CITATION: Midwest v. Thordarson, 2013 ONSC 775
COURT FILE NO.: CV-09-382649
DATE: 20130228

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Midwest Properties Ltd.	)	*Evert Van Woudenberg*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
John Thordarson and Thorco Contracting Limited	)	*Frank Zechner*, for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** January 7, 8, 9, 10, 11, 14, 16, 17, 18, 2013 and Febru8ary 15 , 2013

POLLAK J.

[1] Midwest Properties Ltd. ("Midwest" or the "Plaintiff") became owner of 285 Midwest in December 2007. Midwest claims damages against Thorco Contracting Limited ("Thorco"), and its' principle, John Thordarson (collectively, the "Defendants"), emanating from the migration of contamination from 1700 Midland Avenue onto 285 Midwest. 1700 Midland Avenue has been used by the Defendants as a storage site for petroleum hydrocarbon waste since 1973. Midwest alleges that such contaminants have permeated their soil and groundwater.

[2] The Plaintiffs' claims against the Defendants are brought on three different bases: statutory remedy under the *Environmental Protection Act*, R.S.O. 1990, c. E.19 ("*EPA*"), damages for nuisance and negligence, and punitive damages.

[3] The Plaintiffs allege that the Defendants have been in continuous breach of their obligations under the *EPA* since 1988. The Plaintiffs' experts have opined that PHC contaminants have migrated from 1700 Midland onto 285 Midwest into the soil and groundwater, and "free product" has been found on the property. The Ministry of the Environment ("MOE") standards are exceeded at some tested locations on their property, and

285 Midwest must ultimately be remediated and protected from more migrating contamination. The Plaintiff submits that damages for the cost of their proposed remediation should be awarded.

[4] The MOE has ordered the Defendants to investigate the extent of the contamination of 285 Midwest and to correspondingly remediate the property.

[5] The Defendants submit that there is no recoverable loss by the Plaintiff, as they are under an Order of the MOE to remediate 285 Midwest from any contaminants originating from 1700 Midland.

[6] The Defendants also submit that it is reasonable, on the evidence, to conclude that a significant portion, or all, of the contamination on 285 Midwest occurred before July 2007, prior to the Plaintiffs' owning 285 Midwest. The Defendants specifically rely on evidence that there were large quantities of liquid waste on 285 Midwest from the late 1990's until 2001. As of 2000, the evidence suggested that liquid waste quantities on 285 Midwest were decreased as a result of the winding down of the Thorco business.

[7] There was no evidence on whether the property exceeded MOE standards, with respect to the relevant contaminants, when the Plaintiffs bought the property in December 2007. The evidence was that the Plaintiffs had a Phase I environmental assessment performed at this time, but there was no testing of the soil or the groundwater.

[8] I accept the expert evidence of Mr. Bob Tossell for Midwest, who testified that, on the basis of all of the material and testing produced and reviewed by Pinchin Environmental Ltd., the groundwater would flow from 1700 Midland onto 285 Midwest and that the known contamination at 1700 Midland would necessarily migrate onto, and has contaminated, 285 Midwest. There is, however, no evidence as to when such contamination has occurred.

[9] The Defendants do not dispute the evidence that shows contamination of certain chemicals on the Midwest property beyond MOE standards. They do, however, dispute the fact that such contamination was caused by contaminants escaping from their property. I do not accept their submission in this regard. Although they advanced a theory that the contamination could have been caused by another property, they did not provide evidence to substantiate such an allegation.

[10] The crux of the Defendants' position is that Midwest has not proven any alleged damages. The issue is whether the Plaintiff:

(a) have/ing proven that there are readings of contaminants on some parts of the property in excess of the MOE standards;

(b) but not having proven when such contamination occurred;

(c) is entitled to be awarded damages in the amount that will pay for what it submits is a reasonable remediation plan.

[11] The Defendant submits that a common requirement underlying the different causes of action claimed by Midwest is proof of actual damage to the property caused by the Defendants.

[12] The Defendants submit that there is no evidence that the alleged spill of pollutants has caused an "adverse effect", as contemplated by the *EPA*, or that the Plaintiff has suffered any damages. More particularly, a chemical alteration in the soil content does not establish harm or damage to the property. The fact that certain contaminants in the soil exceed the relevant MOE standards is not evidence of physical harm or damage to the property. Further, there is no evidence that there was any chemical alteration of their property after they acquired it. In the same vein, the Defendants submit that there is no evidence of any impairment of the use that Midwest is making of its property, no harm or material discomfort to any person, no adverse impact on the health of any person, no evidence that the property is unfit for continued use as a commercial/industrial property for the manufacture of clothing, and no evidence of interference with the normal conduct of business at the property. Midwest has not shown any interference with its operation of business, and no loss of profits or other financial loss associated with the presence of the contaminants at 285 Midwest. They argue that, without proof that there has been actual, substantial, physical damage and harm to the property, all of the Plaintiff's claims cannot succeed.

[13] Midwest, on the other hand, submits that to succeed, it must prove that:

(d) Contamination exists at 1700 Midland;

(e) That contamination is migrating onto 285 Midwest;

(f) The remediation plan proposed by the Plaintiff is reasonable; and

(g) The reasonable costs of implementing that remediation plan.

[14] Midwest submits that under the various causes of action in its claim, proof of contamination of the Midwest property unequivocally entitles it to an award of damages equivalent to the cost of a reasonable remediation plan. Midwest similarly argues that the "adverse effect" on the property, or damages they have suffered, are proven by the testing results that show levels of pollutants above acceptable MOE standards after they purchased 285 Midwest.

***EPA* Claim**

[15] Midwest relies on the following sections of the *EPA*, which provide right of action for compensation in favour of any person incurring loss or damage as a result of neglect or default in carrying out a duty imposed by the *EPA* or any orders made under its authority:

Compensation, spills

99. (1) In this section,

"loss or damage" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income.

Right to compensation

(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,

(a) for loss or damage incurred as a direct result of,

(i) the spill of a pollutant that causes or is likely to cause an adverse effect,

(ii) the exercise of any authority under subsection 100 (1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or

(iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;

(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant.

Exception

(3) An owner of a pollutant or a person having control of a pollutant is not liable under subsection (2) if they establish that they took all reasonable steps to prevent the spill of the pollutant or if they establish that the spill of the pollutant was wholly caused by,

(a) an act of war, civil war, insurrection, an act of terrorism or an act of hostility by the government of a foreign country;

(b) a natural phenomenon of an exceptional, inevitable and irresistible character; or

(c) an act or omission with intent to cause harm by a person other than a person for whose wrongful act or omission the owner of the pollutant or the person having control of the pollutant is by law responsible,

or any combination thereof.

Qualification

(4) Subsection (3) does not relieve the owner of the pollutant or the person having control of the pollutant,

> (a) from liability for loss or damage that is a direct result of neglect or default of the owner of the pollutant or the person having control of the pollutant in carrying out a duty imposed or an order or direction made under this Part; or
>
> (b) from liability, under clause (2) (a), for cost and expense incurred or, under clause (2) (b), for all reasonable cost and expense incurred,
>
> > (i) to do everything practicable to prevent, eliminate and ameliorate the adverse effect, or
> >
> > (ii) to do everything practicable to restore the natural environment,
>
> or both.

Enforcement of right

(5) The right to compensation under subsection (2) may be enforced by action in a court of competent jurisdiction.

Liability

(6) Liability under subsection (2) does not depend upon fault or negligence.

Contribution

(7) In an action under this section,

> (a) where the plaintiff is an owner of the pollutant or a person having control of the pollutant, the court shall determine the degree, if any, in which the plaintiff would be liable to make contribution or indemnification under subsection (8) if the plaintiff were a defendant; and
>
> (b) where the plaintiff is not an owner or a person having control referred to in clause (a), the court shall determine the degree, if any, in which the plaintiff caused or contributed to the loss, damage, cost or expense by fault or negligence,

and the court shall reduce the compensation by the degree, if any, so determined.

Extent of liability

(8) Where two or more persons are liable to pay compensation under this section, they are jointly and severally liable to the person suffering the loss, damage, cost or expense but as between themselves, in the absence of an express or implied contract, each is liable to make contribution to and indemnify the other in accordance with the following principles:

1. Where two or more persons are liable to pay compensation under this section and one or more of them caused or contributed to the loss, damage, cost or expense by fault or negligence, such one or more of them shall make contribution to and indemnify,

i. where one person is found at fault or negligent, any other person liable to pay compensation under this section, and

ii. where two or more persons are found at fault or negligent, each other and any other person liable to pay compensation under this section in the degree in which each of such two or more persons caused or contributed to the loss, damage, cost or expense by fault or negligence.

2. For the purpose of subparagraph ii of paragraph 1, if it is not practicable to determine the respective degrees in which the fault or negligence of two or more persons liable to pay compensation under this section caused or contributed to the loss, damage, cost or expense, such two or more persons shall be deemed to be equally at fault or negligent.

3. Where no person liable to pay compensation under this section caused or contributed to the loss, damage, cost or expense by fault or negligence, each of the persons liable to pay compensation is liable to make contribution to and indemnify each other in such degree as is determined to be just and equitable in the circumstances.

Enforcement of contribution

(9) The right to contribution or indemnification under subsection (8) may be enforced by action in a court of competent jurisdiction.

Adding parties

(10) Wherever it appears that a person not already a party to an action under this section may be liable in respect of the loss, damage, cost or expense for which compensation is claimed, the person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of practice for adding third parties.

[16] At trial, neither party was able to provide the Court with any jurisprudence on the interpretation of the term "loss or damages" under the *EPA*.

[17] The Court provided the parties with copies of *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1996), 3 O.T.C. 44, 2 C.P.C. (4th) 143, wherein the Court held that:

> 11 Further it would appear to me that the damage aspect is somewhat blurred under this statutory provision. Pursuant to s. 99(2) the Hodgsons would still have to show loss or damage as a direct result of the spill. However, the loss or damage can arise because the spill "causes or is likely to cause *an adverse effect*" (emphasis added). While PWL would not appear to be responsible for any spill (which took place) of leachate leaking from the authorized site of the garbage dump before it became R/M and thereafter migrated across the ILC boundary to the neighbouring properties, including that of the Hodgsons, PWL would be responsible for any adverse effect caused by a PWL generated leachate. It would seem to me that the language of the statute would be sufficiently all encompassing to take into account a loss to property value directly caused by the spill as an adverse effect. The difficulty for the Hodgsons here will be in identifying where and how much of the PWL generated leachate penetrates their border and then by how much that PWL generated spill will further reduce their property value from what it is said to have already been decreased by virtue of the pre-PWL generated leachate. The Hodgsons should only be allowed leave to sue for loss caused by the PWL generated leachate. In this regard, there has been no satisfactory demonstration that the Hodgsons' property has been invaded by PWL generated leachate. If and when that happens then it would appear appropriate to allow the Hodgsons to sue for spill liability of PWL generated leachate if they can then demonstrate that they have suffered a loss over and above what they say is now the problem created by pre-PWL generated leachate. Perhaps in this regard the Hodgsons might explore the possibility of pursuing the Environmental Compensation Corporation pursuant to s. 103 of the EPA; of course they will still face the hurdle of showing an increase in loss for this 1985-1990 generated leachate over and above what may have been caused by pre-Nov. 29, 1985 generated leachate.

[18] The parties made submissions on this case.

[19] Although this decision dealt with a request for leave to commence action against a court appointed receiver, the court had to consider the nature of the relief that the *EPA* intended. The court, in that case, commented on the types of damage defined in the *EPA*. The evidence of the type of damages claimed by Midwest – namely the fact that the property had locations where the soil and groundwater exceeded MOE standards was not referred to by the court, nor was there any reference to damages to be awarded for the cost of remediation.

[20] The *EPA* gives the MOE the power to order the Defendants to remediate the Plaintiff's property and it has, in fact, done so. In the current context, this Court holds that the *EPA* cannot be interpreted, as suggested by the Plaintiff, in an expansive manner that allows damages contemplated by section 99 to include damages for the cost of remediation in circumstances where such remediation has already been ordered under the *EPA*.

[21] Midwest submits that there is no requirement for it to wait for an excessive period of time for remediation; rather, they are entitled to pursue an immediate remediation strategy notwithstanding the presence of an MOE order to remediate. Midwest submits that this is sensible as there is no guarantee the remediation will be performed, let alone on a timely basis.

[22] There is no evidence before the Court regarding the length of time such remediation will take. I do not accept Midwest's submission for the reasons articulated above. Further, Midwest cannot be entitled to a double recovery arising from the same legislation, which would result if their property is remediated pursuant to the MOE order and this Court concurrently awards a sum equivalent to Midwest's proposed remediation.

[23] The Court finds that the Plaintiff did not introduce evidence of damage or loss pursuant to section 99 of the *EPA*, such as actual loss in property value or its inability to use its property or operate its business on its property, or business losses. The Court therefore dismisses Midwest's claim on this basis.

Nuisance

[24] The parties agree that an actionable nuisance has been defined as " … causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable."

[25] Midwest submits that an escape of hydrocarbons contaminating its soil and water is a clear nuisance [*Ball v. Imperial Oil Resources Ltd.*, 2008 ABQB 765, paras. 117-118]. Similarly, the Defendants allowed a noxious substance to escape onto its property, thereby damaging Midwest's land or property.

[26] With respect to this nuisance claim, the Defendants allege that the Plaintiff failed to prove requisite damages, which is similar to the argument made in respect to the *EPA* claim.

[27] I agree with these submissions. There is no evidence that Midwest acquired a property which was not already damaged (as there is no evidence of the environmental state of the property when it was acquired). The Plaintiff, therefore, cannot establish that any chemical alteration in the soil and groundwater has occurred in its property. The Plaintiff did not take action against the vendor of the property, or the environmental company that did the Phase I testing on the property.

[28] If Midwest purchased a contaminated property, it must prove that there has been an increase in the contamination level of property caused by the Defendants.

[29] In *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1996), 3 O.T.C. 44, 2 C.P.C. (4th) 143, para. 9, the court held the following with respect to a claim of nuisance:

> In *Muirhead v. Timbers Brothers Sand & Gravel Limited* (1977), 3 C.C.L.T. 1 (Ont. H.C.) Rutherford J. at p. 5 stated:
>
> The law of nuisance refers to invasions of an occupier's interest in the beneficial use and enjoyment of land. To succeed in a private nuisance action, the plaintiff must establish either:
>
> (1) some interference with the beneficial use of his premises: or
>
> (2) some injury to those premises or the property located thereon.
>
> With respect to the first branch of the above principle, sufficient interference with beneficial use to support a nuisance action is present where there is any substantial interference with the comfort or convenience of persons occupying or using the premises (Salmond on The Law of Torts, 16th ed. (1973), at p.56, quoted in *Walker*, at p. 38) and, as pointed-out in the *Walker* case, the character of the locality in question has no relevance with respect to the second branch of the above principle, where material change to the plaintiff's premises (or property thereon) occurs as a result of the activities of the defendant, the plaintiff is entitled to redress irrespective of locality:
>
> Actual damage must be proven to succeed in nuisance (as opposed to trespass which is actionable per se): see *Mann v. Saulnier* (1959), 19 D.L.R. (2d) 130 (N.B. C.A.) at p. 133. No special damages (for alleged devaluation of property) can be advanced on the basis of mere speculation that a prospective purchaser might be apprehensive about the impact of the alleged nuisance on the property: see *Desrosiers v. Sullivan* (1985), 66 N.B.R. (2d) 243 and 169 A.P.R. 243 (Q.B.) at p. 251, affirmed (1986), 192 A.P.R. 271 (N.B. C.A.); leave to appeal refused (1987), 201 A.P.R. 90 (note) (S.C.C.). An interference with the health of the plaintiffs thereby interfering with their enjoyment of the lands would fall within the essence of nuisance: see *Palmer v. Stora Kopparbergs Bergslags AB* (1983), *(*sub nom. *Palmer v. Nova Scotia Forest Industries)* 2 D.L.R. (4th) 397 (N.S. T.D.) at p. 493. If there were an actionable nuisance created previous to PWL becoming the R/M of this garbage dump, then PWL would incur liability for nuisance if it did not take timely steps to abate it: see *Brewer v. Kayes*, [1973] 2 O.R. 284 (Dist. Ct.) where Gratton D.C.J. said at p. 288.

[30] In *Smith v. Inco Ltd.*, 2011 ONCA 628, the court held:

> [116] The alleged harm in this action was not related to the levels of nickel in the soil or the actual effects, if any, of that nickel on the property or its occupiers. Rather, as the trial judge stated at para. 12, "the alleged harm in this action is restricted to the negative effect, if any, on property values." For the claimants to succeed, they had to prove that their properties failed to appreciate in value, as they otherwise would have, because of adverse publicity generated by MOE's findings and reports that nickel from Inco had contaminated the soil on their properties.
>
> [67] In our view, actual, substantial, physical damage to the land in the context of this case refers to nickel levels that at least posed some risk to the health or wellbeing of the residents of those properties. Evidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not, in our view, amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property. The claimants failed to establish actual, substantial, physical damage to their properties as a result of the nickel particles becoming part of the soil. Without actual, substantial, physical harm, the nuisance claim as framed by the claimants could not succeed.

[31] For reasons referred to above, I agree with the submissions of the Defendant that the Plaintiff has not proven damages in nuisance.

Negligence

[32] The Plaintiff alleges the Defendants were negligent in the operation of their business at 1700 Midland, resulting in spills at 1700 Midland which constituted a nuisance to the Plaintiff's land.

[33] In *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1996), 3 O.T.C. 44, 2 C.P.C. (4th) 143, para. 9, which I have referred to above, the court summarized the following with respect to the negligence claim:

> (d) *Negligence* - A fundamental requirement of negligence is the constituent element of there being shown actual damage suffered by the plaintiff as a result of the defendant's breach of a duty of care towards the plaintiff. Actual damage must be proven; if not there will not be any entitlement to a verdict for nominal damages: see *Maple Leaf Lumber Co. v. Caldbrick* (1917), 40 O.L.R. 512 (C.A.) at p. 524; see also *Klar, Linden, Cherniak, Kryworlk, Remedies in Tort*, Vol. 3 (Toronto; Carswell, 1987) ch. 16, ss. 16-8. Again the Hodgsons would appear to have difficulty with showing any ability to prove damage based on the leachate plume.

[34] For the reasons articulated above, the Court similarly reaches the conclusion that Midwest failed to prove damages to support its negligence claims.

Punitive

[35] The parties do not dispute the requirements for an award of punitive damages. Punitive damages are awarded in exceptional cases for malicious, oppressive and high-handed misconduct that offends the court's sense of decency [*Desjardins v. Blick* (2009), 2009 CarswellOnt 1613, para. 26 (Ont. S.C.J.)].

[36] Punitive damages should be awarded only in exceptional cases for malicious, oppressive, and high-handed misconduct that offends the court's sense of decency. The purpose of punitive damages is to condemn the Defendant's conduct and to deter the Defendant and others from engaging in similar conduct in the future.

[37] I accept the Defendants' submissions that a finding that the conduct of the Defendants was wrong in law, caused or permitted the deposit of contaminants onto the Plaintiffs property, or has caused damage, would be insufficient to warrant an award of punitive damages.

[38] The Plaintiff, however, submits that it is appropriate to award punitive damages of $100,000 given the severity of the Defendants conduct and the length of time for during which the conduct continued. The amount of the award must demonstrate that it is not the cost of a license to continue wholly inappropriate and indefensible conduct.

[39] The Plaintiff refers to jurisprudence where awards of punitive damages were made, all of which can be distinguished from the present circumstances.

[40] In *Deumo v. Fitzpatrick*, 39 C.E.L.R. (3d) 299, para. 23 (Ont. S.C.J.), the court held that the conduct of the Defendants was reckless, destructive, persistent, pervasive and heedless of their neighbours' physical integrity and property rights, and therefore awarded punitive damages in the amount of $20,000.

[41] I do not find that the evidence supports such a finding on the Defendants' conduct.

Costs

[42] The Plaintiff submitted a Bill of Costs for $105,603 on a partial indemnity basis, and $139,981 on a substantial indemnity basis.

[43] The Defendants submitted a Bill of Costs for $62,353.50 on a partial indemnity basis, and $83,446.50 on a substantial indemnity basis.

[44] As the Defendants are the successful party, they are entitled to an award of costs. Submissions on costs may be made as follows:

(i) by the Plaintiff until 12:00 p.m. on March 12, 2013; and

(ii) by the Defendants until 12:00 p.m. on March 19, 2013.

Pollak J.

Released: February 28, 2013

CITATION: Midwest v. Thordarson, 2013 ONSC 775
COURT FILE NO.: CV-09-382649
DATE: 20130228

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Midwest Properties Ltd.

Plaintiff

– and –

John Thordarson and Thorco Contracting Limited

Defendants

REASONS FOR JUDGMENT

Pollak J.

Released: February 28, 2013