
CANADA / JUDGMENT

Jedd Ent. Ltd. v. Actton Petroleum Sales Ltd.

2020 BCSC 131

COURT

Supreme Court of British Columbia

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jedd Ent. Ltd. v. Actton Petroleum Sales Ltd.,

2020 BCSC 131

Date: 20200205

Docket: S38951

Registry: Vernon

Between:

Jedd Ent. Ltd. and Hilltop Sales & Services Ltd.

Plaintiffs

And

Actton Petroleum Sales Ltd.

Defendant

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

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Place and Date of Trial/Hearing:

Kelowna, B.C.

October 23, 2019

January 24, 2020

Place and Date of Judgment:

Kelowna, B.C.

February 5, 2020

- [1] The plaintiff commenced this claim for damages in 2006 alleging that its lands had been contaminated with hydrocarbons emanating from the defendant's property. The defendant applies to add third parties to this matter, which is currently set for trial commencing June 1, 2020.

Background

- [2] The plaintiff, Jedd Ent. Ltd., owns a commercial property in Vernon, BC. The defendant owns an adjacent commercial property where it operates a gas station. In June 2006, the plaintiff commenced this claim under the Environmental Management Act, S.B.C. 2003, c. 53, claiming that gasoline and other hydrocarbons had leached through the soil and contaminated its land.
- [3] The proposed third parties are Chevron Canada Limited ("Chevron"), Shell Canada Products ("Shell") and Husky Energy International Corporation ("Husky"). Chevron and Shell operated or supplied product to gas stations in the vicinity of the plaintiff's property. Husky is responsible for gas stations previously operated or supplied by Mohawk Oil Company. Shell's

gas station was the closest, kitty corner to the plaintiff's property across a laneway. The Chevron and Mohawk gas stations were nearby. The defendant's proposed third-party claim would add Shell, Chevron and Husky (the "Oil Companies") and seeks contribution and indemnity, alleging that any contamination of the plaintiff's lands was not caused solely by the defendant but was contributed to by contamination emanating from the other gas stations.

Procedural Background

- [4] This action was commenced by writ of summons and statement of claim on June 27, 2006. The defendant filed its statement of defence on July 24, 2006, in which it denied liability. It is significant that the defendant specifically pleaded in 2006 that any contamination was caused or contributed to by Shell and Chevron because these are the parties it now seeks to add as third parties by way of its application filed in July 2019. The defence included the following plea:
17. In answer to the whole of the Statement of Claim, and in the alternative, any alleged contamination of the Jedd lands was caused or contributed to by the plaintiffs and/or alternatively by others, including, but not limited to, the other defendant, Shell Canada Limited, Chevron Canada Limited and in the further alternative, caused by the B.C. Ministry of the Environment due to its failure to enforce the provisions of the EMA as against Shell Canada Limited and Chevron Canada Limited in not ordering those companies to clean up known contamination under the roads near their stations and Acton claims contribution and indemnity in respect of any amounts paid by it in respect of such alleged contamination. Acton pleads and relies upon section 35(3) of the Regulations and the provisions of the Negligence Act, R.S.B.C. 1996, c. 333 and amendments thereto.
- [5] There have been a number of prior trial dates: February 4, 2008, April 7, 2015, February 22, 2016 and June 1, 2020. The pending trial date was scheduled by way of notice of trial filed in June 2019. The trial is currently scheduled for five days commencing June 1, 2020.
- [6] This application to add the Oil Companies as third parties was filed shortly after the notice of trial in June 2019.

Legal Test

- [7] The parties agree on the appropriate test on an application to add third parties under Rule 3-5(4)(a), which permits a party to file a third party notice at any time with leave of the court.
- [8] In *Steveston Seafood Auction Inc. v. Bahi*, 2013 BCSC 1072, the court summarized the applicable principles as follows:
- (a) The test is the same as under Rule 9 - 5. The proposed third party must establish beyond doubt that the pleadings disclose no cause of action. The court is permitted to reject proposed claims only if the action is "bound to lose" or there is no bona fide triable issue.

- (b) In exercising its discretion as to whether leave ought to be granted, the court can consider factors such as:
 - (i) prejudice to the parties,
 - (ii) the expiration of a limitation period,
 - (iii) the merits of the proposed claim,
 - (iv) any delay in the proceedings; and
 - (v) the timeliness of the application.
 - (c) The court is required to assume that all pleaded facts are true.
 - (d) An important consideration is whether it is "just and convenient" in all the circumstances of the case to grant leave to file the third party notice.
- [9] The proposed third party notice claims contribution and indemnity from the Oil Companies pursuant to the law of nuisance, the doctrine in *Rylands v. Fletcher*, the Negligence Act, R.S.B.C. 1996, c. 333, and the Environmental Management Act. There is no doubt that the proposed third-party notice discloses a cause of action. The issue on this application is therefore whether the court should exercise its discretion to allow the third-party notice to be filed.

Positions of the parties

- [10] The defendant's primary argument is that it is more just and convenient to determine all matters at a single trial as opposed to having a trial only between the plaintiff and defendant followed by a subsequent trial in which the defendant seeks contribution and indemnity from the proposed third parties. It argues that although the action is now 14 years old, it is not particularly far along in many respects in that there have been no examinations for discovery and document disclosure is incomplete. The trial date will not be lost as a result of adding the new parties because it will not be in a position to go ahead anyway.
- [11] The plaintiff and the Oil Companies oppose the application. The plaintiff says it will suffer significant prejudice because the trial will become a lot longer and more complex resulting in delay. It says the application has not been made in a timely manner and should be viewed as nothing more than a tactic to stall.
- [12] The Oil Companies also argue prejudice, although for different reasons. They point out that the defendant has been aware of its claim for contribution and indemnity from the outset, as evidenced by the specific plea in the statement of defence, and that their ability to investigate and prepare for trial has been compromised by the defendant's delay. They also say there are other non-parties who might need to be joined. Finally, they argue that the defendant's claim may be subject to a limitation defence.

Discussion

[13] Third party proceedings exist to serve the objective of avoiding an unnecessary multiplicity of proceedings arising out of the same events. In *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (B.C.C.A.), McLachlin J.A. described the rationale for having third party claims adjudicated at the same time:

14 Third party pleadings function as a special type of statement of claim. Indeed, the claim they embody could be brought by separate action. But to avoid a multiplicity of proceedings, the rules permit the claim to be made in the action which has been commenced against the defendant. The object of permitting third party proceedings to be tried with the main action is to provide a single procedure for the resolution of related questions, issues or remedies, in order to avoid multiple actions and inconsistent findings, to provide a mechanism for the third party to defend the plaintiff's claim, and to ensure the third party claim is decided before a defendant is called upon to pay the full amount of any judgment. The avoidance of a multiplicity of proceedings is fundamental to our rules of civil procedure. This has been the case since the reforms effected by the Judicature Acts in the nineteenth century. As Cotton L.J. stated in *Searle v. Choat* (1884), 25 Ch. D. 727 : "the whole tenor of the Judicature Acts is to require all proceedings as far as possible to be taken in one action".

[14] This overarching objective must be kept in mind when deciding whether or not to allow the third party claims to be filed at this time. However, this objective must be balanced against the potential prejudice to the affected parties in granting leave to file such a notice.

[15] Shell provided detailed evidence about the prejudice it would face if it were joined in the action by way of an affidavit from Ms. Karen Bliss who is Shell's America Post Closing Rights and Obligations Claim Manager. Ms. Bliss is responsible for overseeing the management and resolution of third-party prelitigation property damage received by Shell's business operations in Canada and the US. She notes the following with regard to hydrocarbon contamination investigations in order to illustrate that prejudice:

- a) proximity between properties is significant: concentrations of migrated hydrocarbons generally decrease with distance from the source;
- b) potential sources of hydrocarbon contamination identified based upon land-use, and it is not uncommon that potential sources of contamination are clustered together;
- c) it is often not possible to distinguish between different types of hydrocarbon derived contamination (e.g. diesel versus gasoline, leaded versus unleaded gasoline);
- d) it is generally not possible to distinguish between manufacturers of similar hydrocarbons (e.g. Shell gasoline versus Chevron gasoline); and
- e) investigations will often take years to conduct as hydrocarbon contamination can migrate over time.

- [16] Coincidentally, Ms. Bliss resides in the Vernon area. From her preliminary review, she has identified up to five additional parties that may be required in order to ensure that all contributors to the contamination on the plaintiff's lands are before the court.
- [17] Shell operated a gas station close to the plaintiff's lands from 1954 until 1993. In 1995, it began remediation of the lands and removed all underground fuel storage tanks. A remediation program was undertaken and a certificate of compliance from the Ministry of the Environment was obtained no later than the end of 2001.
- [18] Chevron and Husky are in a similar position to Shell as it relates to prejudice. The Chevron gas station operated from 1963 to 1999, at which time it too was decommissioned. The Husky station was opened in 1964.
- [19] It is obvious that it would not be possible for the Oil Companies to be ready for a trial in June 2020. If the Oil Companies were to become parties to the action, it is unlikely that the trial could take place for some time. In this regard, I accept Ms. Bliss' evidence regarding the level of investigation that would be required in order to prepare adequately.
- [20] That said, the usual arguments regarding prejudice, such as fading memories and recollections, loss of documents, and inability to locate witnesses are not of significance in this case because the Environmental Management Act, sections 45 to 47, specifically provides for retroactive liability for producers of contaminants. Manufacturers of hydrocarbons such as the Oil Companies can be required to defend claims arising out of historical acts or omissions. The only real prejudice to the Oil Companies would therefore be limited to having time to prepare for the trial, which prejudice could be obviated by affording them ample time.
- [21] However, I accept that the plaintiff will suffer significant prejudice, if the trial is delayed to permit the Oil Companies sufficient time to prepare. The plaintiff concedes that its June 2020 date may be in jeopardy in any case because it has yet to receive a certificate of compliance to confirm that its remediation work has been completed. However, even if the June 2020 date is lost, there is no suggestion that the trial will be significantly delayed as a result.
- [22] The plaintiff's claim, which has taken a long time to get to the point where it is ready for trial, otherwise appears ready to proceed. The claim is for approximately \$350,000, a relatively modest amount in the circumstances. A trial as between the plaintiff and defendant would be focused solely on whether hydrocarbons originating on the defendant's lands contaminated the plaintiff's lands. The question of other potential sources of contaminants is of relevance only to the apportionment of damages.
- [23] I am satisfied that the trial would be significantly delayed if the Oil Companies and perhaps other parties are identified and then afforded time to marshal their respective defences, and that the trial itself would take substantially more than one week. There is also the logistical problem of finding a block of trial time in five or more lawyers' calendars.

- [24] Where the application if successful will cause an adjournment of the trial or substantial delay, it is incumbent on the applicant to provide an explanation for the delay, including evidence as to when the applicant knew that a claim for contribution or indemnity could be advanced: *Tyson Creek Hydro Corp. v. Kerr Wood Leidal Associates Ltd*, 2013 BCSC 1741 at para. 63, *aff'd* 2014 BCCA 17. The defendant suggests that recent document disclosure and the contents of the plaintiff's expert report have led to its bringing this application at this time. I do not accept that explanation.
- [25] First, the defendant was clearly aware of the potential involvement of Shell and Chevron in July 2006 because it specifically pleaded in its statement of defence that Shell and Chevron contributed to the contamination. The effect of any new documents and the expert report could therefore only have been to supplement or amplify what the defendant already knew.
- [26] Moreover, the plaintiff's expert report, which was served in October 2018, is on its face exculpatory as to the involvement of the Oil Companies:

To confirm the 2006 measured groundwater flow direction, Associated conducted an updated detailed groundwater elevation survey that incorporated the new off-site wells (MWS-11 and MWS-12) and the existing wells on site. The objective was to expand the survey footprint beyond the boundaries of the Subject Site to provide better certainty of flow direction. The results of the updated survey confirmed that the flow direction is indeed to the southwest (Figure 1), suggesting that the northern properties are the likely contributors to the on-site contamination.

The new off-site wells MWS-11 and MWS-12 (Figure 1) were strategically placed to capture potential contamination from the former Chevron Service Station and former Shell Service Station. Field and analytical testing confirmed no hydrocarbon exceedances (Table 2), as verified in the attached Caro report. We did not discover any hydrocarbon detections in the subsurface media, despite groundwater being measured at the same depth as shown in MWS-2 and MWS-3 (Figure 1). Given the contaminant transport mechanism via groundwater, if the Chevron and Shell station (now Budget Rentals) were contributing to the contamination observed at the Subject Site, we should have observed some indications of hydrocarbons at MWS-11 and MWS-12. Further, based on a +/- 87 m/year approximate travel time (Summit 2006) contamination from the Budget Rentals property would have either diluted or migrated past the Subject within a matter of 3-5 years following remediation and issuance of the Certificate of Compliance in 1998. On this basis, I was able to rule out the former Chevron property and Budget Rentals [the former Shell property] as a source contributor of hydrocarbon contamination to the Subject Site. The Acton site therefore appeared to be the last remaining possible source of the hydrocarbon contamination. Further based on potential evidence of hydrocarbons noted by EBA (1995; 1996) along the City of Vernon's 27th Street ROW, it is highly possible that contamination has been present at the Subject Site at that time as well. Acton's environmental consultants, AquaTerra, strengthened our theory following my conversation with them in 2008 regarding their in-situ groundwater bio-remedial plans (R. Koenig, R., Personal Communication 2008).

- [27] This matter is now on its fourth trial date. On the three previous occasions, the defendant took no steps to add the Oil Companies as third parties. As the first trial date was prior to the enactment of the Supreme Court Civil Rules, it could have added third parties as of right up to 120 days before the trial. I note that the adjournment of that trial date occurred within 120 days of the trial.
- [28] While there is an underlying concern on the part of the court to avoid a multiplicity of proceedings relating to the same matter, this is not absolute principle and will not necessarily override other concerns. In *Tyson Creek*, Goepel J. (as he then was) held that the avoidance of a multiplicity of proceedings was not the only factor and that prejudice to the plaintiff may be more significant:
- [66] While KWL will undoubtedly suffer some prejudice if forced to bring a separate action for contribution, in the circumstances of this case I find that the potential and real prejudice to the plaintiff trumps the defendant's right to bring additional third party proceedings. The object of the rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits. This requires all parties to move with some haste. KWL has known since August of 2012 that this matter was scheduled for trial in March 2014. It was incumbent on it to bring its application to add third parties at the earliest possible date or to give a complete explanation as to why it had not.
- [29] As I said before, there is scant evidence from the defendant as to why this application was not brought earlier and I do not accept the explanation provided.
- [30] The effect of granting the order sought at this time would be to either force the Oil Companies to trial without adequate time to prepare, or alternatively, to significantly delay the plaintiff's opportunity to prove its case. Neither scenario would be fair to the parties impacted.
- [31] As was the case in *Tyson Creek*, I am mindful that there might be some prejudice to the defendant if forced to commence a separate claim for contribution and indemnity. Ultimately, however, the defendant has no one to blame but itself.
- [32] While a multiplicity of proceedings should generally be avoided, I am unaware of any other prejudice to the defendant. There would not appear to be any risk of inconsistent findings from the court, which often warrants hearing related matters together. At the same time, because the plaintiff's claim against the defendant will not involve any analysis of contribution from others, it is unlikely there would be a significant reduction in the number of days required for trial if the application were granted.
- [33] In the absence of a clear explanation from the defendant as to why it did not commence third party proceedings earlier, either as of right, or by application brought in a timely manner, I infer that the application is tactical, intended to either adjourn or delay, or to render the plaintiff's claim uneconomical.

[34] I conclude it would be neither just nor convenient to add the Oil Companies as third parties at this juncture.

Limitation issue

[35] Finally, I wish to touch briefly on Shell's argument regarding the possibility of a limitation defence. The expiration of a limitation period is a factor for the court to consider in the exercise of its discretion, and in particular whether the order if granted would have the effect of depriving the third party of a limitation defence.

[36] Under the old Limitation Act, R.S.B.C 1996, c. 266, there was no express limitation for claims for contribution and indemnity, and therefore the limitation period was six years. Under the new Limitation Act, S.B.C. 2012, c. 13, which came into force June 1, 2013, claims for contribution and indemnity are subject to a two year limitation.

[37] More importantly, it had been generally considered that the limitation for a claim for contribution and indemnity started to run no earlier than when a plaintiff obtained judgment against the defendant. Under the new Limitation Act, which adopts a discoverability analysis for the commencement of limitations, a claim for contribution and indemnity is considered to have been discovered on the later of the date when the defendant is served with the claim or the first day when the claimant knew or ought reasonably to have known that a claim for contribution or indemnity may be made (new Limitation Act, s. 16).

[38] As Justice Kent said in *Sohal v. Lezama*, 2019 BCSC 1709, because the limitation period for a claim for contribution and indemnity was six years and did not start to run until the plaintiff obtained judgment against the defendant, the limitation was seldom if ever in issue in third party claims for contribution and indemnity under the old Limitation Act.

[39] *Sohal* also involved an application to add third parties. The new Limitation Act applied to the possible third party claim. Kent J. concluded that if the limitation period for a claim for contribution and indemnity has expired, the court has no discretion and the application to add the third party must be dismissed.

[40] In this case, the action was started and the statement of defence filed prior to enactment of the new Limitation Act. Shell suggests that perhaps the new Limitation Act applies, in whole or in part, in which case the claim against it would be statute-barred.

[41] However, I conclude that it is not necessary for me to determine the limitation issue because the application is dismissed for other reasons as set out above. The defendant does not suggest that it will lose the right to bring its claim for contribution and indemnity if the order is not granted. If Shell has a limitation defence, it is not precluded from advancing it at a later time.

Disposition

[42] The application is dismissed, with costs to the plaintiff and to the proposed third parties.

"Wilson J."

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