COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sakwi Creek Hydro Limited Partnership v. Dickin,* 2023 BCCA 188

Date: 20230428
Docket: CA48543

Between:

Sakwi Creek Hydro Limited Partnership, Sakwi Creek Hydro Ltd., Connor, Clark & Lunn Energy Infrastructure Limited Partnership, Connor, Clark & Lunn Hydro Ltd. (previously known as Connor & Lunn Energy Infrastructure Ltd.), Sts'Ailes Eco Energy Development (Sakwi) Limited Partnership, and Sts'Ailes Development Corporation

Appellants
(Defendants)

And

Grant Phillip Dickin

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated August 18, 2022 (*Dickin v. Windriver Power Corp.*, 2022 BCSC 1426, Chilliwack Docket S39153).

Oral Reasons for Judgment

Counsel for the Appellant: A.B. Gray

No one appearing on behalf of the Respondent:

Place and Date of Hearing: Vancouver, British Columbia
April 27, 2023

Place and Date of Judgment: Vancouver, British Columbia
April 28, 2023

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Summary:

The plaintiff brought claims against eight defendants in nuisance, the rule in Rylands v. Fletcher, negligence and unjust enrichment with respect to noise allegedly emanating from a turbine at a hydroelectricity project close to where he lives. The defendants applied for an order under Rule 9-6 dismissing the plaintiff's notice of civil claim against four of the named defendants. They also sought an order dismissing the claims in negligence and unjust enrichment against the remaining defendants on the basis that those claims were statute-barred. The defendants appeal the order of the chambers judge dismissing the application for summary judgment.

Held: Appeal allowed in part. The chambers judge failed to consider the defendants' application based on the pleadings and uncontradicted evidence. The failure to engage with the evidence at all constituted an error in law in the application of the test under Rule 9-6. It was manifestly clear on the uncontradicted evidence that there was no genuine issue with respect to the liability of the four non-Sakwi defendants. With respect to the claims being statute-barred, the judge found that the plaintiff made no further inquiries to ascertain the identity of other possible defendants because he believed he had already identified the owner and operator of the project. In short, he was not satisfied beyond a doubt that the negligence and unjust enrichment claims had no chance of success because the identities of the defendants were discoverable by the plaintiff through the exercise of reasonable diligence. His finding on this issue was not a palpable and overriding error. The appeal was allowed, but only to the extent that the plaintiff's claim against the four non-Sakwi defendants was dismissed in its entirety.

FITCH J.A.:

I. Introduction

[1] The appellants (defendants in the court below) appeal from an order dismissing their application pursuant to Rule 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. By that application, the appellants sought an order:
(1) dismissing the plaintiff's Notice of Civil Claim ("NoCC") in its entirety as against four of the named defendants; and (2) dismissing the plaintiff's claims in negligence and unjust enrichment as against all remaining defendants on grounds that those claims are statute-barred.

II. Background

[2] The appeal is unopposed and I will set out only so much of the background as is necessary to explain the disposition I propose.

[3] The Sakwi Creek Hydro project is a run-of-river hydroelectric project located on Sakwi Creek near Agassiz, British Columbia. The project is owned by Sakwi Creek Hydro Ltd. ("Sakwi Ltd.") for and on behalf of Sakwi Creek Hydro Limited Partnership ("Sakwi LP"). I will refer to these two entities as the "Sakwi Defendants". It is operated by WindRiver Power Corporation ("WindRiver"). The project generates electricity through a turbine. The electricity is sold to BC Hydro pursuant to an Electricity Purchase Agreement ("EPA") between Sakwi LP and BC Hydro.

[4] The plaintiff, who lives about 1.5 kilometers from the project, claims that the turbine emits a high-pitched sound that gives rise to an unreasonable and substantial interference with the use and enjoyment of his property.

[5] The plaintiff's NoCC was filed on December 21, 2021. It asserts undifferentiated claims in nuisance, negligence, the rule in *Rylands v. Fletcher*, and unjust enrichment against eight defendants, including WindRiver, the Sakwi Defendants, and four other defendants: Connor, Clark & Lunn Energy Infrastructure Limited Partnership, Connor, Clark & Lunn Hydro Ltd., Sts'Ailes Eco Energy Development (Sakwi) Limited Partnership, and Sts'Ailes Development Corporation. I will refer to these four defendants as the "Non-Sakwi Defendants". The claim against an eighth defendant was dismissed on consent and does not concern us.

[6] The material facts pleaded in support of the nuisance, negligence and *Rylands v. Fletcher* claim are that: the defendants have been in occupation and possession of the lands on which the turbine is located at all material times; the defendants have had the care, control and operation of the turbine since 2015; the operation of the turbine constitutes a non-natural use of the defendants' land; the defendants have failed to prevent the escape of the alleged nuisance from their land; the defendants owe a duty of care to the plaintiff by virtue of the close geographical proximity between them as adjacent owners or occupiers of rural property; the defendants breached the alleged duty of care by failing to assess and address the impact the operation of the turbine would have on nearby landowners, and address

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noise-related concerns by investigating, resolving or attenuating the alleged nuisance.

[7] The material fact pleaded in support of the unjust enrichment claim is that the defendants earn a profit from the operation of the project by virtue of the EPA with BC Hydro and that they do so to the direct and corresponding detriment of the plaintiff.

[8] The plaintiff pleads that he has been aware of the noise issue since early 2015 and informed "the defendants" of the alleged nuisance in September 2016.

[9] Following receipt of the NoCC, the defendants advised the plaintiff of their position that the only properly named defendants were the Sakwi Defendants. They invited the plaintiff to amend his pleading. He declined to do so.

[10] On the Rule 9-6 application, the defendants argued that the plaintiff's claims against the Non-Sakwi Defendants should be summarily dismissed as disclosing no genuine issue for trial. They also argued that the plaintiff's negligence and unjust enrichment claims should be dismissed as against all remaining defendants on grounds that those claims were statute-barred and, as such, disclosed no genuine issue for trial.

[11] In support of their application to have the plaintiff's claim against the Non-Sakwi Defendants dismissed, the defendants relied on the uncontroverted and unchallenged evidence before the chambers judge that: the project is owned by Sakwi Ltd. for and on behalf of Sakwi LP; three of the four Non-Sakwi Defendants are neither limited nor general partners of Sakwi LP; the fourth entity, Sts'Ailes Eco Energy Development (Sakwi) Limited Partnership ("SEED LP") is a limited partner of Sakwi LP but is not involved in the day-to-day management or operation of Sakwi LP; none of the other three Non-Sakwi Defendants are involved in the day-to-day management or operation of Sakwi LP; none of the Sakwi Defendants own, occupy or possess the project lands (in fact, none of the defendants own the project lands; rather the lands are owned by the Crown and Sakwi LP has rights of access and

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occupation in relation to the lands pursuant to a licence of occupation and other agreements and permits); none of the Non-Sakwi Defendants are in care, control, or operation of the turbine; and, none of the Non-Sakwi Defendants are a party to the EPA, which is solely between Sakwi LP and BC Hydro.

[12] As an aside, that SEED LP is a limited partner of Sakwi LP with no role in the day-to-day management of Sakwi LP was of no moment. As this Court explained in *Harrison Hydro Project Inc. v. British Columbia (Environmental Appeal Board)*, 2018 BCCA 44 at paras. 42–44, leave to appeal to SCC ref'd, 38047 (2 August 2018), a limited partner who takes no part in the management of the business is only liable for the amount of property they contribute or agree to contribute to the limited partnership. It is not necessary to name any of the limited partners in a legal proceeding against a limited partnership.

[13] The defendants argued that the evidence they adduced on the application was a complete answer to the plaintiff's pleaded claims as against the Non-Sakwi Defendants, and that there was no genuine issue for trial in respect of these four entities. More specifically, the defendants argued that even if the turbine was causing a substantial and unreasonable interference with the plaintiff's property, that interference was not caused by the Non-Sakwi Defendants as they did not occupy or possess the project lands, and were not involved in the day-to-day management of the project or its turbine.

[14] In support of their application to have the plaintiff's claims in negligence and unjust enrichment dismissed as against all remaining defendants, the defendants noted the plaintiff's pleading that he has been aware of the alleged nuisance since early 2015, and informed "the defendants" of the alleged nuisance in September 2016. The defendants noted that, unlike nuisance-related claims, claims in negligence and unjust enrichment are not torts of a continuing nature. They argued that on the face of the NoCC, the plaintiff was aware of the facts alleged to support his claims in negligence and unjust enrichment for more than six years prior to the filing of the NoCC.

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[15] In an affidavit filed for use on the Rule 9-6 application, the plaintiff deposed that, beginning in September 2016, he had numerous telephone calls with Greg Trainor and Anthony Ramirez, representatives of WindRiver. The dialogue between the plaintiff and WindRiver representatives continued for about four years during which the plaintiff expressed to them his ongoing concerns about the noise the turbine allegedly makes. The plaintiff deposed that, as a result of this ongoing contact, he "believed at the time that the project was owned and operated by WindRiver". He deposed that at no time did WindRiver's representatives indicate to him that an entity other than WindRiver was involved in the project.

[16] The plaintiff also deposed that at some unspecified time, but in contemplation of commencing a legal action, he discovered, among other things, WindRiver's website and noted that WindRiver professed to be a joint owner of the project along with the Sts'Ailes First Nation and Connor, Clark and Lunn Infrastructure.

[17] Finally, the plaintiff deposed that on May 21 and June 3, 2021, he conducted BC Registry Services searches, discovered Sakwi LP and learned of the identity of its general partner, Sakwi Ltd. He deposed that the claims were made against the named defendants collectively as there was no way for him to know prior to filing the NoCC the exact involvement of each of the named defendants in the planning, development, construction, ownership, and operation of the project and turbine.

III. Reasons for Judgment

[18] In reasons for judgment indexed as 2022 BCSC 1426, the chambers judge noted that it was incumbent on the defendants to show there is a genuine issue of material fact that requires a trial: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at paras. 10–11 [*Lameman*].

[19] The chambers judge did not engage at all with the defendants' evidence concerning the nature of their relationship with the project, or with their related submission that the plaintiff's claims against the Non-Sakwi Defendants raised no genuine issue for trial.

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[20] The chambers judge did address the defendants' argument that the claims in negligence and unjust enrichment were statute-barred. He said this:

> [31] The applicants say that the claims in negligence and unjust enrichment are statute barred because the plaintiff knew of the alleged torts at least six years prior to the Claim being filed. The plaintiff contends that he had been discussing the issues with Mr. Trainor through 2020, and assurances had been given that steps were being taken to resolve the issues. The plaintiff also states that he believed Windriver owned and operated the enterprise, and it was only after he realized that litigation would be necessary, that the identity of the other partners came to light.
>
> [32] The applicants argue that the plaintiff, as a retired lawyer, should have discovered the identity of all the partners long before the filing of the Claim and, accordingly, he is barred by the two-year limitation period.
>
> [33] There is an obligation on a party to proceed with due diligence in ascertaining the appropriate parties to a potential claim. There is no higher standard affixed to a party simply because he is a lawyer. Knowledge of the law does not give rise to knowledge of the facts. The sophistication of a party may be a relevant factor in making the determination as to whether due diligence was exercised, but it does not necessarily impose a higher standard.
>
> [34] In these circumstances, the evidence as to the steps taken by the plaintiff are set out in his affidavit. Any conflicts in the evidence are not to be weighed in this hearing. Mr. Dickin had an ongoing dialogue with Mr. Trainor, whom he understood represented the party that operated the turbine. As a result, I am not satisfied that Mr. Dickin failed to exercise reasonable diligence in ascertaining the identity of all defendants.

[21] The chambers judge dismissed the defendants' application (heard at the same time) to strike the NoCC pursuant to Rule 9-5. This aspect of the order has not been appealed.

IV. Grounds of Appeal

[22] The appellants submit that the chambers judge erred in law and in fact by failing to dismiss the claim in its entirety as against the Non-Sakwi Defendants. They submit that the chambers judge erred in law by: (a) failing to consider, based on the evidence before him, whether the pleaded claims disclosed a genuine issue for trial; and (b) failing to apply the correct legal principles applicable to summary judgment applications. The appellants also submit that in refusing to dismiss the claim against the Non-Sakwi Defendants, the chambers judge made factual findings that reflect palpable and overriding error.

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[23] The appellants also submit that the chambers judge erred by failing to summarily dismiss the claims in negligence and unjust enrichment against all of the defendants as being statute-barred. Specifically, they argue that the chambers judge erred in law by permitting the plaintiff to take a position on discoverability that was irreconcilable with his pleading. In the alternative, if the plaintiff was properly permitted to argue that he did not discover the claims against the defendants until 2020, the appellants submit the chambers judge nonetheless committed palpable and overriding error by finding that the negligence and unjust enrichment claims were not discoverable through the exercise of reasonable diligence until 2020.

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V. Analysis

[24] Under Rule 9-6, the court is empowered to pronounce judgment or dismiss a claim if it is satisfied there is no genuine issue for trial. Rule 9-6(5) provides as follows:

> (5) On hearing an application under subrule (2) or (4), the court,
>
> > (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,

[25] As noted in *Lameman* at para. 19, "[a] motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future". A defendant applying for summary judgment may succeed either by demonstrating that the plaintiff's case is unsound or by adducing evidence that provides a complete answer to the plaintiff's case: *Beach Estate v. Beach,* 2019 BCCA 277 at para. 48 [*Beach*]. While an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial. The judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is "incontrovertible". If the court is satisfied that it is manifestly clear (or beyond doubt) that the plaintiff is bound to lose, the defendant must succeed on the Rule 9-6 application: *Lameman* at paras. 10–11; *Beach* at paras. 48–49. Conversely, if the plaintiff submits evidence contradicting the

defendant's evidence in some material respect, the application must be dismissed: *Beach* at para. 48.

[26] In my view, the chambers judge failed to consider the defendants' application based on the pleadings and uncontradicted evidence before the court. Respectfully, the reasons for judgment reflect a failure on the part of the chambers judge to engage meaningfully with the defendants' evidence. I consider that failing to engage with the test the chambers judge was bound to apply constitutes an error in law.

[27] Indeed, to the limited extent the chambers judge referred to that evidence, he misconstrued it and made factual findings the evidence could not support by concluding that: (1) the project lands "have been used by the defendants to generate electricity for the purposes of sale to BC Hydro"; and (2) the appellants, including all of the Non-Sakwi Defendants, "are limited partners in the … project". These findings reflect palpable error in fact. In my view, the first error is also overriding in the sense that it led the chambers judge to conclude there was a *bona fide* triable issue as to whether the "defendants' turbine" has caused loss and damage.

[28] On the uncontradicted evidence before him, I am satisfied that it is manifestly clear there was no genuine issue for trial with respect to the liability of the Non-Sakwi Defendants. I say this for the following reasons.

[29] The plaintiff's claim in negligence rests on his pleading that the defendants owed a duty of care "by virtue of the close geographical proximity between them as adjacent owners or occupiers of rural real property to avoid acts and/or omissions that might cause the plaintiff harm". Again, on the uncontroverted evidence before the chambers judge, the Non-Sakwi Defendants do not own, occupy or possess the land on which the project sits. There is no genuine issue for trial in respect of the negligence claim as against the Non-Sakwi Defendants. The judge erred in implicitly concluding otherwise.

[30] The plaintiff's claim in nuisance and under the rule in *Rylands v. Fletcher* fails on the same grounds. The plaintiff's nuisance claims rest on his pleading that the

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defendants “owned or occupied” the project lands and/or “have been in care, control, and operation of the Turbine” which is said to be the source of the nuisance. The uncontradicted evidence before the chambers judge is that the Non-Sakwi defendants do not own, occupy or possess the project lands and are not in care, control or operation of the turbine.

[31] The plaintiff’s claim in unjust enrichment rests on his pleading that “the Defendants earn profit from the operation of the Turbine and the Nuisance by virtue of a contract with BC Hydro to the direct and corresponding detriment of the Plaintiff”. On the unchallenged evidence before the chambers judge, the EPA was between Sakwi LP and BC Hydro. The Non-Sakwi defendants are not parties to the EPA.

[32] In my view, and in light of the conclusions I have reached, it is unnecessary to address the appellant’s further submission that the chambers judge erred in law by summarily dismissing the Rule 9-6 application (to the extent that it sought dismissal of the claims against the Non-Sakwi defendants) on grounds that it was premature.

[33] I turn next to the appellants’ contention that the claims in negligence and unjust enrichment should have been dismissed in their entirety as statute-barred and that the chambers judge erred by not making this order.

[34] Noting that the limitation period for the negligence and unjust enrichment claims expired in early 2017, two years after the plaintiff pleaded awareness of the material facts underlying the claims and long before the action was filed, the appellants say the chambers judge erred by: (1) permitting the plaintiff to submit on the Rule 9-6 application that he had not identified the defendants until 2020, a position said to be irreconcilable with his pleading that he had informed “the defendants” of the alleged nuisance in September 2016; and (2) even if it was open to the plaintiff to argue that he did not discover the claims against the defendants until 2020, the chambers judge made a palpable and overriding error in fact that the claims as against the defendants were not discoverable until 2020.

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[35] The general discoverability rule is found in s. 8 of the *Limitation Act*, S.B.C. 2012, c. 13. It provides as follows:

> Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
>
> (a) that injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the person against whom the claim is or may be made;
>
> (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[36] I would not give effect to the appellants' first argument. While the principle relied upon by the appellant is generally sound, giving effect to it in the circumstances of this case would require us to adopt a literal interpretation of an inelegantly worded pleading in circumstances where doing so would conflict with the substance of the plaintiff's evidence adduced on the Rule 9-6 application.

[37] Turning to the second prong of the appellant's argument on this issue, it is well-settled that where the discoverability rule is invoked, the claimant must have exercised reasonable diligence in discovering the material facts upon which to found the action. Due diligence may include determining the identity of the alleged tortfeasors.

[38] The appellants take no issue with the way in which the chambers judge articulated the law in this area, but submit he made a clearly wrong and unsupported finding that the claims as against the defendants were not discoverable until 2020. The appellants rely on evidence adduced on the application that a basic internet search would have informed the plaintiff that Sakwi LP has, since at least October 1, 2014, been publicly identified as the owner and Independent Power Producer of the Sakwi Creek Run of River Project. With this information, the plaintiff could have conducted a BC Registry Services search for Sakwi LP—as he did in May and June of 2021—to identify Sakwi LP and Sakwi Ltd., as Sakwi LP's general partner. If, for

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some reason, the plaintiff wished to identify Sakwi LP's limited partners, he could have requested the names of those limited partners from Sakwi LP's registered office pursuant to s. 54 of the *Partnership Act*, R.S.B.C. 1996, c. 348.

[39] For the reasons that follow, I am not persuaded that the judge's finding on this issue reflects palpable and overriding error.

[40] The judge had to be satisfied on the application "beyond a doubt" that the negligence and unjust enrichment claims had no chance of success because the identities of the defendants were discoverable by the plaintiff through the exercise of reasonable diligence.

[41] While it was open to the judge to come to this conclusion, he declined to do so noting that the plaintiff was engaged in a lengthy dialogue with representatives of WindRiver, and understood from those discussions that WindRiver operated the turbine. It is a reasonable interpretation of the plaintiff's evidence—and one the chambers judge appeared to adopt, at least for the purposes of this application—that he made no further inquiries about the potential involvement of other entities in the project because he believed that he had already identified and was dealing with its owner and operator. For this reason, the judge was not satisfied that the plaintiff failed to exercise reasonable diligence in ascertaining the identity of all of the defendants.

[42] For these reasons, I would not give effect to the appellants' submission that we should dismiss the negligence and unjust enrichment claims as against the three remaining defendants—Sakwi LP, Sakwi Ltd. and WindRiver.

[43] In light of the foregoing reasons, and as success on the application below is divided as a result of the order I propose making, I would allow the appeal, set aside terms 3 and 4 of the order of the chambers judge made August 18, 2022, and substitute the following terms:

> 3. The Plaintiff's claim is dismissed as against Connor, Clark & Lunn Energy Infrastructure Limited Partnership, Connor, Clark & Lunn Hydro Ltd., Sts'Ailes

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Eco Energy Development (Sakwi) Limited Partnership, and Sts'Ailes Development Corporation in its entirety pursuant to Rule 9-6;

4. The application for relief under Rule 9-6 is otherwise dismissed;

5. The parties shall bear their own costs.

[44] **FENLON J.A.**: I agree.

[45] **ABRIOUX J.A.**: I agree.

[46] **FENLON J.A.**: The appeal is allowed to the extent indicated in the reasons of Justice Fitch.

"The Honourable Mr. Justice Fitch"

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