LexisNexis®

Agricultural Law NetLetter™

A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditors rights, animals, grain, import/export and other matters in an agricultural context.

Thursday, April 7, 2011 - Issue 223

Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

* An Ontario Superior Court Justice has summarily dismissed a farmer's claim for damages based on an allegation that feed purchased from a supplier was defective, and that the defect resulted in the death of the farmer's cattle and sheep. The Court assumed that an implied warranty of fitness for purpose applied with respect to the feed products, but relied on uncontradicted laboratory and veterinary evidence which indicated that the losses were sustained as a result of the farmer's improper feeding and management practices, and not defective feed. (McNevan v. Agrico Canada Ltd., CALN/2011-012, [2011] O.J. No. 1488, Ontario Superior Court of Justice)

* A Justice of the British Columbia Supreme Court has issued a mandatory injunction which required an Abbotsford berry farmer to construct lateral support along the boundary of adjoining lands to prevent erosion along a steep bank which resulted from excavations to create a flat 5 acre berry field. (Miklosko v. Deol, CALN/2011-013, [2011] B.C.J. No. 533, British Columbia Supreme Court)

**** NEW CASE LAW ****

McNevan v. Agrico Canada Ltd.; CALN/2011-012, Full text: [2011] O.J. No. 1488; Ontario Superior Court of Justice, Toscano Roccamo J., April 4, 2011.

Sale of Goods -- Fitness for Purpose -- Animal Feed -- Causation.

Agrico Canada Ltd. ("Agrico") brought an action in small claims court to recover an outstanding debt of $13,651.40 for livestock feed Agrico delivered to a farmer, David McNevan ("McNevan"). McNevan brought an action in Ontario Superior Court for damages in excess of $50,000.00 alleging that the feed was "improper" and not properly delivered, and had caused the death of 13 livestock, including cows and sheep, as well as

lost profits and veterinary expenses. Master Feeds, Inc. ("Master Feeds") which manufactured the feed, was joined as a third party.

The small claims proceedings were then transferred to the Superior Court.

Agrico brought an application for summary dismissal of McNevan's claim on the basis that McNevan had not substantiated his claim for implied breach of warranty under the Sale of Goods Act, R.S.O. 1990, chapter S.1, and had not made out any claim in negligence.

In support of the summary judgment application, Agrico filed Affidavit evidence concerning the investigation carried out by Master Feeds following the livestock deaths. Laboratory reports confirmed that the feed delivered to McNevan was in conformity with standard nutrient composition for the feed.

A veterinary report which concluded the cows died from "grain overload" resulting from mismanagement of livestock, and not feed content, was filed.

Affidavit evidence was also filed concerning an allegation that McNevan had delayed the trial of the action.

Decision: Toscano Roccamo, J. granted summary judgment to Agrico for the amount of its claim and dismissed McNevan's claim against Agrico [at para. 40].

Roccamo, J. reviewed the heavy onus on parties seeking summary judgment at para. 20 to 23. Roccamo, J. held that courts on a summary judgment motion may nevertheless weigh evidence, evaluate credibility, and draw reasonable inferences from the evidence [at para. 20].

Roccamo, J. assumed there was sufficient evidence to establish an implied warranty as to the fitness of the feed, including proof that Agrico knew of the intended purpose of the feed, and that McNevan had relied on the advice of Agrico's representatives with respect to the feed [at para. 28 and 29].

Roccamo, J. held, however, that McNevan still had the onus to exclude other probable causes for his loss [at para. 30], and concluded that the evidence established that the feed conformed to acceptable standards and that the loss resulted from McNevan's own failure to properly feed his cattle, stating at para. 35 to 36:

> [35] I find that the evidence before me from A & L Laboratories is that the Masterfeeds product confirms to standards, and that Agrico delivered when requested by McNevan to do so. I find it reasonable to infer, particularly given from the lengthy history of litigation in this matter, that McNevan's loss resulted from his own failure to ensure proper feeding of his cattle, and subsequent management of feed delivered to him by Agrico.
>
> [36] McNevan bears the burden to demonstrate that "but for" the negligence of Agrico his loss would not have occurred: See Resurfice v. Hanke, 2007 SCC 7 (CanLII), [2007] 1 S.C.R. 333 at paragraph 21.

Miklosko v. Deol; CALN/2011-013, Full text: [2011] B.C.J. No. 533; British Columbia Supreme Court, W.G.E. Grist J., March 29, 2011.

Real Property -- Boundary Disputes -- Excavations and Loss of Lateral Support -- Mandatory Injunctions.

Imrick Miklosko ("Miklosko") sued an Abbotsford, British Columbia berry farmers, Sukhraj Singh Deol and Navreetjot Kaur Deol (the "Deols") seeking damages and a mandatory injunction to require the Deols to construct a retaining structure at the boundary of the Deols' property to prevent damage resulting from the loss of lateral support along a steep bank created by excavations on the Deols' property.

Miklosko and the Deols own adjoining properties in a rural area near Abbotsford. In 2006, the Deols changed the contours of their property to accommodate a flat 5 acre berry field. As a result of the excavations, a steep bank approximately 4 to 6 metres in height was created at the property boundary which resulted in some erosion to the Miklosko's property and the prospect of future weathering and loss of support.

Miklosko's damages at the date of the trial were minimal. Miklosko sought a mandatory injunction to require Deols to construct a retaining wall, however the evidence indicated that a retaining wall would be expensive and that the most economical method would be to flatten or remediate the slope.

The Deols argued that a mandatory injunction should not be granted to require them to remediate the slope without imminent grave consequences as a result of subsidence to the surface of Miklosko's property.

Decision: Grist, J. granted a mandatory injunction which directed the Deols to take remedial steps to replace the support they had removed on the Deols' side of the property line [at para. 22 and 23].

Grist, J. reviewed case law with respect to the availability of mandatory injunctions [at para. 16 to 18], referring to British Columbia decisions in Bullock Holdings Ltd. v. Jerema, [1998] B.C.J. No. 142 (S.C.) and Kerlenmar Holdings Ltd. v. Matsqui (District), [1991] B.C.J. No. 3123 (C.A.), and a decision of the House of Lords in Redland Bricks Ltd. v. Morris, [1970] A.C. 652, and stating at para. 17 and 18:

> [17] In Redland, Lord Upjohn said at page 579-580:
>
> > .The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be "as of course". Every case must depend essentially on its own particular circumstances. Any general principles for its application can only be laid down in the most general terms:
> >
> > 1. A mandatory injunction can only be granted where the plaintiff

shows a very strong probability on the facts that grave damage will accrue to him in the future. .

2. Damages will not be a sufficient or adequate remedy if such damage does happen. .

3. Unlike the case where a negative injunction is granted to prevent the continuance or recurrence of a wrongful act the question of the cost to the defendant to do so works to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account .

4. If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can given his contractors the proper instructions.

[18] The "very strong probability . that grave damage will accrue" is listed among the "general principles . laid down in the most general terms". In appropriate cases a mandatory injunction has issued without there being a threat to safety or exceptional damage to the land in question. In Kerlenmar Holdings Ltd. v. Matsqui (District), [1991] B.C.J. No. 3123 (C.A.), the plaintiff's agricultural land was subject to increased flooding due to several decades of urbanization of the neighbouring municipalities. The agricultural potential of the land was always compromised by flooding, but was further negatively affected as a result of this process. Toy J. held that damages based on the cost of remedial measures were not appropriate because the plaintiff was unlikely to go ahead with the improvements. Ultimately, he determined the appropriate remedy was to require a system of dykes to be constructed around the plaintiff's land ameloiorating the runoff flooding.

Grist, J. concluded that the principles in Redland should be viewed as a guideline rather than a code, and concluded, at para. 22 and 23:

[22] On review of these authorities, I think the general principle cited in Redland needs to be considered as a guideline rather than part of a code, and that notwithstanding the consequences cannot be realistically seen as constituting the probability of grave damage, the circumstances of this case still give cause to seriously consider the remedy of a mandatory injunction. Damages will not provide a remedy of much consequence in the future if general damages alone are an issue. If Mr. Miklosko is to build a retaining structure at the edge of his property, the cost of the structure will likely be claimable as special damages, as it was in Ardavicius v. Kairys, [2009] O.J. No. 2402 (S.C.); however, as indicated in Mr. Kokan's engineering

report, the cost will be very significant. On the other hand, remedial steps to replace the support on the Deols' side of the line would not be extensive and would be relatively inexpensive. Further, the directions required in the mandatory injunction should present no risk of uncertainty or marked difficulty by way of enforcement. Fill of like quality to that removed needs to be replaced at a grade of two measures horizontal to one vertical. The defendant should also be at liberty to adopt one of the other remedial methods, a rock faced fill on a one-to-one grade; or a retaining wall, so long as the choice of these last two options is certified as built to engineering standards.

[23] In my view, without one of these fairly simple remedies, Mr. Miklosko's right to neighbouring lateral support is challenged to the point of constituting a right without an effective remedy. On balance I find the discretionary use of the remedy to be appropriate and the mandatory injunction will issue.

** CREDITS **

This NetLetter is prepared by Brian P. Kaliel, Q.C. of Miller Thomson LLP, Edmonton, Alberta.