Scarborough Golf Country Club Ltd v City of Scarborough et al. *

Indexed as: Scarborough Golf & Country Club v. Scarborough (City)
(Ont. C.A.)

66 O.R. (2d) 257
[1988] O.J. No. 1981
Action No. 466/88

ONTARIO
Court of Appeal
Lacourciere, Grange and Carthy JJ.A.

December 12, 1988.

*** An application for leave to appeal from this decision was dismissed with costs by the Supreme Court of Canada (Wilson, La Forest and Sopinka JJ.) on August 10, 1989. S.C.C. File No.: 21350. S.C.C. Bulletin, 1989, p. 1953.**

Appeal — Grounds — New issue raised on appeal — Respondent raising new issues on appeal — Not entertained.

Civil procedure — Costs — Party and party — Entitlement — Plaintiff not entitled to Bullock order where successful against one defendant but unsuccessful against other because claims distinct.

Civil procedure — Costs — Solicitor and client — Trial judge awarding solicitor-and-client costs to plaintiff following settlement offer prior to trial — Calculation referred to master.

Damages — Property damage — Municipality draining storm sewers into creek — Increased run-off and flow causing damage to golf club — Municipality failing to show damage would be caused by creek in natural state or extent of repairs required — Liable for damages in nuisance for infringement of riparian rights in amount calculated by club, with reference to determine cost of work necessary to prevent further damage.

Real property — Riparian rights — Infringement — Municipality draining storm sewers into creek — Increased run-off and flow causing damage to lower riparian owner — Infringement of rights — Municipality liable.

Torts — Nuisance — Private nuisance — Municipality draining storm sewers into creek — Increased run-off and flow causing damage to golf club — Municipality liable in

nuisance — Statutory right to construct sewers did not entitle municipality to create private nuisance — Municipal Act, R.S.O. 1970, c. 284, s. 352, paras. 16, 17, 19 — Ontario Water Resources Act, R.S.O. 1980, c. 361, ss. 29, 30.

The respondent had operated a golf course in the appellant city since 1912. A creek ran through the course. Until 1955, there was occasional flooding of parts of the course, but it did not cause extensive damage. The area was then largely agricultural and most of the water which fell into the area was absorbed by the soil. After 1955 there had been rapid urbanization of the area. This made most of the area surrounding the golf course impervious to water. Most rain-water has since been drained through storm sewers into the creek. Outside the club property the creek was widened and improved with concrete lining and gabions at various locations. The city controlled most of the creek valley above the club and a conservation authority controlled the valley below the club. The city's actions caused the creek to become twice as wide and deep, eroded the banks and resulted in flooding of large parts of the course during heavy rainfall throughout the season. As a result, some holes had to be shortened and several fairways were decreased in width in strategic areas. All this made the course increasingly unplayable and decreasingly enjoyable. Expert evidence confirmed the effect of the city's rapid urbanization and water control plans on the creek. The club brought this action against the city and against the conservation authority for damages and other relief. The city pleaded, but did not rely on s. 30 of the Ontario Water Resources Act, R.S.O. 1980, c. 361, which deems sewers constructed and maintained with approval to have been authorized. It did not plead or rely on s. 29 of the Act, which provides that the Expropriations Act, R.S.O. 1980, c. 148, applies when land is expropriated for sewer construction or is injuriously affected by such construction. At trial the city did rely on, although it did not plead, s. 352, paras. 16, 17 and 19, of the Municipal Act, R.S.O. 1970, c. 284, which permit a municipality to construct sewers.

At trial damages were awarded against the city in the amount expended by the club for repairs and for the estimated cost of placing concrete liners in the creek over its entire length on the club property. The action against the conservation authority was dismissed. In subsequent proceedings, the club was awarded party-and-party costs before the date of a settlement offer, which was substantially less than the amount recovered in the action, and solicitor-and-client costs thereafter. The conservation authority was awarded party-and-party costs against the club, but the club's claim for a Bullock order was denied, since the claims against the two defendants were distinct.

The city appealed and the club cross-appealed on the issue of the Bullock order.

Held, the trial judgment should be varied by directing a reference to the master about the cost of future repairs and about the issue of solicitor-and-client costs; the cross-appeal should be dismissed.

(1) As a lower riparian owner, the club had the right to the natural flow, quantity and quality of the water in the creek. As the upper riparian owner, the city had the right to natural drainage into the creek and the club was obliged to accept that drainage.

However, the drainage must be reasonable and must not increase the volume by artificial means. The trial judge found that the drainage was not reasonable and the evidence fully supported that finding, since it clearly indicated that the capacity of the creek was exceeded by the city's actions.

(2) Since, on the appeal, the city's factum made no reference to the Ontario Water Resources Act, and since that Act was not relied on at trial, the city should not be allowed to argue that that Act gave it statutory authority to construct the sewers and absolved it from liability in nuisance. Further, the provisions of the Municipal Act were merely permissive. In any event, the trial judge found the city negligent, so that, even if it had statutory authority, it would not be absolved for that reason. Moreover, the city should not be allowed to argue a prescriptive easement based on s. 31 of the Limitations Act, R.S.O. 1980, c. 240, since that issue was not pleaded or argued at trial.

(3) Although the trial judge was hampered by a lack of evidence from the city upon which an alternative assessment could be made of the estimated costs of repairing the creek so as to prevent future erosion, there was evidence to indicate that it would not be necessary to place a concrete liner in the creek for its entire length. That being so, the issue of those damages should be referred to the master. In addition, the matter of solicitor-and-client costs after the settlement offer should be referred to the master to be dealt with following the assessment of damages.

(4) The refusal to grant a Bullock order was correct.

Shaver Hospital for Chest Diseases v. Slesar (1979), 27 O.R. (2d) 383, 106 D.L.R. (3d) 377, 15 C.P.C. 97 [leave to appeal to S.C.C. refused 38 N.R. 353n], *apld*

Groat v. City of Edmonton, [1928] 3 D.L.R. 725, [1928] S.C.R. 522; John Young & Co. v. Bankier Distillery Co., [1893] A.C. 691; McGillivray v. Township of Lochiel (1904), 8 O.L.R. 446, *folld*

Other cases referred to

Miller v. Laubach, 47 Pa. St. 154 (1864); Edwards v. Rural Municipality of Scott, [1934] 1 W.W.R. 33; affd [1934] 3 D.L.R. 793, [1934] S.C.R. 332; Buysse v. Town of Shelburne (1984), 45 O.R. (2d) 501, 6 D.L.R. (4th) 734, 28 C.C.L.T. 1, 27 M.P.L.R. 137; City of Portage la Prairie v. B.C. Pea Growers Ltd. (1965), 54 D.L.R. (2d) 503, [1966] S.C.R. 150, 54 W.W.R. 477; Marriage v. East Norfolk Rivers Catchment Board, [1950] 1 K.B. 284; District of North Vancouver v. McKenzie Barge & Marine Ways Ltd. (1965), 49 D.L.R. (2d) 710, [1965] S.C.R. 377, 51 W.W.R. 193; Johnson v. Town of Dundas, [1945] O.R. 670, [1945] 4 D.L.R. 624

Statutes referred to

Expropriations Act, R.S.O. 1980, c. 148

Limitations Act, R.S.O. 1980, c. 240, s. 31

Municipal Act, R.S.O. 1970, c. 284, s. 352, paras. 16, 17, 19 -- now R.S.O. 1980, c. 302, s. 208, paras. 13, 14, 16

Ontario Water Resources Act, R.S.O. 1980, c. 361, ss. 29, 30 (rep. & sub. 1988, c. 54, s. 69)

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84

APPEAL from a judgment of Cromarty J., 55 O.R. (2d) 193, 28 D.L.R. (4th) 321, 32 M.P.L.R. 197, awarding damages for nuisance; APPEAL and CROSS-APPEAL from a judgment of Osler J., 57 O.R. (2d) 202, 32 D.L.R. (4th) 732, awarding costs in the action.

Thomas G. Heintzman, Q.C., Harry C.G. Underwood and S.E. Pohjola, for appellant, City of Scarborough.

H. Lorne Morphy, Q.C., and Laurence A. Pattillo, for respondent, Scarborough Golf and Country Club Ltd.

The judgment of the court was delivered by

CARTHY J.A.:— The Scarborough Golf and Country Club Ltd. (Club) says that the use and enjoyment of its premises have been affected by the actions of the City of Scarborough (City). The Club once had a meandering stream criss-crossing its lower fairways which golfers treated as an interesting and attractive feature of the course. It now complains that the water emanating from the storm sewer system of the City upstream of the Club has caused erosion of the creek bed and a widening and deepening of its incised form. Short of elaborate preventative measures the Club says this erosion will continue and that all but scratch golfers have increasing difficulty in overcoming this undesigned obstacle. This description of the complaint runs over the top of more concrete claims of property damage but is sufficient to set the stage for the question -- can a downstream owner who establishes a land use in the flood plain expect protection of that use from the upper riparian owner, and, in particular, a municipality that is pursuing its statutory powers and authority?

The claim is based upon riparian rights, nuisance and negligence, and originally included a claim in negligence against Metropolitan Toronto and Region Conservation Authority (M.T.R.C.A.). A claim against the Municipality of Metropolitan Toronto was discontinued and the trial judge dismissed the claim against M.T.R.C.A. The City appeals from the judgment of Cromarty J. dated July 15, 1986, whereby damages were awarded to the Club and against the City in the amount of $3,076,146.24 [55 O.R. (2d) 193, 28

D.L.R. (4th) 321, 32 M.P.L.R. 197]. The City also appeals from the judgment of Olser J. dated November 17, 1986, whereby the City was ordered to pay solicitor-and-client costs of the trial of the action as a result of an offer to settle made prior to trial [57 O.R. (2d) 202, 32 D.L.R. (4th) 732]. The Club cross-appeals against the refusal by Olser J. to make a "Bullock" or "Sanderson" award of costs arising from the dismissal of the Club's action against the M.T.R.C.A. Osler J. dealt with the postjudgment matters because of the illness of Cromarty J.

After a 29-day trial, Cromarty J. delivered very extensive and carefully detailed reasons which will be summarized for the purposes necessary to deal with the issues on appeal.

The Club was incorporated in 1912 and by 1927 had completed a redesign of a championship quality course within the watershed of the west branch of the Highland Creek. That watershed is substantially all within the current City boundaries and that portion of the City to the north and upstream of the Club was largely agricultural land prior to about the middle 1950's. The golf course itself was built on either side of the meandering creek with eight holes on the tableland or flood plain adjacent to the creek and the balance on higher lands formed by the hills and cliffs on each side. The evidence was that prior to urbanization rain falling on the 11,000 acres of watershed upstream of the Club would be largely absorbed by the open farm lands and only a small proportion found its way through swales and ditches to the stream. Despite this the Club did suffer damage from water flows and flooding as evidenced by the minutes of the Club showing 37 references to such problems between 1927 and 1954.

In about 1955 serious development to the north of the Club's property commenced and storm sewer facilities were created to control and direct the run-off. These facilities were built in stages over the ensuing 20 years or more. The situation was well described in a City staff report of October 4, 1966, which said in part:

> In the natural state frequent floodings of large flat areas of undeveloped land is not serious, and in fact occurs every spring, however this is not tolerable as the land is developed, and becomes more valuable. The main watercourse becomes essential as an outlet for local storm sewers. The watercourse in essence must become an open storm trunk sewer, and trunk sewers must be deep to fully service the area.
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> However, when development occurs these opened grassed and ploughed areas are replaced by paved streets, parking lots, roof areas, patios and paved driveways, which are all virtually impervious, consequently the water runs off rather than soaking into the ground. In developed areas even the grassed areas such as parklands and backyards become more impervious, because the ground is packed down through constant use. These factors are analogous to holding an umbrella over the area. The validity of this concept is proven by

> the fact that as development proceeds existing wells start to go dry, due to the fact that the water table becomes lower as more and more of the rainfall runs off to the streams rather than soaking into the earth.
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> In order to carry this runoff from the developed areas to the streams, storm sewers, and catchbasins are installed. The catchbasins serve as the entry points for the runoff into the storm sewers.
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> Consequently as a result of the foregoing the flows in the watercourse increase several times in quantity.
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> Another factor which increases the demands on the channels is that the runoff which previously meandered slowly across gently rolling farmland to the watercourse; in the developed state flows to 15 feet per second. Consequently a greater volume of water reaches the stream in a much shorter time. All these factors combine to increase the volume of flow which must be removed through the watercourse. Due to the fact that the velocities in the main channel must be kept to the reasonable slow rate of approximately 6 feet per second to prevent erosion; then the size of the channel must be increased greatly to remove the same volume of water in the same length of time.

The City recognized these problems and acquired all of the flood plain lands above the Club's property and the conservation authority acquired most of the lands downstream from the Club's property. The two authorities then proceeded to take such steps as were appropriate on their properties, widening and deepening the creek bed in some places, installing concrete linings or gabions in others, and in other places leaving the creek in its natural state, each decision presumably based on a sensible way to contain and direct the flows, prevent damage to the creek bed and adjacent owners, and generally make the system work to accomplish its intended purpose. Except for some modest work done by agreement between the two authorities and the Club, and except for work that has been done independently by the Club and is a subject of the claim in this action, no comprehensive plan has been undertaken for protection of the creek bed on the Club property.

In the summer of 1976 and again in the summer of 1977 there were serious storms that caused substantial damage both through flooding and erosive action on the Club's property. When agreement as to the respective obligations for the damage could not be reached, this action was launched addressing itself to the general issue of erosion from year to year. It is important to note that the case is not presented primarily as a complaint against flooding but rather that the markedly increased flows and increased velocity of flow have caused and continue to cause damage to the creek bed and the adjacent tableland. The situation is well described by the trial judge in his reasons where he summarizes the evidence of an expert called by the Club [at pp. 203-4 O.R., pp. 331-2 D.L.R.]:

He explained that erosion occurs from water flowing against particles in the stream and that velocity is important because fine particles dislodge and are carried by the stream and forced against the bank or roll or bounce on the bed. If flow is increased in a channel its depth increases and the velocity of the flow also tends to increase. He said that a rural stream with no change in its pattern will erode over a long period of time but that eroded material may be deposited in the calm sections of water. Vegetation will grow and debris will accumulate as the stream tends to repair itself. It reaches an equilibrium in the supply of water and sediments. In his opinion equilibrium is a condition whereby streams create a channel just sufficient to handle the normal flows. The shape, grade and size of the channel stays much the same over a long period of time. When storms occur there is a temporary change in dynamic equilibrium. Banks will be eroded, shoals formed, soils randomly moved and vegetation torn away. Then all that begins to restore itself and will tend to come back into equilibrium in about the same conformation as before the storm. This process may take 12 to 15 years depending on the extent of the damage.

An increase in the volume, speed and duration of flow of water will cause the stream to get wider, velocities to increase and banks to erode more rapidly and more frequently than in the original stream. In his opinion, when he examined the stream it was nowhere in equilibrium. It was difficult for him to say when equilibrium may be achieved. One must consider the extensive impervious surfaces and the greater frequency and duration of run-off which can only be carried away by an enlarged stream. Soil for the restoration of equilibrium now must come from the greatly reduced banks but since so much of them are covered with concrete and gabions, the supply of sediment is substantially diminished.

In his opinion there was more erosion in the Creek on the golf club than elsewhere because there was not the same amount of bank protection and there was no supply of sediment coming down from upstream for natural self-repair.

His evidence was that minor erosion may correct itself in 10 to 15 years, but a major impact on a watercourse may take 100 years to repair. He preferred to make no guess as to the actual time it would take and would say only that it will take "a very long time" and in his opinion the Creek will continue to get wider. He described the banks as looking raw and sloughing in and said there was no sediment in the Creek bed and that the bottom was dense, erosion-proof clay. I found Mr. McClimans an intelligent, well-informed, low-keyed witness whose evidence seemed altogether reasonable and I accept it.

There can be no doubt that the storm sewer facilities and urbanization of the lands to the north of the Club are the cause of the effects just described and that the difference in

flow and velocity of flow is very substantial. There is equally no challenge on the evidence that the Club's enjoyment of its property is impaired.

The City's position has been that it not so much disputes the facts alleged by the Club as it disputes the legal consequences flowing therefrom. It asserts the right of an upper riparian owner to take the natural waters from its lands and direct them by gravity through the lower riparian owner's portion of the stream. It also relies upon statutory authority for the undertaking in question.

Riparian rights

The position put by the City is that lower riparian lands lie in servitude to upper riparian lands and must receive all natural drainage of surface water from those lands even though they are artificially collected. It is conceded that this servitude is limited by a reasonable use of the watercourse but argued that it is always reasonable to use the capacity of the watercourse. Thus it is said that damages can never be recovered for erosion in the incised banks or bed of the stream because waters flowing in that channel are within the capacity of the stream and, further, that the flood plain is part of the watercourse and no complaint can arise from it serving its natural purpose so long as the flood waters flow in a body and eventually return to the incised channel. In other words, the lower owner must recognize that if activities are carried on within the flood plain, the consequences must be accepted of water flowing from above from any natural source within the same watershed so long as the capacity of the flood plain is not exceeded.

The legal issue can be framed from a few of the many authorities. In Groat v. City of Edmonton, [1928] 3 D.L.R. 725 at pp. 730-1, [1928] S.C.R. 522 at pp. 532-3 (S.C.C.), Rinfret J. said:

> The right of a riparian proprietor to drain his land into a natural stream is an undoubted Common Law right, but it may not be exercised to the injury and damage of the riparian proprietor below, and it can afford no defence to an action for polluting the water in the stream. Pollution is always unlawful and, in itself, constitutes a nuisance.
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> In cities and towns, drains and sewers are a necessity. Generally they are built under statutory powers. They may also be said to be constructed in the exercise of the collective rights which, in that respect, the local ratepayers have at Common Law and which are represented by the municipality. But these rights are necessarily restricted by correlative obligations. Although held by the municipalities for the benefit of all the inhabitants, they must not, except upon the basis of due compensation, be exercised by them to the prejudice of an individual ratepayer. So far as statutory powers are concerned, they should not be understood as authorizing the creation of a private nuisance, unless indeed the statute expressly so states.

. . . . .

> In our opinion, they do not authorize interference with the inherent right of a riparian owner to have a stream of water "come to him in its nature state, in flow, quantity and quality" (per Lord Wensleydale in Chasemore v. Richards (1859), 7 H.L.C. 349, at p. 382, 11 E.R. 140) except when necessary and then upon payment of adequate compensation.

In John Young & Co. v. Bankier Distillery Co., [1893] A.C. 691 at pp. 696-7, Lord Watson put it this way:

> The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in aemulationem vicini. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case here, and water artificially conveyed from a distant stream.

The Latin phrase is translated and explained in the Oxford Companion to Law (1980), as follows: "In Scots law a proprietor of land may make any lawful use of his land, however offensive or harmful to a neighbour, but not if he does so in aemulationem vicini, namely for pure spite or other oblique motives."

Literally, this would make spite a requirement for objection by a lower riparian owner, and if this was intended by Lord Watson in respect of the Scots land that he was dealing with, it has never been so applied elsewhere. The test has been simply "reasonable" as stated by Lord Macnaghten in the same case at p. 698:

> A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality.

In McGillivray v. Township of Lochiel (1904), 8 O.L.R. 446 at pp. 449-50 (C.A.), Garrow J.A. quoted with approval from the case of Miller v. Laubach, 47 Pa. St. 154 (1864):

> In the case of Miller v. Laubach (1864), 47 Pa. St. 154, the law is in my opinion well stated as follows: "No doubt the owner of lands through which a stream flows may increase the volume of water by draining into it without any liability to damages to a lower owner. He must abide the contingency of increase or diminution of the flow in the channel of the stream because the upper owner has the right to all the advantages of drainage or irrigation reasonably used which the stream may give him."
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> To the same effect is the recent decision by this Court in Re Elma and Wallace (1903), 2 O.W.R. 198. And what is a "reasonable use" is defined in McCormick v. Horan (1880), 81 N.Y. 86, as a use up to the capacity of the banks of the stream. See also Gould on Waters, 3rd ed. (1900), sec. 274; Young v. Tucker (1899), 26 A.R. 162.

Applying these principles to the evidence in this case and to the argument put by the City, it becomes apparent that the only real issue is as to whether the use of the stream as it flows through the Club's property for the discharge of this amount of water was and is reasonable. This is a factual issue and the trial judge has found that it is not a reasonable use. In my view, the evidence fully supported those findings.

As indicated above the City contends that the flood plain, which includes several fairways, is part of the watercourse and that it has the right to use the "capacity" of the watercourse as so defined and has never exceeded it, and thus is acting reasonably. The Club says that on a proper reading of the authorities the watercourse is limited to that which shows clear signs of a defined channel (in this case, the incised creek bed) and the flooding of the fairways indicates that capacity has been exceeded: see Edwards v. Rural Municipality of Scott, [1934] 1 W.W.R. 33 at p. 38 (Sask. C.A.); affirmed [1934] 3 D.L.R. 793, [1934] S.C.R. 332 (S.C.C.).

In my view the question of reasonableness and capacity can be answered here on a somewhat different approach. Flooding of the fairways has been an occasional event, but the damages which the Club seeks in lieu of an injunction relate to the erosion in the creek bed. Even if flooding must be tolerated as an incident of being in a flood plain, capacity can be exceeded on a daily basis if the waterway cannot handle the flow without damaging itself. Looking at the creek bed and flood plain together, they were originally capable of handling a limited daily flow and occasional flooding -- that was their capacity. The original, narrower and shallower creek was unable to withstand the markedly increased flows and velocity of flow over the years since urbanization to the north. The creek's answer to that capacity limitation was to erode and become wider and deeper and no opportunity has been given to permit nature to recover what has been lost as would occur under earlier conditions. Thus, capacity of this part of the watershed (the

incised creek bed) was exceeded. This analysis is confirmed by the City staff report of October 4, 1966, quoted above, where it states:

> Due to the fact that the velocities in the main channel must be kept to the reasonable slow rate of approximately 6 feet per second to prevent erosion ... the size of the channel must be increased greatly to remove the same volume of water in the same length of time.

The City itself knew what was reasonable in terms of the use of the stream as it passes through its own property and installed concrete linings and gabions to contain the flow and to protect adjacent land uses. In other areas where the adjacent uses are not threatened the stream has been left in its natural state. Some users of lands adjacent to a stream might not be affected by the erosion that has occurred on the golf course but most certainly the Club and its enjoyment of its facilities is affected. Once the use is found unreasonable and a finding is made, as it has here by the learned trial judge, that "the very use and enjoyment of the Club as a golf course has been seriously impaired" then it follows that this constitutes a nuisance at common law. I therefore agree with the conclusions of the learned trial judge on this branch of the case.

Statutory defence

The City argues that the storm sewer facility was installed with specific statutory authority, that the damage that has been sustained was the inevitable consequence of the approved undertaking, and that there was no evidence of negligence in the manner in which this particular undertaking was constructed or operated; thus, it is said, the City is free of liability.

If all of the above is supported by the evidence then on the authorities the plaintiff cannot succeed in an action based upon common law remedies and must proceed to obtain compensation through the statute which gives the authority, if there be such a compensation provision: see Buysse v. Town of Shelburne (1984), 45 O.R. (2d) 501, 6 D.L.R. (4th) 734, 28 C.C.L.T. 1 (H.C.J.); City of Portage la Prairie v. B.C. Pea Growers Ltd. (1965), 54 D.L.R. (2d) 503, [1966] S.C.R. 150, 54 W.W.R. 477 (S.C.C.); Marriage v. East Norfolk Rivers Catchment Board, [1950] 1 K.B. 284 (C.A.), and District of North Vancouver v. McKenzie Barge & Marine Ways Ltd. (1965), 49 D.L.R. (2d) 710, [1965] S.C.R. 377, 51 W.W.R. 193 (S.C.C.).

The relevant sections of the Ontario Water Resources Act, R.S.O. 1980, c. 361, read as follows:

> 29. Where land is expropriated by a municipality for sewage works or is injuriously affected by the construction, maintenance or operation of sewage works by a municipality, the Expropriations Act applies.

and further:

> 30. Sewage works that are being or have been constructed, maintained or operated with the approval of the former Department of Health, the Commission, the Executive Director ... so long as the sewage works are being so constructed or are so constructed, maintained or operated, shall be deemed to be under construction, constructed, maintained or operated by statutory authority.

(These sections have not materially changed in content through relevant times.)

The Act does not bar a common law action but the authorities referred to above establish that specific statutory authority, such as here provided to these sewage schemes, does protect the City absent negligence in implementation of the approved scheme and if the resulting damage is inevitable, the onus of proving the latter being upon the City.

On the face of it, it would seem that the compensation provision in s. 29 would have been the most obvious route for the plaintiff to have pursued. However, we were told that when initially instructed, counsel for the Club was not aware of this provision but did file a claim for injurious affection under the Expropriations Act, R.S.O. 1980, c. 148. It was then decided not to pursue that remedy because the Expropriations Act limits recovery to damage caused by the construction of the undertaking and counsel felt that the appropriate claim should be based upon the operation of the facility. Looking back upon the situation now it is apparent that the Ontario Water Resources Act does encompass damages for operations but difficulty might still be presented by the reference over to the Expropriations Act that has narrower recovery rights. In any event, that is history.

In the pleadings the City relied, simpliciter, upon s. 30 without reference to s. 29 or any particular elaboration of the defence. At trial no reference was made to the Ontario Water Resources Act and instead the City relied upon the Municipal Act, R.S.O. 1970, c. 284, s. 352, paras. 16, 17 and 19, which among other things, empower a municipality to construct sewer works such as here in question. Curiously that section was not pleaded but no issue seems to have been made of this. It is certainly a very different type of authority from that set out in the Ontario Water Resources Act in that it is purely permissive and simply gives the City general authority to undertake sewage works.

The evidence led at trial and the cross-examinations were directed to analyzing alternative schemes and the reasonableness of this particular scheme within the then current technology. It was not a question of whether the damage flowed inevitably from the approval of this scheme (which would have been the test under the Ontario Water Resources Act) but rather whether the choice of schemes was a reasonble one in all the circumstances. The learned trial judge dealt with the evidence and arguments on this basis and quite properly found that there was no foundation for holding that the municipality had satisfied the onus of eliminating all reasonable alternatives. Indeed, in a separate part of the reasons it was held that the municipality was negligent in its choice of schemes, knowing of the damage that could result.

The notice of appeal has 39 grounds of appeal and while reference is made to the Municipal Act provisions referred to above, there is no reference to the Ontario Water Resources Act. The latter statute is not referred to in the appellant's factum and was first mentioned in argument before this court. Put simply, the argument is that when these particular storm sewer installations are approved and put in place the rainfalls and gravity does the rest -- the consequence to the Club is inevitable. That may have been a good argument at trial but, if the issue had been squarely framed before the trial, it would undoubtedly have brought about a detailed analysis of each of the successive approvals, whether discretion was available as to connections of feeding lines and the use of ponding to hold backflow and other matters upon which I can only speculate that might bear upon the true inevitability of the damage. It should also be noted that the statutory authority would cover the sewer system but not the pavements and buildings which contributed to the flow and this may have intruded upon the question of inevitability. Further, if the issue had been squarely addressed, including a plea of s. 29, the plaintiff may have decided to pursue the damages to which it was ostensibly entitled under the statute and have avoided the 29 days of trial and possibly this appeal. It seems that the language of Lord Halsbury, quoted by Lacourciere J.A. in Shaver Hospital for Chest Diseases v. Slesar (1979), 27 O.R. (2d) 383 at p. 387, 106 D.L.R. (3d) 377 at p. 380, 15 C.P.C. 97 (C.A.), is particularly apt:

> "... you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another question, and have fought it, and have been beaten upon it."

The Shaver case involved an issue pleaded, not pursued at trial, and then an attempt made to raise the issue on appeal. This court refused to hear the argument, noting that such an attempt ought to be most jealously scrutinized and that the court must be satisfied beyond doubt that all evidence bearing upon the new contention has been canvassed at trial. I am not satisfied beyond doubt that this is so and in all the circumstances refuse to give effect to this argument or to direct a new trial on that issue.

Limitations Act

The City seeks to assert a 20-year easement and relies upon s. 31 of the Limitations Act, R.S.O. 1980, c. 240. This was not pleaded and since the undertaking being complained of was constructed in bits and pieces over an extended period, it is obvious that evidence would have been required at trial to pinpoint cause and effect with particular date references if that defence had been asserted. I refuse to give effect to that argument at this point in the process.

Rulings by trial judge

The learned trial judge refused to permit the City to adduce certain expert evidence in rebuttal to that proferred by the Club. There is confusion on the record as to whether the refusal was premised upon an attempt to buttress earlier evidence given by the same

witnesses or was because of a failure to file a report under the Rules of Civil Procedure, prior to offering the evidence. It is sufficient to observe that nothing could have turned on this ruling. Everyone agrees that storm sewers and urbanization caused erosion and the experts were simply debating the degree and extent of the difference between rural and urban conditions. Any modification in that evidence would not have affected the decision with respect to liability of the learned trial judge or of this court. I therefore see no merit in that ground of appeal.

Damages

The Club claimed specific costs for repairs and protective works over the course of the years 1976 to 1984 and about which there is no controversy on the evidence or argument. These costs total $176,956.73 and that portion of the judgment under appeal should stand.

The Club further claimed the estimated cost of continuous lining of the incised creek bed throughout the length of the creek through the Club's property being $2,899,189.51. This amount was also allowed by the trial judge. The Club says that this will protect it from erosion for 50 years but will still leave it exposed to flooding, which it accepts, and the Club agrees that this is a once and forever claim which bars it from future complaints. The Club called evidence to support this approach to damages and no evidence was called by the City.

The learned trial judge was urged by the City to direct a reference as to damages and to make an allowance for damage that would have been caused to the Club in non-urban conditions, as indicated by the minutes of the Club in its earlier years evidencing frequent costs for repairs occasioned by flood damage. Reference was made to Johnson v. Town of Dundas, [1945] O.R. 670, [1945] 4 D.L.R. 624 (H.C.J.), as support for reducing the damages to allow for pre-existing conditions.

The trial judge was hampered by a lack of any evidence from the City upon which an alternative assessment could be made and we sympathize with his reluctance to entertain speculative estimates in these circumstances. However, I am impressed by an exchange in cross-examination of the Club's witness dealing with the proposed continuous protection plan. The cross-examination reads in part:

> Q. You have prepared a recommendation to the Golf Club to do certain work which would, in effect, line the entire channel with gabions.
>
> A. That is correct.
>
> Q. And that would protect and stabilize the incised channel for a period of 50 years or so.

A. For a design life of 50 years, yes.

Q. Did you say you did that on the basis of a cost benefit analysis?

A. No, I didn't.

Q. For two-and-a-half million dollars or more, at 10 per cent, you could spend a quarter-of-a-million dollars a year on maintenance without touching the principal. Would you not think if the Golf Club was doing this themselves they would concentrate on doing repairs in the sections you have referred to which may historically have been subject to overtopping?

A. Yes, I would expect them to address the worst areas, if you would, first, the highest priority areas first.

Q. If none of the other areas, other than the sections you have read out to us that you used in Exhibit 69, were overtopping even in 1942 and now in your calculations only the lowest overtops over 1 to 11/2 years, would the simplest solution not be to repair that low section which, as I have forgotten now but I believe you indicated it was section 1 in 1976 and section 4 now?

A. That would address the question of flooding only, not necessarily address the aspect of erosion.

Q. I put it to you, as I understand the evidence, in the last three years, other than putting in some bridges and some rip-rap at 17, that there has been nothing spent on maintenance. I suggest to you that for a much smaller amount of money you could do maintenance on an annual basis which would maintain the stream.

A. I would accept the comment you made in terms of lack of maintenance in the last three years. In terms of my assessment, the greatest concern I have with regard to the ongoing stability of even the existing works is the layering of the bed which is undermining those existing works and they are going to require very substantial maintenance.

Q. What you are recommending is maintain the channel in the same location and position for 50 years.

A. Correct.

Q. That is something the Club has never had before.

A. That is correct.

Further, by way of example only, one of the photographs included in ex. No. 86 (labelled No. 155-36), illustrates very clear damage in the foreground done by erosion to the creek bed where the water is sweeping around a curve and the water velocity would be the greatest, but untouched green grass running down to the water on the other side of the bank and on the same side of the bank at the approach to the curve, suggesting that selective work might be more appropriate to be the equivalent of what a prudent owner would do with his own land.

When the learned trial judge was recounting historic events he said at p. 260 O.R., p. 388 D.L.R. of the reasons:

> The Authority, in conjunction with the City, regarded the Creek as the natural means of effecting drainage of storm water from the municipality. In part, it was necessary that flood plain lands be acquired wherever possible so that they could be retained and used as floodways on an ever increasing basis as urbanization increased. At the same time, to maintain the aesthetics of flood plain lands and their utility for recreational purposes and to preserve the integrity of the valley walls so as to prevent endangering urban developments at their top, a limited program of erosion control for the incised channel of the Creek was a necessity. However, erosion control was by far the most expensive response that could be taken by the Authority and so was to be resorted to only where absolutely necessary to accomplish those purposes.
>
> The Club was and is, largely, an anomalous parcel of land in an otherwise homogeneous plan. I have little doubt that given the value of Club property, and given the limited budgets of both the City and the Authority, neither could afford to acquire those lands through expropriation. At the same time, the cost of channel improvements to control the erosion of the incised channel was far too great to warrant hardening the entire Creek as it ran through the Club, nor would doing so have served the purposes discussed above.

(Emphasis added.)

I am prepared to support the learned trial judge in declining to make an allowance for pre-existing problems because flooding may have been the only substantial source of problems before 1960 and the Club will not be protected against flooding by any of the protective provisions that are being discussed. As well, there is no evidentiary basis for making a division between pre-urban and post-urban conditions, nor is it likely that one could be developed. Further, the creek is presently wider and deeper than the Club desires for optimum playing conditions. This is a negative feature that the City created and will remain.

On the other hand, for the foregoing reasons I cannot agree that it was a proper basis of assessment to direct payment for continuous lining of the incised bed. As awkward as the situation may have been for the trial judge, I think a reference should have been directed

to the master to determine the cost of work that a prudent owner would undertake to meet the circumstances and prevent further erosion to the incised creek bed.

Since this reference is required as a result of the City's failure to introduce the evidence at trial, the costs of the reference should be paid by the City on a party-and-party basis, subject to the discretion of the master to limit those costs if the Club unduly prolongs the proceedings.

The City has appealed against the award of solicitor-and-client costs following the date of an offer of settlement made prior to the trial. That issue should be referred to the master to be dealt with following the assessment and in accordance with the Rules. The amount of the offer is now a matter of public record but I suggest to the parties that in fairness they should avoid any effort to bring this amount to the direct attention of the master until the assessment is completed. I say "urge" with the intent of avoiding a formal order and with confidence that counsel will proceed in good faith.

The costs of this appeal will be to the plaintiff on a party-and-party basis. Although the City may have succeeded in part (this will not be known until the outcome of the reference), its success is based upon its own failure to introduce evidence as to damages at trial.

Cross-appeal

The Club instituted this action against both the City and the Metropolitan Toronto and Region Conservation Authority. The claim against the latter was in negligence for allegedly failing to carry out its mandate in supervising the installation of the sewer facilities. The action was dismissed at the conclusion of the trial with costs payable by the Club. The Club then sought either a "Sanderson" order or a "Bullock" order and these were refused on the ground that the two causes of action were separate and distinct. The Club now appeals against that refusal to permit it to recover the costs payable over against the City. Osler J. found that the claims were independent and chose not to visit the added costs upon the City [57 O.R. (2d) 202, 32 D.L.R. (4th) 732]. I see no error in principle and would dismiss the cross-appeal. The time consumed on this cross-appeal was minimal and there will be no order as to costs.

Conclusion

Accordingly, I would vary para. 2 of the judgment of Cromarty J. dated July 15, 1986, by replacing the amount of $3,076,146.24 with $176,956.73 and adding a paragraph providing for a reference to the master to determine the balance of the damages in accordance with these reasons. I would direct that the costs of the Club of the reference be borne on a party-and-party basis by the City subject to the discretion of the master as set out in these reasons. I propose that the order designate the Club to have carriage of the reference and that the master give directions for its conduct.

I would vary the judgment of Osler J. dated November 17, 1986, by deleting para. 2 thereof and inserting in its place an order that the issue as to solicitor-and-client costs be referred to the Master hearing the reference. I assume that the amount of prejudgment interest provided for in para. 1 of the judgment of Osler J. is the appropriate amount related to the $176,956.73, now being inserted into the judgment of Cromarty J. If so that will stand as the only prejudgment interest to be recovered by the Club for the reason stated by Osler J. that any other recovery will be for future expenses.

I would award costs of this appeal to the Club on a party-and-party basis and dismiss the cross-appeal without costs.

Judgment accordingly.