Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Spraggs v. Canadian Pacific Railway Limited et al,* 2018 BCCRT 819

B E T W E E N :

Thomas Spraggs

APPLICANT

A N D :

Canadian Pacific Railway Limited and Loram Maintenance of Way, Inc.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. The applicant, Thomas Spraggs, says his boat was damaged by grinding dust, resulting from railway work that was completed by the respondent Loram Maintenance of Way, Inc. (Loram), on behalf of the respondent Canadian Pacific Railway Limited (CP).

2. The applicant seeks $3,595.20 as reimbursement for his boat's repair invoice plus $1,000 in compensation for the accelerated depreciation of his boat. The respondents deny liability, saying that the rail grinding could not have caused the alleged damage and even if it did the applicant has not proved Loram was negligent. CP generally agrees with Loram, and adds that Loram has indemnified Loram under their service agreement.

3. The applicant, who is a lawyer, is self-represented. Loram is represented by a paralegal employee. CP is represented by an employee.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018

BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is in issue.

6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. Under tribunal rule 126, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

8. The issue in this dispute is whether the respondents are responsible for damage to the applicant's boat, and if so what is the appropriate remedy.

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicant bears the burden of proof on a balance of probabilities. I have only addressed the evidence and submissions below as necessary to explain my decision.

10. It is undisputed that the applicant owns a 43 foot Maxum 3900 SCR boat, berthed at Reed Point Marine (marina) in Port Moody, BC. At the time in question, the applicant's boat was being serviced in a marina parking slot beside a shipwright service shop.

11. The applicant says his boat is one of many vessels covered in metal dust from Loram's grinding operations on an area of CP's nearby track. The applicant says the damage occurred the same evening as Loram's grinding work was being done on CP's track, May 22, 2017. The applicant was not at the marina at the time. Based on the evidence before me, I accept the applicant's boat sustained damage

from metal dust or particulate around this time. The issue is whether the respondents are responsible.

12. On May 31, 2017, the marina sent an email to boat owners advising that Loram's grinding created "much more metal dust than usual" and that CP had not alerted the marina about the upcoming grinding as usual. The marina advised the tenants to clean their boats without delay. I note 2 other disputes before me with similar complaints against Loram and CP, which are the subject of separate decisions. It appears the applicants in each are aware of the others' claims, although nothing turns on this as it is undisputed that a number of boat owners found dust on their boats shortly after May 22, 2017. That said, I find the marina's email may have set the tone for the applicants in the disputes to assume the dust must have come from Loram's grinding work. In any event, in each dispute the applicant bears the burden of proof.

13. It is undisputed that Loram's business includes providing rail grinding services to maintain CP's railway lines. Loram says it provides regular maintenance operations on the railway near the marina 2 to 3 times per year.

14. Loram says it uses state of the art dust collections systems during all of its grinding operations, which use blowers to vacuum up the dust particles created by the grinding (blowers). Loram says when grinding is active and dust is collected, the blowers work so that the metal dust is not airborne.

15. Loram admits it performed grinding operations near the marina on May 22 and 23, 2017. Loram says its data logs and milepost map of the area show: the marina is located roughly in the westerly half of milepost 18, the grinding unit travelled past the marina on 2 night shifts on May 22 and 23, 2017, the grinding unit was active near the marina on May 22 from 11:54 p.m. to 12:10 a.m., and there was no active grinding near the marina on May 23, 2017.

16. I accept Loram's evidence in this respect, which is supported by a written statement from Loram's chief engineer RL. RL had the opportunity to provide his own direct

observations as Loram's employee and whose evidence is not contradicted in this dispute.

17. As referenced above, I accept that several boat owners determined their boats were covered in some metal dust or particulate between May 23 and 31, 2017.

18. The issue in this dispute, and the similar other 2, is two-fold: 1) whether the particulate was grinding dust from Loram's railway work on CP's nearby track, and b) if it was Loram's grinding dust, whether the applicant has proved negligence. I find the applicant has not proved negligence, and my reasons follow.

19. Loram provided 2 videos of the grinding operation running along the track. One shows it with the blowers off, and what appear to be "billowing clouds" rising above the train that holds the grinder. The other with the blowers on, and no clouds. Loram says and RL's evidence is that the data logs show that while active grinding was going on near the marina, the blowers were running and dust collection systems were never bypassed. There is no contradictory opinion evidence before me with respect to Loram's logs, which are in evidence. Loram and RL say the logs show there was no malfunction.

20. Loram also provided handwritten signed statements from 2 members of its grinding unit crew, which state that nothing unusual occurred on May 22 or 23, 2017. It is undisputed that the historical weather records show there were no high winds or unusual weather reported for the relevant time.

21. On balance, I accept RL's evidence, Loram's crew statements, and contemporaneous business records (its logs), that the grinding operation performed normally in the evening of May 22, 2017, with the blowers operating.

22. Loram says a nearby industrial terminal was also doing metal work around the day and time in question, which is undisputed though the applicant says that terminal was too far away or shielded to cause the damage. Loram also points to other nearby industrial sites as possible causes of the dust, and again the applicant says those industrial sites were too far away or shielded. However, the applicant does

not have any expert opinion to support her claim that the dust likely came from Loram's grinding work.

23. Loram provided a transcript of its insurer's interview with SV, a boatowner at the marina and a chemical engineer. SV stated that it is not unusual to see rust particles on boats moored at the marina. Loram says SV says his boat had no more rust particles at the material time than compared to 2 years before. SV says these deposits occur "randomly" given the marina's location and the surrounding activities. SV also notes there are many potential sources for rust particles, including diesel trains passing along the tracks, emitting black soot, and open metal grinding by boat-owners inside the marina, which SV has seen in the past. SV says the historical problem with dust and oxidization was so prevalent before the incident in question that he developed a special product to assist in cleaning rust. The applicant says SV's evidence is improper double hearsay because it was provided by Loram through its insurer. As noted above, I have flexibility in accepting evidence. I do not find it is improper hearsay, given I accept the transcript reflects a first-person interview. In any event, SV's evidence is one factor, and is not determinative.

24. I turn then to the applicable legal analysis. There are 2 potential bases for the applicant's claim. The first is negligence. The second is what is known in law as the rule in *Rylands v. Fletcher*, which attracts strict liability in certain situations where a substance escapes from the respondent's land onto the applicant's property. *Rylands v. Fletcher* requires a "non-natural" use of land where a substance migrates due to an unintended mishap (see *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 and *John Campbell Law Corp. v. Strata Plan 1350*, 2001 BCSC 1342, as cited by Loram). I find that Loram's grinding operations were part of their intended and routine railway maintenance, and this was not a "non-natural" use of industrial land. Therefore, contrary to the applicant's submission, the rule in *Rylands v. Fletcher* does not apply here. I have therefore focused on negligence.

25. I note, contrary to the applicant's assumption, there is no absolute or automatic liability on the respondents' part if I find the grinding dust caused the damage to the applicant's boat. In particular, contrary to the applicant's submission, the doctrine of *res ipsa loquitur* ("the thing speaks for itself") is no longer the law in Canada (see *Fontaine v British Columbia (Official Administrator)*, 1998 CanLII 814 (SCC)).

26. For a respondent to be liable in negligence the applicant must show that (1) the respondent owed the applicant a duty of care; (2) the respondent breached the applicable standard of care; and (3) that the breach caused the applicant's loss or damage. The damage caused must also have been foreseeable.

27. I find Loram and CP owed its neighbouring marina tenants a duty of care. However, I agree with Loram that the standard of care is based on what would be expected of an ordinary, reasonable and prudent person in the same circumstances, which includes an examination of the likelihood of foreseeable harm and the gravity of the harm, the burden of the cost to prevent injury, and external factors such as custom and industry practice or regulatory standards (see *Ryan v. Victoria (City)*, [1999] 1 SCR 201 (SCC) at paragraph 28, a railway case; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41).

28. I agree with Loram that if the respondent establishes they took reasonable measures to prevent damage, an applicant cannot establish negligence even if the damage occurred (see *Laursen v. Bemister*, 1999 CanLII 6059 (BCSC)). In that case, the plaintiffs paid the defendant to store their belongings in his barn for the winter. A month or two later, the barn roof collapsed due to snow, damaging the plaintiffs' property. The court found that the defendant had taken reasonable steps to address the risk of snow collapse, and bore in mind there had been no problems previously. I find this is similar to the situation before me: there is no evidence that Loram had past problems with damage from grinding dust and I accept Loram's evidence about its precautions with blowers.

29. Further, I agree with Loram that the test to establish causation is the "but for" test, meaning "but for" the respondent's negligence the injury or loss would not have

occurred. As noted above, the burden of proof is on the applicant, on a balance of probabilities (see *Fontaine,* above).

30. Loram says that even if it owed the respondent a duty of care (which I find it did), the applicant has not proved the standard was breached. I agree. Loram's evidence is undisputed that the railway grinding is a normal maintenance operation of CP's railway line. I find that Loram's use of blowers was a reasonable system to prevent damage, and there is no evidence before me to the contrary. I also find that the applicant has not proved that Loram's machinery or blowers malfunctioned at the time or that Loram's staff was negligent in their use. On the evidence before me I find Loram took reasonable steps to prevent damage from grinding dust, and therefore it is not liable in negligence.

31. In short, I find that the applicant has not proved Loram breached the relevant standard of care. The applicant has also not proved that Loram's actions damaged the boat, and so has not proved negligence.

32. Given my conclusion above, I do not need to address Loram's and CP's submissions about any indemnity agreement by Loram in favour of CP. I do note that CP concurs with Loram that Loram uses modern equipment and there was only light wind at the time, and as such it was impossible for grinding dust particulate to reach the marina and not the other areas along the subdivision.

33. As the applicant was unsuccessful in his claims, in accordance with the Act and the tribunal's rules I find the applicant is not entitled to reimbursement of tribunal fees.

ORDER

34. I order the applicant's claims and this dispute are dismissed.

Shelley Lopez, Vice Chair