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Thursday, July 7, 2016

Issue 351

Issues added on the 7th and 21st of every month.

HIGHLIGHTS

* A justice of the Ontario Superior Court of Justice has granted summary judgment, dismissing a claim for damages based on the Rule in Rylands v. Fletcher resulting from alleged odours and seepage emanating from farmland following the application of "biosolids". The Court observed that the spreading of "biosolids" as well as fertilizer/nutrients/pesticides did not constitute a "non-natural" use of property and that there was no evidence that either the biosolids or the odour could be considered a "dangerous product". However, the Court also refused to grant summary dismissal of the same claim based on negligence, trespass or nuisance. The Court observed that there might be evidence to establish contaminated materials had seeped from the farm to neighbouring property; that compliance with Ministry of Environment standards alone might not rule out a negligence claim, and that odours could be subject to a claim in nuisance. The Court commented on different categories of offensive odours under the Nutrient Management Act (Ontario). (Deavitt v. Greenly, CALN/2016-016, [2016] O.J. No. 1516, Ontario Superior Court of Justice)

NEW CASE LAW

Deavitt v. Greenly;

CALN/2016-016,

Full text: [2016] O.J. No. 1516;

2016 ONSC 1693,

Ontario Superior Court of Justice,

B.G.A. MacDougall J.,

March 24, 2016.

Application of Biosolids to Farmlands -- Odours and Seepage to Neighbouring Lands -- Negligence -- Nuisance -- Trespass -- Rule in Rylands v. Fletcher.

Terry Greenly and Sandra Greenly (the "Greenlys") , the Town of Cobourg (the "Town") and the Minister of Environment brought motions for summary judgment to dismiss claims advanced against them by the Greenlys' neighbours, William Deavitt and Wendy Deavitt (the "Deavitts") who alleged that they had sustained losses as a result of the Greenlys applying biosolids to their farm property.

The Greenlys operated a farming business which included 50 milk cows and 400 acres of cash crops near Cobourg, Ontario. In 2001, the Deavitts purchased a 7 acre hobby farm which abutted the Greenly farm.

The Town wished to provide farms with biosolids from their Water Pollution Control Plants at no cost for application to certified agricultural lands.

The Town provided the Greenlys with written confirmation that the spreading of biosolids was safe; that it had been applied to certified agricultural lands for years; that the biosolids were sampled and analyzed monthly and met all requirements under the Nutrient Management Act (Ontario) and that during the application of the biosolids to agricultural lands, the process would be continually monitored to ensure all regulations under this Act were followed.

The Ministry of the Environment issued a provisional certificate of approval with respect to the application of biosolids to the Greenlys' land, provided, among other things, that biosolids would not be spread within 90 metres of any residences; within 100 metres of any surface water; within 15 metres of any drilled wells having watertight casings, and within 90 metres of other wells.

On November 7, 2005, the Ministry of Environment approved a reduction of the minimum separation distance between the application area and residences to a 20 metres setback provided that this reduction was granted for injection application only.

Biosolids were applied to the Greenlys' lands on numerous occasions between 2005 and 2007 and the application of the biosolids were inspected by inspectors from the Town and the Ministry of Environment.

The Deavitts filed a claim seeking, among other things, loss of market value to their farm, damages for the loss of a horse and the cost of veterinary care for their livestock, medical treatment for Mrs. Deavitt, and relocation costs for themselves and their animals. They based their claim on:

1. Trespass to property.

2. The Rule in Rylands v. Fletcher.

3. Negligence.

4. Nuisance.

The Court ruled, in a previous decision, that the Plaintiffs' claims were discoverable prior to October 21, 2007 and that all claims prior to May, 2007 were statute barred by virtue of the Limitations Act (Ontario).

This application was for summary dismissal on the grounds that the claims after May, 2007 disclosed no genuine issue requiring a trial.

Decision: B.J. MacDougall, J. granted the Greenlys' summary judgment application with respect to the claim under the Rule in Rylands v Fletcher, but dismissed the other summary dismissal motions [at para. 116].

MacDougall, J. observed that the evidence indicated that:

1. Biosolids applications in August, 2007 were applied to the surface and not injected into the soil.

2. Odours were detected in 2007.

3. There was no basis on which it could be concluded that odours had subsequently dissipated and that there was evidence, including photograph evidence, indicating that noxious odours continued until 2008 and that biosolids were "pooling" on the surface in 2008.

With respect to the claims advanced by the Deavitts, MacDougall, J. concluded:

(a) Trespass: MacDougall, J. adopted the following description of the law with respect to trespass from Lewis Klar Tort Law [at para. 37]:

> [37] Trespass to property is an intentional tort that involves the unjustified and direct interference by force with another person's land. The force must be directly applied to the land. Non-physical interferences such as vibrations, noise, fumes and odours do not constitute trespass. The defendant's act need not be intentional, but it must be voluntary. Trespass is actionable without proof of damage. While some form of physical entry onto or contact with the plaintiffs' land is essential to constitute trespass, the act may involve placing or propelling an object or discharging some substance onto the plaintiff's land which can constitute trespass.

MacDougall, J. reviewed the Deavitts' evidence [at para. 38 to 51] and the allegation that contaminated liquid substances from the Greenly land had seeped onto the Deavitt land and observed that the Deavitt land had a lower

elevation than the Greenly land [at para. 53]. MacDougall, J. concluded that the "Greenlys have a responsibility to see that the biosolids do not seep onto the neighbour's property" [at para. 54], and held that the trespass claim required a trial [at para. 55].

(b) Rule in Rylands v. Fletcher: MacDougall, J. summarized the law with respect to the Rule in Rylands v. Fletcher as follows [at para. 56 and 57]:

> [56] The Rule in Rylands v. Fletcher imposes strict liability for damages caused to a plaintiff's property by the escape from the defendant's property of a substance "likely to cause mischief". See Smith v. Inco Limited, 2011 ONCA 628, 2011, ONCA 628.
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> [57] For the Rule in Rylands v. Fletcher to apply, the plaintiffs must show that the Greenlys made a non-natural use of their land by bringing something onto their land which was likely to cause damage if it escaped and that the escape of that substance did in fact cause the plaintiffs' damages.

MacDougall, J. held that the spreading of biosolids on a farmer's field was not a "non-natural use of the property" stating [at para. 58]:

> [58] The plaintiffs have not provided any evidence that, if accepted, could demonstrate that the spreading of biosolids on a farmer's field could constitute a "non-natural" use of their farm fields. In my view, the use by a farmer of fertilizer/nutrients/pesticides on a farm field would not constitute "non-natural" use of the property and the Plaintiffs' claim on the Rylands v. Fletcher Rule would fail for that reason alone.

Further, there was no evidence that the biosolids or the odour could be considered a "dangerous product" [at para. 59]. The Deavitts' claim under the Rule in Rylands v. Fletcher was dismissed.

(c) Negligence: MacDougall, J. observed that the Greenlys' argument that they had complied with the Ministry of Environment's conditions would not, of itself, be a complete answer to the allegation that they had met their duty of care, even if they had established that the biosolids were applied in accordance with Ministry standards, stating, at para. 75:

> [75] Again, as noted earlier, the MOE conditions applicable to the use of biosolids are "minimum" conditions only and therefore to only say in response to an allegation of negligence, "I followed the conditions", might not be a complete answer to whether or not, in these particular circumstances, that satisfies the acknowledged "duty of care".

With respect to the negligence claim against the Town and the Ministry of the Environment, MacDougall, J. observed that it might be argued that the applications of biosolids were done negligently, or that the standards set by the Ministry were not adequate as the Deavitts' property was at a lower elevation than the Greenly fields and that seepage from the Greenly lands might have occurred [at para. 82 and 83].

(d) Nuisance: MacDougall, J. reviewed the law of nuisance [at para. 87 to 91] in relation to odours, relying on the decision of the Ontario Court of Appeal in Smith v. Inco, supra and Pyke v. Tri Gro Enterprises Ltd. [1999] O.J. No. 3217. MacDougall, J. quoted the following statement by Ferguson, J. in Pyke [at para. 91]:

> 201 The material claim of the plaintiffs is about odours. There is no doubt that odours can be the subject of a claim in nuisance.

and commented as follows at para. 89:

> [89] Even if the plaintiffs were unable to prove that the Greenly spreading of biosolids did not cause physical damage to the plaintiffs' property, they could still assert a claim for damages for "amenity nuisance", that is, that the odour from the biosolids substantially interfered with the use and enjoyment of their lands.

MacDougall, J. concluded that a trial was required with respect to the nuisance claim and made the following observations with respect to the provisions of the Nutrient Management Act (Ontario) and the Regulations thereunder with respect to offensive odours from biosolids:

> [112] Only as an aside, I noted that on the nuisance issue relating to alleged "offensive odours" emanating from the spread of biosolids, since 2012, there have been significant regulatory changes enacted under the Nutrient Management Act that requires that an independent panel test the "level of offensiveness" of the odour from samples of the biosolids intended for application. The Regulations create 3 "categories" of odours. As the "offensiveness" of the odours increases, the setbacks required for the applications, depending on whether the biosolids are spread on the fields with "incorporation" into the field shortly after or injected or when there is no incorporation, significantly increase. The highest category of offensiveness of the odour (Category 3) now requires a setback from a residence to be 450 m and the biosolids are to be incorporated into the solid within 24 hours. See: Nutrient Management Act.

CREDITS

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