CITATION: 10379875 CANADA INC v. TIW Industries Ltd./Les Industries TIW Ltee, 2024 ONSC 4922
COURT FILE NO.: CV-19-00628860-0000
DATE: 20240906

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 10379875 CANADA INC. and HEWARD STUDIO INVESTMENTS INC./ INVESTISSEMENTS HEWARD STUDIO INC. Plaintiffs

AND:

TIW INDUSTRIES LTD./ LES INDUSTRIES TIW LTEE, AKZO NOBEL N.V., AKZO NOBEL COATINGS LTD. / AKZO NOBEL PEINTURES LTEE, AKZO NOBEL WOOD COATINGS LTD., AKZO NOBEL PEINTURES BOIS LTEE, AKZO NOBEL SALT LTD. / SEL AKZO NOBEL LTEE, COVERIGHT SURFACES CANADA INC., NOURYON CHEMICALS LTD., NOURYON PULP AND PERFORMANCE CANADA INC./ NOURYON PATE ET PERFORMANCE CANADA INC., NOURYON CHEMICALS LLC., PPG ARCHITECTURAL COATINGS CANADA, INC./ PPG REVETEMENT ARCHITECTURAUX CANADA, INC., PPG CANADA INC., PPG INDUSTRIES, INC., TEK PLASTICS LIMITED, CANADIAN ERECTORS LIMITED I LES ERECTEURS CANADIENS LIMITEE, and CANERECTOR INC. Defendants

BEFORE: Merritt J.

COUNSEL: *Barry Weintraub* and *Patrick Healy* Counsel, for the Defendants/Moving Parties Akzo Nobel Coatings Ltd. / Akzo Nobel Peintures Ltee, Akzo Nobel Wood Nobel Ltee, Nouryon Chemicals Ltd., Nouryon Pulp and Performance Canada Inc./ Nouryon Pate et Performance Canada Inc., Nouryon Chemicals LLC, PPG Architectural Coatings Canada, Inc. / PPG Revetements Architecturaux Canada, Inc., PPG Canada Inc. and PPG Industries, Inc. Coatings Ltd. / Akzo Nobel Peintures Bois Ltee, Akzo Nobel Salt Ltd. / Sel Akzo

Paula Lombardi Counsel for the Defendant, Coveright Surfaces Canada Inc.

Matthew Benson Counsel for the Defendants, Canadian Erector Limited/Les Erecteurs Canadiens Limitee and Canerector Inc.

Richard Butler and *Alessia Petricon-Westwood* Counsel, for the Plaintiffs/Responding Parties

HEARD: **June 18, 2024**

MOTION TO STRIKE ENDORSEMENT

OVERVIEW

[1] The Plaintiffs own 65 Heward Avenue, Toronto, Ontario ("65 Heward"). They seek damages from the Defendants relating to environmental contamination at 65 Heward. The Plaintiffs also seek declarations, including a declaration that the Defendants are jointly and/or severally liable for contamination at 65 Heward.

[2] The Defendants other than Akzo Nobel N.V. ("NV") and the inactive/unresponsive parties (the "Defendants") jointly move to strike the Plaintiffs' Further Fresh as Amended Statement of Claim (the "Claim") under r. 21.0l(l)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194 without leave to amend for disclosing no reasonable cause of action.

DECISION

[3] The Defendants are not barred from bringing this motion because two Defendants have delivered defences or because of delay in bringing this motion.

[4] The Defendants' motion to strike the claim is dismissed.

BACKGROUND FACTS

[5] On May 7, 2018, the Plaintiff 10379956 Canada Inc. ("103") purchased the surface and air rights of 65 Heward (the "Surface Parcel") pursuant to an Agreement of Purchase and Sale (the "Surface APS"). The site has two buildings: an office building and a television/movie studio.

[6] On May 7, 2018, 103 also purchased the subsurface of 65 Heward (the "Subsurface Parcel") pursuant to an Agreement of Purchase and Sale (the "Subsurface APS").

[7] On June 11, 2018, 103 changed its name to Heward Studio Investments Inc. Investissments Heward Studio Inc. ("Heward Studio").

[8] The Claim relates to the pre-existing environmental contamination of the Subsurface Parcel.

[9] The Claim defines the Defendants as former owners of 65 Heward that have caused and/or contributed to its environmental contamination. The Claim specifies various owners of 65 Heward at particular times between 1934 and 1985.

[10] The Claim identifies each of the Defendants and their historical relationship to 65 Heward through amalgamations or as owners on title (paras. 7 to 42 of the Claim).

[11] The Claim identifies a long history of heavy industrial use including for chemical, solvent, and paint manufacturing and storage. The Claim identifies the historical contaminating activities as follows:

(1) use and occupation by an ammonia manufacturing plant that processed and stored chemicals including aqua ammonia and anhydrous ammonia;

(2) use of various storage tanks containing fuel oil, gasoline, anhydrous ammonia, trichloroethylene, trichloroethane and tetrachloroethylene;

(3) use and occupation for paint manufacturing, storage and handling;

(4) oil-containing transformers;

(5) generation of hazardous waste; and

(6) use and storage of coal for a boiler.

[12] The Claim identifies the contaminants which exist at 65 Heward:

(1) volatile organic compounds ("VOCs"), including;

(a) trichloroethylene ("TCE"),

(b) tetrachloroethylene ("PCE"),

(c) vinyl chloride ("VC"),

(d) 1, 1-dichloroethylene,

(e) 1, 1,2-trichloroethane;

(f) cis-1,2-dichloroethylene,

(g) 1, 1, 1-trichloroethane, and

(h) trans-1,2-dichloroethylene;

(2) benzene, toluene, ethylbenzene and xylene ("BTEX");

(3) petroleum hydrocarbons ("PHCs") fractions 1 to 4;

(4) polycyclic aromatic hydrocarbons ("PAHs");

(5) metals and inorganics; and,

(6) ammonia.

[13] The Claim also identifies some of the causes of contamination. For example: the Claim states that chlorinated VOCs in the soil and groundwater were identified in the central and north portions of the property and were caused by the former TEC and PCE bulk storage tanks at the

central portion of the property; the PHCs and BTEX in the soil and groundwater were likely caused by discharges from the former fuel oil and gasoline storage tanks at the central portion of the property; the PAHs in the soil and groundwater were likely caused by imported fill.

[14] The Claim sets out how TCE was used including as a metal cleaner and degreaser, as a raw material to make other chemicals, a cleaner in electronics manufacturing and as a general solvent in paints, paint strippers and adhesives.

[15] The Claim sets out the level of TCE concentrations identified and that it far exceeds the regulated standards set by the Ministry of the Environment, Conservation and Parks ("MECP").

[16] The Claim sets out the level of PHC concentrations and that it far exceeds the safety standard set by MECP.

[17] The Claim pleads that the contamination in the soil or groundwater volatilized (i.e., evaporated and dispersed into the air) such that the MECP Health Based Indoor Air Criteria values were exceeded in both the north and south buildings.

[18] The Plaintiffs advance claims against the Defendants for negligence, strict liability and under s. 99 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the "*EPA*").

Status of the Litigation

[19] Akzo Nobel Coatings Ltd./ Akzo Nobel Peintures Ltee, Akzo Nobel Wood Coatings Ltd./ Akzo Nobel Peintures Bois Ltee, Akzo Nobel Salt Ltd./ Sel Akzo Nobel Ltee, Nouryon Chemicals Ltd., Nouryon Pulp and Performance Canada Inc. / Nouryon Pate et Performance Canada Inc., Nouryon Chemicals LLC, PPG Architectural Coatings Canada, Inc. / PPG Revetements Architecturaux Canada, Inc., PPG Canada Inc., and PPG Industries, Inc. (collectively the "Akzo Nobel Coatings Defendants") became aware of the action in October 2020.

[20] Canadian Erectors Limited/Les Erecteurs Canadiens Limitee and CanErector Inc. ("Canadian Erectors") served its Statement of Defence and Crossclaim dated February 1, 2021.

[21] The Akzo Nobel Coatings Defendants served a Request to Inspect Documents and Demand for Particulars on May 12, 2021.

[22] In their response, the Plaintiffs admitted that they do not yet know the precise timing of the potentially contaminating activities as follows: "The precise timing of the potentially contaminating activity/ies is not yet known, while the existence, use and location of the bulk storage tanks has been pleaded." The Akzo Nobel Coatings Defendants did not challenge the lack of further particulars by bringing a motion.

[23] Between February 2021 and March 2022, the Plaintiffs sought to narrow the number of Defendants in the action by requesting admissions that would allow for the release of some Defendants prior to discoveries.

[24] In July 2022 the Plaintiffs discontinued the action against the following Defendants who provided admissions and records demonstrating that they had no operations at or liabilities associated with 65 Heward: Invista (Trans) Company, Invista (Canada) Company / La Compagnie Invista (Canada), Koch Industries, Inc., E.I. Du Pont de Nemours and Company, and Performance Science Materials Company.

[25] Coveright Surfaces Canada Inc. ("Coveright Surfaces") served its Statement of Defence on October 28, 2022.

[26] Canadian Erectors served its Amended Statement of Defence and Crossclaim dated August 3, 2023.

[27] The Akzo Nobel Coatings Defendants have not yet defended the Claim.

[28] In October 2022 the Plaintiffs brought a motion to amend their pleading and to extend the time to serve NV in the Netherlands.

[29] On May 19, 2023 Associate Justice Brown issued an endorsement permitting the amendments and extending the time for service on NV.

[30] The claim against NV was the subject of a motion to dismiss the claim on the basis that this court has no jurisdiction over it (the "jurisdiction motion"). I heard the jurisdiction motion the same day as this motion to strike. I have issued a separate endorsement on the jurisdiction motion.

POSITIONS OF THE PARTIES

[31] The Defendants say the Plaintiffs cannot succeed because they knew about the environmental contamination when they purchased 65 Heward and either did or could have fully mitigated their damages and therefore suffered no loss because the purchase price reflected the known contamination.

[32] The Defendants say the Claim does not allege any facts which would give rise to liability and lacks sufficient particulars. The Claim lumps all Defendants together and fails to particularize any material fact against any specific Defendant. The Defendants say the Claim does not specify which Defendant did which act or when the act was done.

[33] The Defendants also say the limitation period has expired.

[34] The Plaintiffs say that the Claim discloses multiple recognized causes of action and has sufficient particulars to allow the Defendants to defend. The Plaintiffs say that the Defendants' motion should be dismissed because two of the Defendants have delivered defences and all of the Defendants have delayed in bringing the motion.

THE ISSUES

(1) Should the motion be dismissed because two Defendants have defended the action or due to the delay in bringing the motion?

(2) Is the fact that the Plaintiffs knew of the contamination when they purchased the property fatal to the Claim?

(3) Has the limitation period expired?

(4) Have the Plaintiffs pleaded sufficient particulars of negligence, strict liability, and offences under the *EPA*

ANALYSIS

Multiple Attacks, Pleading Over and Delay

[35] The Plaintiffs say the Defendants' motion should be dismissed because two of the Defendants have delivered defences, there has been a 4-year delay and this motion constitutes a multiple attack on the Claim.

[36] The Plaintiffs rely on r. 2.02 which provides:

> A motion to attack a proceeding or a step, document or order in a proceeding for irregularity shall not be made, except with leave of the court,
>
> (a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity; or
>
> (b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity.

[37] The Plaintiffs also raise r. 21.02 which provides: "A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs."

[38] The Plaintiffs say this is a second attack on the same pleading because the Defendants previously challenged the proposed amendments to the Statement of Claim.

[39] The general rule is that multiple attacks on pleadings are prohibited absent exceptional circumstances: *Doyle Salewski Inc. v. Scott et.al.*, 2020 ONSC 7725, at paras. 78-81, citing *Tribar Industries Inc. v. KPMG LLP*, 2009 CanLII 9747 (Ont. S.C.) and *Slan et al. v. Beyak et al.*, 3 O.R. (2d) 295.

[40] In this case, there have not been multiple attacks on the pleading by the Defendants. The Defendants did not bring a previous motion attacking the Statement of Claim. The only other pleadings motion was a motion brought by the Plaintiffs to amend the Statement of Claim. That motion was within the jurisdiction of, and heard by, Associate Justice Brown.

[41] A motion to strike a claim under r. 21 must be made to a judge: r. 21.01 (1). It was not open to the Defendants to bring their r. 21 motion at the same time as the Plaintiffs' motion before Associate Justice Brown.

[42] Normally, the time for bringing a motion under r. 21.01(1)(b) for disclosing no cause of action is before the defendant pleads over to the claim because filing a defence may be seen as a further step waiving any irregularity with the claim and signifying that the claim contains recognizable causes of action to which the defendant can respond: *Sigma Convector Enclosure Corp. v. Fluid Hose & Coupling Inc.*, 2022 ONSC 4371, at para. 30, citing *Polytainers Inc. v. Armstrong*, 2011 ONSC 4807; *Tribar Industries Inc. v. KPMG LLP*, 2009 CanLII 9747 (Ont. S.C.); *Bell v. Booth Centennial Healthcare Linen Services*, 2006 CanLII 39029 (Ont. S.C.); and *Canadian National Railway v. Holmes*, 2014 ONSC 6390, leave refused, 2014 ONSC 6390 (Div. Ct.).

[43] Recent caselaw has adopted a more contextual approach than the seemingly rigid approach in *Bell: Ovari v. Brant Community Healthcare System*, 2023 ONSC 6933, at paras. 19-22.

[44] The delivery of a defence does not always preclude a motion to strike. The interests of justice may require resolution of the challenge to the claim where the defendant reserves right to dispute the existence of a cause of action and there has been no unconscionable delay: *Sigma* at paras. 30-31.

[45] A defendant may bring a r. 21 motion without leave after delivering a defence where it is obvious from the defence that the defendant takes issue with the sufficiency of the plaintiff's claim: *Potis Holdings Ltd. v. The Law Society of Upper Canada*, 2019 ONCA 618, at para. 14, citing *Arsenijevich v. Ontario (Provincial Police)*, 2019 ONCA 150, at para. 7.

[46] Delay can, in appropriate circumstances, be a sufficient reason to dismiss a r. 21 motion. What constitutes "appropriate circumstances" partly depends on the effect the motion will have on trial efficiency*: Ovari*, at para. 19, citing the Court of Appeal in *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company)*, 2021 ONCA 141, 457 D.L.R. (4th) 530, at paras. 71-72, citing *Fleet Street Financial Corp. v. Levinson*, [2003] O.T.C. 94.

[47] In this case, two Defendants, Canadian Erectors and Coveright, have filed defences.

[48] In its pleading Coveright has not expressly reserved its right to object to the Claim but it does raise an issue with the sufficiency of the Claim by pleading that it has requested, but not received, particulars of the Plaintiffs' allegations that Coveright had some form of involvement in the alleged contamination. The lack of particulars is one of the main objections raised in the r. 21 motion.

[49] Canadian Erectors did not reserve its right when it initially delivered its Statement of Defence dated February 1, 2021; however, it did raise the same deficiencies it now relies on. Further, when it delivered its Amended Statement of Defence dated August 3, 2023, Canadian Erectors specifically pled that the Claim discloses no reasonable cause of action and has no possibility of success.

[50] The Defendants submit it would not have made sense for them to bring this motion while the Plaintiffs were sorting out how to narrow the issues and which parties could be released from the action. I agree.

[51] I do not find the delivery of the defences, in the circumstances of this case, is a bar to these two Defendants bringing the r. 21 motion.

[52] There has been no unconscionable delay by the Defendants which bars them from bringing this motion.

[53] Some of the delay was caused by the Plaintiffs seeking to narrow their claims and let some of the defendants out of the action which they have done. Some of the delay was caused by the Plaintiffs' motion to amend their pleading.

[54] The action is still in its infancy. As set out above, the Akzo Nobel Coatings Defendants have not yet defended the Claim and pleadings are not closed. Documentary and oral discoveries have not been conducted. This motion will not negatively affect trial efficacy: "It would be antithetical to the aim of litigation efficiency to insist that a claim that has no chance of success cannot be the subject of a r. 21 motion because of delay, and must be brought to trial": Todd Archibald, Stephen Firestone & P. Tamara Sugunasiri, *Ontario Superior Court Practice: Annotated Rules & Legislation*, 2024 ed. (Markham: LexisNexis, 2024), at Rule 21 — Determination of an Issue Before Trial, Practice Notes, s. 4 Delay in bringing motion.

[55] I find that Canadian Erectors and Coveright do not require leave to bring this r. 21 motion because it is obvious from the defences they have filed that these two defendants take issue with the sufficiency of the Plaintiffs' Claim. In the event that I am wrong, I grant leave to Canadian Erectors and Coveright to bring this motion.

Striking for No Cause of Action

[56] The test to be applied under r. 21.01(1)(b) is whether it is "plain and obvious" that the claim has no chance of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, 335 D.L.R. (4th) 513, at paras. 17-19; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[57] The test under r. 20.01(1)(b) is stringent and imposes a very high threshold. Only claims that are certain to fail should be struck at the pleadings stage: *Rausch v. Pickering (City)*, 2013 ONCA 740, 369 D.L.R. (4th) 691, at para. 34, citing *Amato v. Welsh*, 2013 ONCA 258, 362 D.L.R. (4th) 38, at paras. 32-33.

[58] The facts pleaded are to be taken as true and read generously: *Ahmad v. Mehta*, 2024 ONSC 3778, at para. 3.

[59] The court should err on the side of permitting an arguable claim, even if novel, to proceed to trial: *Rausch* at para. 34 and *Fernandez Leon v. Bayer Inc*., 2023 ONCA 629 at para. 8.

[60] No evidence is admissible on a motion to strike under r. 21.01(1)(b); however, the court can rely upon documents referred to in the claim which form an integral part of the claim: *Ahmad* at para. 11 citing *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, 116 O.R. (3d) 429, at paras. 31-37; *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.), at para. 3.

[61] A critical analysis is required in order to prevent untenable claims from proceeding, particularly given scarce judicial resources and the challenges of systemic delay: *Rayner v. McManus*, 2017 ONSC 3044, at para. 25.

Plaintiffs' knowledge of contamination is not fatal

[62] The Defendants say that the Plaintiffs' Claim must fail because *caveat emptor* applies and there is no latent defect. The Plaintiffs were aware of the contamination and chose to accept the property "as is".

[63] The Subsurface APS listed five environmental investigation reports (the "Environmental Reports") which the vendor provided to the purchaser. It confirmed that the vendor disclosed to the purchaser that certain hazardous substances affected the property, the purchaser was purchasing 65 Heward "as is" and relied on its own inspections.

[64] The Plaintiffs plead that the contaminants at 65 Heward which exceed the MECP standards include chlorinated volatile organic compound ("CVOC"). Schedule D to the Subsurface APS describes the existing contamination and refers to the recommended remedial approach for the CVOC impacted groundwater and indoor air identified. Prior to closing the Subsurface APS, the Plaintiffs completed a Phase Two Environmental Site Assessment and placed $3,140,000 into an Escrow Fund for the purpose of undertaking remediation work. The Claim states that 103 closed the transaction once it was satisfied with the environmental condition of 65 Heward.

[65] The Defendants say that the governing principle when real estate is sold is *caveat emptor* and this principle applies to contaminated lands. They rely on *Antorisa Investments Ltd. v. 172965 Canada Ltd.* (2006), 82 OR (3d) 437 (S.C.). I find that *Antorisa* is distinguishable. In *Antorisa* the plaintiff purchased the property in issue from the defendant and expressly agreed and acknowledged that the vendor had no liability for the environmental condition of the property and made no representations or warranties, etc. The case largely turned on whether a vendor had a common law duty to clean a site in circumstances where the plaintiff made a deliberate decision not to seek a warranty and chose not to do intrusive environmental testing.

[66] In any event, the Defendants do not allege that the Claim lacks particularity in this regard or that the duty of care is not pleaded.

[67] The Defendants say the Plaintiffs purchased contaminated property, presumably at a price reflecting what they knew about the contamination, and to allow a claim for damages now would result in a windfall to the Plaintiffs.

[68] There is no evidence that the price paid by the Plaintiffs reflected what they knew about the contamination and no such evidence would be admissible on this r. 21 motion. At this point it is it unknown whether the Plaintiffs will receive a "windfall" if they are awarded the damages which they claim in this action. Expert evidence will be required at trial regarding the value of the land, the cost of remediation and whether the Plaintiffs paid a discounted price for 65 Heward.

[69] The Defendants rely on *French v. Chrysler*, 2016 ONSC 793, at para. 109 for the proposition that the vendor of a property does not remain liable to the purchaser in the absence of an agreed upon on-going warranty. However, at paragraph 108 the court says the vendor can be liable to successors in title if there is a duty of care owed to the purchaser.

[70] It is not plain and obvious that the doctrine of *caveat emptor* will provide a complete defence to the Plaintiffs' claims.

Limitation Period

[71] The Defendants say the vendor of 65 Heward allowed the limitation period to expire because the last of the Environmental Reports is dated March 9, 2017 and therefore the vendor clearly had knowledge of the contamination issues several years earlier. More than two years passed until the Plaintiffs issued the Statement of Claim on October 9, 2019. At that time, the property was still owned by the vendor and was not owned by the Plaintiffs. The Defendants submit that the Plaintiffs closed the sale on November 6, 2020 knowing that the vendor had already allowed the limitation period to expire.

[72] The Defendants say the Plaintiffs cannot be in a better position than they inherited from the vendor. They cannot litigate the Claim to "refresh" a limitation period that already expired and to allow them to do so would "upend the limitations regime in Ontario" and previous owners could never rest easy from future contamination claims, even those that were discovered or discoverable for more than two years.

[73] The Plaintiffs say that the allegation that they knew the vendor had allowed the limitation period to expire is a fact not contained in the Claim and there is no evidence of the vendor's state of mind.

[74] The Plaintiffs also submit that the court cannot determine whether the limitation period has expired without evidence.

[75] An action must be commenced within two years after the claim was discovered: *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B. (the "*Limitations Act*").

[76] Section 5(1) of the *Limitations Act* provides as follows:

> A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[77] The discovery of a claim requires consideration of the date of the Plaintiffs' first knowledge of injury, loss or damage and the date of the Plaintiffs' knowledge that the injury, loss or damage was caused by or contributed to by an act or omission of the Defendants.

[78] These are factual matters which cannot be decided on a r. 21.01 motion to strike: *Toussaint v. Canada (Attorney General)*, 2023 ONCA 117, at paras. 10-11.

[79] The Plaintiffs' cause of action may not have accrued until they incurred the cost of remediation: *J.I. Properties Inc. v. PPG Architectural Coatings Canada Ltd.*, 2015 BCCA 472 at paras. 83-85. The Plaintiffs started remediation after the closing on July 9, 2018 and the Claim was issued on October 9, 2019.

[80] The Plaintiffs may be able to demonstrate that they commenced this action within two years of the date they incurred a loss for which the Defendants are responsible. It is not certain the Plaintiffs' case is doomed to fail based on the expiration of the limitation period.

Lack of Particulars

[81] Rule 25.06(1) of the Rules provides as follows:

Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

[82] If a party does not provide the minimal level of factual information required by r. 25.06(1) the remedy is a motion to strike the pleading: *Copland v. Commodore Business Machines Ltd.*, 52 O.R. (2d) 586 at para. 15.

[83] The Defendants rely on *Wunnamin Lake First Nation v. Rowe*, [2000] O.J. No. 223 (S.C.), at para. 11 for the proposition that the Plaintiffs must plead who has done what, to whom and when. This case is distinguishable.

[84] *Rowe* involved a demand for particulars where the Plaintiffs were ordered, on appeal, to provide some particulars. In several instances the Plaintiffs said that the particulars were within the knowledge of the Defendants and the court did not order particulars. In most of the instances where the court did order particulars, the court specifically said the Plaintiffs should provide the information **if** they had it: see paras. 27, 30, 33, 43, 47.

[85] I find that the Claim contains sufficient particulars.

[86] The Claim sets out the location (65 Heward) of the spills, the parties responsible and their successors (in title and alleged liability), the alleged negligent conduct of those parties, and the particulars of the contamination. There are claims based in tort (negligence and strict liability) and a statutory claim under the *EPA*.

Akzo Nobel Coatings Defendants

[87] The Claim sets out that CIL was a textile and chemical manufacturer which owned 65 Heward from September 23, 1942 until November 17, 1975 and used it for chemical refining, storage and distribution activities: Claim paras. 10 and 12.

[88] The Claim pleads that CIL's operations caused or contributed to the contamination by brining contaminants onto 65 Heward and allowing them to escape due to improper storage and handling. The Claim pleads that CIL breached the standard of care by failing to ensure the proper containment of contaminants including TCE and PHC, causing and permitting the spill(s) of those contaminants from the former storage tanks at the central portion of 65 Heward. They failed to act forthwith and do everything practicable to prevent and ameliorate adverse effects of the spill(s) and failed to restore the natural environment: Claim paras. 5, 46, 75, 76, 78, 82 and 83.

[89] The Claim then sets out the corporate transactions by which the Plaintiffs say liability flowed to Akzo Nobel N.V. and PPG Industries, Inc. for the CIL activities described above: Claim paras. 23-25.

Coveright Surfaces

[90] The Claim sets out that Akzo Nobel Coatings Holdings Ltd. was incorporated on June 18, 1997 and the Plaintiffs say it is liable for the historical environmental liabilities of CIS, for reasons similar to the Akzo Nobel Coatings Defendants. On April 1, 2003 Coveright Surfaces Canada Inc. ("Coveright Surfaces") was formed by an amalgamation of Akzo Nobel Coatings Holdings Ltd with other corporations: Claim para. 35

[91] The Plaintiffs plead that during the period of the Akzo Nobel Coatings Defendant's respective ownership of the environmental liabilities of CIL, the Akzo Nobel Coatings Defendants, and therefore Coveright Surfaces, breached the standard of care by failing to provide timely notice of the presence of contaminants in the soil and groundwater at 65 Heward to neighbouring landowners or the appropriate environmental regulators. The Akzo Nobel Coatings Defendants and Coveright Surfaces permitted and/or failed to prevent the off-site migration of contamination.

Canadian Erectors

[92] Canadian Erectors Limited/Les Erecteurs Canadiens Limitée changed its name Canerector Inc. ("Canadian Erectors") and owned the Property from August 11, 1983 to December 20, 1985: Claim paras. 40-42 and Statement of Defence of Canadian Erectors, paras. 7-10.

[93] The Claim sets out that Canadian Erectors caused or contributed to the contamination through their manufacturing operations at 65 Heward. It failed to address the contamination during its ownership resulting in further migration and dispersion of contamination and breached the standard of care by failing to provide timely notice of the presence of contaminants to neighbouring landowners or the appropriate environmental regulators. The Claim also pleads that Canadian Erectors permitted and/or failed to prevent the off-site migration of contamination: Claim paras. 46, 75, 77, 78, 82, 83.

[94] I find that there are sufficient particulars to provide the factual foundation for the causes of action in negligence pled.

Strict liability - Rylands v. Fletcher

[95] The Defendants say that the Plaintiffs have not pleaded any facts that would satisfy the required elements of a claim for strict liability under *Rylands v. Fletcher* because they have not pled "non-natural" use. The Defendants also say some former owners and tenants have not been included in the claim and the Plaintiffs have not pleaded the Claim to rule out other perpetrators of the contamination.

[96] The Defendants say that *Rylands v. Fletcher* requires an escape from one property which the defendant controls to another property which they do not own or control and that the Plaintiffs' claim that *Rylands v. Fletcher* can apply when a defendant contaminates its own property is untenable.

[97] The Plaintiffs do plead a "non-natural" or "special" use of the property and "escape" of the contaminants: Claim paras. 74-76.

[98] The Plaintiffs plead the industrial uses and potentially contaminating activities and the result of the release of the contaminants from bulk storage tanks created soil and groundwater exceedances of the *EPA* standards: Claim paras. 43-47.

[99] It is possible that the Plaintiffs could succeed in proving that an "escape" occurred if the contaminants escaped from a container within the Defendants' control into the subsurface groundwater that is outside of their occupation or control.

[100] The Plaintiffs claim that *Rylands v. Fletcher* can be applied where a Defendant contaminates its own property may be novel, and it is not appropriate to decide the issue on a motion to strike.

[101] The Plaintiffs also plead that they built a barrier wall to contain the groundwater within 65 Heward. The Plaintiffs say this relates to offsite contamination. Therefore, the Plaintiffs may well be able to prove there was an escape from 65 Heward to another property not owned or controlled by the Defendants. Again, whether the Plaintiffs can obtain damages for this type of escape is not a matter to be decided on a motion to strike.

[102] I do not find that the Claim as it relates to strict liability under *Rylands v. Fletcher* is certain to fail.

Negligence

[103] In addition to the submission that the Claim lacks particularity with respect to who did what and when, which I have addressed above, the Defendants say the Plaintiffs' negligence claim is untenable because it depends on the novel proposition that a former owner of a property owes a common law duty of care to a subsequent purchaser despite not being a party to the agreement of purchase and sale.

[104] The Defendants rely on *French v. Chrysler*, 2016 ONSC 793. In *French*, the Plaintiff was a subsequent owner who sued the Defendant for negligent remediation. On a motion for summary judgment, the court found there was no genuine issue for trial because there was no duty of care owed by the Defendant. *French* is distinguishable, not only because it involved a motion for summary judgment as opposed to a motion to strike, but also because it involved a claim for negligent remediation as opposed to a claim against alleged polluters.

[105] As set out above, the fact that a claim is novel does not mean that it is doomed to fail. Whether or not such a duty ought to be recognized, what is the appropriate standard of care, and whether it was breached are issues that should not be decided on a motion to strike, but rather on a full evidentiary record with expert evidence. I cannot find that the negligence claim is doomed to fail.

The EPA

[106] Section 99 of the *EPA* provides for a civil cause of action between private parties irrespective of fault or negligence. Section 99 of the *EPA* sets out a statutory right to compensation for "loss or damage incurred as a direct result of the spill of a pollutant that causes or is likely to cause an adverse effect." The right of compensation is against "the owner of the pollutant and the person having control of the pollutant."

[107] The Defendants say that the Plaintiffs only plead potentially contaminating activities in the ordinary course of business and these activities would not constitute "spills" within the meaning of s. 99 of the *EPA.*

[108] The Defendant also says that the Plaintiffs have not pled sufficient material facts with respect to this claim. They say the Plaintiffs must plead:

(1) when a "spill" of a pollutant was alleged to have occurred;

(2) how a "spill" of a pollutant was alleged to have occurred;

(3) who was alleged to have had control, and how (or in what capacity) they were alleged to have had control of the pollutant before its first discharge;

(4) who was alleged to be the owner of the pollutant before its first discharge;

(5) where the pollutant was alleged to have been discharged; and

(6) whether the alleged discharge of the pollutant was in a quantity or with a quality abnormal at the location where the discharge was alleged to have occurred.

[109] The Plaintiffs say they need not plead each of these particulars in this way.

[110] The Defendants have not provided any authority for the proposition that each of the particulars specified above must be pleaded.

[111] I find that the Plaintiffs pleading with respect to the *EPA* is sufficiently particularized.

[112] The Plaintiffs have generally pled that the Defendants' liability flows from ownership of 65 Heward including the bulk storage tanks containing the contaminants at the time of the spills. The allegation is that the improper storage and handling of the contaminants during the ownership and operation of 65 Heward resulted in discharges to the ground. For example, with respect to the liability of the Akzo Nobel Coatings Defendants, the Plaintiffs allege that the spill occurred while CIL owned 65 Heward.

[113] In *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819, 128 O.R. (3d) 81, leave to appeal refused, [2016] S.C.C.A. No. 22, the court appears to have inferred from evidence of Ministry of the Environment Inspectors that "many years of processing oily waste in this unapproved manner has [resulted] in ongoing petroleum hydrocarbon spills to the surrounding soils" (at para. 20).

[114] In *Midwest* the court found that "control" over the pollutant was established by ownership of the land and business sufficient to establish liability for the corporation and its director and officer.

[115] The issue of whether the incidents or activities that caused the contamination are "spills" as defined in the *EPA* is a mixed question of fact and law. The Plaintiffs may well require expert evidence to prove whether the contaminating activities were "abnormal in quality or quantity in light of all the circumstances of the discharge" so as to constitute "spills" within the meaning of s. 99 of the *EPA*. Whether or not the Plaintiffs can prove their claim at trial by direct evidence or inference is not an issue to be determined on this motion to strike.

[116] The Defendants also rely on *Pearson v. Inco Ltd.* which says that s. 99 of the *EPA* does not ground claims for losses for spills that occurred prior to November 29, 1985 which is the date it came into force: 2001 CarswellOnt 4428, rev'd on other grounds, 78 O.R. (3d) 641 (C.A.). *Pearson*

also says that s. 14 of the *EPA* (prohibiting discharge of a contaminant into the natural environment) does not apply to activities before it came into force on July 28, 1971.

[117] In *Huang v. Fraser Hillary's Limited*, 2018 ONCA 527, 47 C.C.L.T. (4th) 70, the Court of Appeal also considered the retrospective application of the *EPA*. The case involved spills that occurred at a dry cleaners between 1960 and 1974. The owner of the property upon which the dry-cleaning business was operated still owned the property at the time of trial.

[118] The trial judge, at para. 81 of their decision (*Huang v. Fraser Hillary's Limited*, 2017 ONSC 1500, aff'd 2018 ONCA 527, leave to appeal refused, [2018] S.C.C.A. No. 355), said:

> Firstly, I am not convinced that applying s. 99(2) to the circumstances of this case constitutes a retrospective application. Secondly, or alternatively, I am of opinion that the presumption against retrospective application is inapplicable given that the provision is designed to protect the public. Lastly, and in any event, if the presumption against retroactivity applies, it is rebutted by the clear intent of the legislator.

And at para. 84:

> Allowing, at this time, a right to compensation for spills that occurred before the section came into force does not change anything done in the past. Rather, it protects the public by creating a right to compensation and, as such, does not constitute a retrospective application.

[119] At para. 31 of the Court of Appeal's decision in *Huang*, the court agreed that even if the spills occurred before s. 99(2) of the *EPA* came into force, there remains an ongoing obligation to remediate the damage. The Court of Appeal did not comment on whether the presumption against retrospective application is inapplicable given that the *EPA* is designed to protect the public or whether the presumption is rebutted by the clear intent of the legislator.

[120] The Plaintiffs here plead that there were spills at 65 Heward during the Defendants' ownership and operation of the businesses, and that the Defendants failed to remediate and failed to notify neighbouring landowners and the appropriate environmental officials. Even though none of the remaining Defendants in the action are currently owners of 65 Heward, I cannot find that the Plaintiffs have no chance of succeeding in establishing that the spills, and improper conduct alleged, attract liability under s. 99 of the *EPA*.

[121] I cannot find that the Claim has a radical defect with respect to the claim under s. 99 of the *EPA*.

[122] The Defendants' motion to strike the Claim is dismissed.

COSTS

[123] If the parties cannot agree on the issue of costs, I will consider brief written submissions. These costs memoranda shall not exceed three pages in length (not including any bill of costs or

offers to settle). The moving party Defendants shall file their costs submissions by September 20, 2024. The responding party Plaintiff shall file their costs submissions within 15 days of the receipt of the Defendants' materials. The Defendants may file a brief reply within five days thereafter. If submissions are not received by September 20, 2024, the issue of costs will be considered settled.

Merritt J.

Date: September 6, 2024