prejudgment Interest

[23] The trial judge allowed prejudgment interest for the 10 years prior to judgment in the total amount of $442,012.81. Prejudgment interest is compensation for being deprived of damages from the date they are suffered. If damages are paid on that date, the plaintiff receives the benefit of the money and its investment value. If not paid, as is the normal circumstance, an interest award is made. Here, if Tridan had undertaken immediate reparation, that model would fit. If the loss had been assessed on property values and costs in 1990, it would fit. If the respondents had not been able to run a successful business in the interim, a claim for prejudgment interest might be justified. Yet on the actual facts there would be a clear double recovery if prejudgment interest were awarded: the assessment is in dollars current to the trial, Tridan has not suffered since the spill, and the dollars are to be spent in the future. If the costs of reparation increase, postjudgment interest and investment income will cover the difference. Section 128(4)(d) of the *Courts of Justice Act*, R.S.O. 1990 c. C.43 excludes prejudgment interest on "pecuniary loss arising after the date of the order and that is identified by a finding of the court." The damages for remediation of the Tridan property came within this exclusion and prejudgment interest should not have been awarded on that amount.

[24] I would allow the appeal against that award and delete the item from the judgment.

Conclusion

[25] The appeal should be allowed in the respects identified in these reasons with costs to Shell.

Signature:___ "J.J. Carthy J.A."

_____ "I agree R.S. Abella J.A."

_____ “I agree M.J. Moldaver J.A.”

Released: “JJC” JANUARY 3, 2002

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