



Civil Resolution Tribunal

Date Issued: April 16, 2021

File: SC-2020-008039

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Porco v. Corporation of the District of Saanich*, 2021 BCCRT 391

BETWEEN:

LUIGI PORCO

APPLICANT

AND:

CORPORATION OF THE DISTRICT OF SAANICH

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This dispute is about a sewer backup.

2. The applicant, Luigi Porco, says that on October 22, 2018 he discovered sewage water coming into his home caused by a blockage in the sewer main that was the responsibility of the respondent, Corporation of the District of Saanich (Saanich). Mr. Porco says that he paid a home insurance deductible to repair the damage. Mr. Porco says the sewage backup was Saanich's fault, so Saanich should be responsible for paying his deductible. Mr. Porco claims reimbursement of his \$2,000 deductible.
3. Saanich says the sewer backup was caused by root infiltration and gravel in the main. It says that it followed its public works inspection policy, and it is not liable for any nuisance from breakdown or malfunction of a sewer system under section 755 of the *Local Government Act* (LGA). Saanich says this dispute should be dismissed.
4. Mr. Porco is self-represented. Saanich is represented by an employee.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.
6. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me, and I find that there are no significant issues of credibility or other reasons that might require an oral hearing. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

7. Section 42 of the CRTA says the CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUE

9. The issue in this dispute is to what extent, if any, must Saanich compensate Mr. Porco for damage to his property caused by the sewer backup.

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicant Mr. Porco must prove his claims on a balance of probabilities. While I have read all of the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.
11. It is undisputed that on October 22, 2018, the Saanich sewer main near Mr. Porco's property backed up, and sewer water flowed into his house, causing damage. I find the evidence shows that Mr. Porco paid a \$2,000 home insurance deductible to have the damage repaired. Mr. Porco says he was not responsible for the sewage backup, so he should not be out of pocket for his deductible.
12. The parties agree that roots infiltrating the main sewer line contributed to the sewer backup. The evidence shows there was also gravel in the main, which Saanich says also contributed to the blockage. It is undisputed that Mr. Porco bears no responsibility for the sewer blockage or the damage to his home.

13. Mr. Porco alleges that Saanich failed to cap an abandoned sewer line, which allowed roots to grow through the abandoned line and into the main causing the blockage. For the following reasons, I do not accept Mr. Porco's allegation that the abandoned line was not capped.
14. Saanich provided a January 27, 2021 statement from Steve Brown, an assistant supervisor of the Construction, Storm and Waste Water Division in Saanich's engineering department. Mr. Brown stated that he was involved in investigating and fixing the October 22, 2018 sewer backup. Mr. Brown confirmed there was an abandoned sewer connection at a nearby property. This abandoned connection had been cut and capped at the property line sometime in the late 1980s. Mr. Brown stated that after the sewer backup, he and his crew dug underneath the road to expose the abandoned connection, and they discovered the roots were entering the main from the abandoned line, about 4 feet from the main's entrance. When they cut open the connection, they saw the roots had grown in from a broken joint. So, they removed the roots and capped the sewer connection at the main and encased it in concrete.
15. In a December 14, 2018 letter Saanich sent to Mr. Porco about the sewage backup, it stated that roots were found to be entering the main via an abandoned sewer connection and "this line has now been capped". I find that Mr. Porco likely misinterpreted this statement to mean that the line had not been capped before the backup occurred. However, based on Mr. Brown's statement, I accept that the abandoned line was previously capped at the property line. I find that in the course of repairing the damage, Saanich then capped the abandoned line at the main.
16. Mr. Porco says Saanich was negligent for failing to properly maintain the sewer main. In his reply submissions, Mr. Porco also says Saanich was negligent for capping the abandoned connection at the property line in the 1980s, rather than at the main. He says any cost or complexity involved with capping at the main does not relieve Saanich of its duty to prevent potential property damage, as occurred in this case.

17. Saanich relies upon a policy defence, which provides that a government body, including a municipality, cannot be held liable in negligence for its policy decisions, unless they are made in bad faith or are so irrational or unreasonable as to not be a proper exercise of discretion. A municipality will only be held liable in negligence for operational decisions implementing its policy, if they are not performed with reasonable care (see *Kamloops v. Nielsen*, [1984] 2 SCR 2 and *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420).
18. Saanich provided a copy of its November 5, 2001 “Public Works Inspection Policy”. This policy states that Saanich will not carry out any formal periodic inspections of sewers, storm drains, water mains and services, among other public works, and that repairs to defects or hazards will be carried out in response to complaints or reports from the public or municipal staff. The policy also states it was adopted by council after consideration of both the cost of assigning staff to periodic inspections and the interest of protecting the public from hazardous conditions.
19. Saanich says that under this policy, it was not obligated to perform any proactive inspections for root infiltration in the sewer main. Rather, it was entitled to rely on complaints from the public to alert it to any potential blockages. Saanich says it had no prior knowledge of any sewer blockage in that location, which I accept, as it is not disputed. Saanich says it acted according to its policy, and when it received a report of the sewer backup, it immediately attended to remove the blockage and repair the main and its connections.
20. While there is no evidence before me that Saanich had an official written policy about capping abandoned lines at the property line, Saanich submits that capping at the property line is its policy due to budgetary considerations. In Mr. Brown’s statement, he explained that Saanich “always” caps off abandoned sewer connections at the property line because that is generally where it is the shallowest, and the easiest area to access because it is generally located on the boulevard. He also stated that capping at the property line allows the abandoned connection to be easily reinstated in the future.

21. I am satisfied that Saanich had a policy of capping abandoned connections at the property line, largely due to cost, but also convenience. I note that in this case, the evidence shows the sewer main is located 9 feet below a busy roadway, whereas the connection at the property line is at a depth of 3.62 feet in a landscaped boulevard area. If capping abandoned lines at the main was required, the disruption involved with digging up roads to access the main could be considerable. I accept that Saanich followed its policy to cap the abandoned sewer line at the property line.
22. The underlying purpose of the policy defence to negligence claims is to recognize that governments, including municipalities, must make policy decisions based upon social, political, and economic factors (see *Just v. British Columbia*, 1989 CanLII 16 (SCC)). I find this applies to Saanich's policy to deal with sewer service-related issues by responding to complaints, and its policy to deal with abandoned sewer lines by capping them at the property line. I find the evidence does not establish that these policies were irrational or unreasonable or were made in bad faith. I find there is also no evidence suggesting Saanich failed to act reasonably with respect to its sewer line, and the circumstances here did not engage any operational decisions. Therefore, I find Saanich was not negligent.
23. I note that Mr. Porco's claim could also be based in the law of nuisance, although he did not specifically argue it. The principle underlying the law of nuisance is that a person is entitled to use and enjoy their land without unreasonable interference. When there is physical damage, such as the damage in this case, there is a strong indication that the interference is not reasonable (see *Royal Ann Hotel Co. v. Ashcroft*, 1979 CanLii 2776 (BCCA)).
24. However, as Saanich submits, I find section 744 of the LGA relieves Saanich from liability for claims based in nuisance due to a sewer backup. Section 744 of the LGA says a municipality is not liable for an action based in nuisance or under the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (U.K) if damages arise, directly or indirectly, out of the breakdown or malfunction of a sewer or drainage system. The rule in *Rylands v. Fletcher* means that a respondent will be strictly liable in certain

situations where a substance escapes from the respondent's land onto the applicant's property.

25. In *Craxton v. District of North Vancouver*, 2006 BCPC 212, the court considered the application of section 744 (formerly section 288) of the LGA. In *Craxton*, a tree root obstructed the municipality's storm service connection and caused a flood to the claimants' property. The court held at paragraph 34 that roots in the storm service connection were a "malfunction" because they "prevented it from being fulfilled in a normal and satisfactory manner". The court found that LGA section 744 applied and protected the municipality from liability in nuisance.
26. Similarly, I find section 744 of the LGA means Saanich cannot be held liable in nuisance for Mr. Porco's deductible expense arising from damage due to the root blockage in the sewer system.
27. While I find Saanich is not responsible for paying Mr. Porco's insurance deductible, the evidence shows that in its December 14, 2018 letter, Saanich offered to pay Mr. Porco \$300 on a "strictly goodwill basis". I find this offer was made in accordance with Saanich's September 5, 2000 "Policy on Sewer Damage Claims". This policy states that Saanich will follow a policy of paying the plumber's bill and small damage claims of amounts up to \$300 for sewer blockages that are not caused by the owner affected. Given that Mr. Porco refused Saanich's offer and proceeded with this dispute, I find Saanich is not bound by its previous offer.
28. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Mr. Porco was unsuccessful and so I dismiss his claim for CRT fees.

ORDERS

29. I dismiss Mr. Porco's claims and this dispute.

Kristin Gardner, Tribunal Member