Date: 20080522

Docket: T-745-04

Citation: 2008 FC 653

BETWEEN:

PEMBINA COUNTY WATER RESOURCE DISTRICT,
CITY OF PEMBINA, NORTH DAKOTA,
TOWNSHIP OF PEMBINA, NORTH DAKOTA,
TOWNSHIP OF WALHALLA, NORTH DAKOTA,
CITY OF NECHE, NORTH DAKOTA,
TOWNSHIP OF NECHE, NORTH DAKOTA, AND
TOWNSHIP OF FELSON, NORTH DAKOTA

Plaintiffs

and

GOVERNMENT OF MANITOBA,
RURAL MUNICIPALITY OF RHINELAND,
RURAL MUNICIPALITY OF MONTCALM,
RURAL MUNICIPALITY OF STANLEY, and
TOWN OF EMERSON, MANITOBA

Defendants

REASONS FOR ORDER AND ORDER

LAFRENIÈRE P.

[1] The Plaintiffs move for leave to amend their Statement of Claim to plead the tort of interference with economic relations and to claim economic damages stemming from the loss of revenue from their tax base due to the decrease in value of lands owned by third parties that were flooded as a result of the Defendants' alleged negligence.

[2] The Plaintiffs submit that the proposed amendments arise from substantially the same factual situation as previously plead in their Statement of Claim and, in the absence of any prejudice to the Defendants, should be allowed. The Defendants counter that it is plain and obvious that the claim of interference with economic relations cannot succeed. They contend that the additional damages being sought amount to a claim for pure economic loss, which is recoverable only in exceptional circumstances and should not to be recognized in this case.

Background

[3] Various towns and cities in North Dakota joined together and commenced an action against the Defendants on April 8, 2004. The Plaintiffs allege in their Statement of Claim that the Government of Manitoba and four municipalities are liable for flooding damage caused by the construction, maintenance, and operation of a dike near the international border running along the 49th parallel between North Dakota and Manitoba. The dike is immediately inside the Canadian side of the border and extends for approximately 30 miles west from a point just west of where the Red River crosses the border. Historical records indicate that the construction of part of the present day dike took place in the early 1940s and, since that time, the dike has been improved and lengthened to its present state.

[4] The Plaintiffs allege that the dike blocks water flowing in natural watercourses in the State of North Dakota from flowing into the Province of Manitoba, in violation of the *International Boundary Waters Treaty Act*, R.S., 1985, c. I-17 (the IBWA Act). They further allege that flooding

and consequential damage is caused by the operation of the dike, resulting in damage to works and undertakings they operate or control. In their prayer for relief, the Plaintiffs request the removal of the dike, re-establishment of the land upon which the dike has been constructed to prairie grade, as well as damages. The Defendants filed statements of defence in March 2005 denying both liability and damages.

[5] Before embarking on examinations for discovery, the Plaintiffs seek leave to amend the Statement of Claim by adding the underlined wording in the following paragraphs:

> 1. The plaintiffs claim:
>
> …
>
> e) damages in the excess of $50,000 caused to the plaintiffs, or any of them, related to the loss of tax revenue from the damage to property, works or undertakings caused directly or indirectly from the intentional and/or negligent acts and/or nuisance of the defendants as hereinafter pleaded;
>
> 8. Each of the plaintiffs owns or controls property, works or undertakings and/or is dependent for its revenues upon the taxes levied upon those persons that own or control property, works or undertakings in the United States that are located close to the International Boundary in the Townships of Pembina, Neche, Felson, St. Joseph, Walhalla, Joliette, Lincoln and Drayton in Pembina County in the State of North Dakota. The Townships of Pembina, Neche, Felson, St. Joseph and Walhalla have a northern boundary that extends to the International Boundary.
>
> 19. The plaintiffs, either directly or indirectly, have for years informed the Province of Manitoba that the said dike was the cause of, and continues to be the cause of, extensive flooding within the Townships of Pembina, Neche, Felson, St. Joseph, Walhalla, Joliette, Lincoln and Drayton, and within the cities of Pembina, Neche, Walhalla and Drayton, in the State of North Dakota, with resulting property damage, loss of income, loss of opportunities, loss of enjoyment of land and property, endangerment of health of persons and livestock and reduction in the quality of the land.
>
> 19.1 The plaintiffs say that the defendants committed the tort of intentional interference with economic interests. The defendants' conduct as herein plead, was

> directed towards the plaintiffs with knowledge of its consequences. The defendants' illegal and/or unlawful conduct has caused ongoing and continuing damage to property, works or undertakings within the tax base of the plaintiffs so that the property has devalued thereby decreasing the tax base and taxes levied by the plaintiffs with the result that the defendants have caused economic loss to the plaintiffs in amounts to be proven at the trial of this action.
>
> 19.2 Furthermore, the plaintiffs say that the defendants, by their intentional and/or negligent actions and/or nuisance in constructing and maintaining the dike as aforesaid, have caused foreseeable, ongoing and continuing damage to property, works, or undertakings within the tax base of the plaintiffs with the result that the property has devalued, thereby decreasing the tax base and taxes levied by the plaintiffs in amounts to be proven at the trial of this action.

Issues to be determined

[6] The issue to be decided on this motion is whether the tort of intentional interference with economic relations has any chance of success, in other words, whether it is "plain and obvious" that the action is doomed to fail. The first matter to be considered is whether the facts pleaded in the proposed amendments meet the requirements of the tort. The second matter is whether there are policy considerations that justify negating liability on the particular facts of this case.

Legal Principles: Amendments to Pleadings

[7] The parties agree on the principles to be applied on this motion for leave to amend a pleading. In determining whether an amendment to a pleading should be permitted, the Court is required to take the facts as stated in the proposed pleading as proven: *Hunt v. Carey* [1990] 2 S.C.R. 959. The Court should take a generous approach to a request for an amendment: *Fox Lake Indian Band v. Reid Crowther & Partners Ltd*, 2002 FCT 630 at paras. 9-13; *Canada v. J.D. Irving, Ltd.* [1999] 2 F.C. 346; *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 at 10 (C.A.). Provided the cause of action is not plainly and obviously destined to fail and there is no significant prejudice to the other

party which could not be compensated by costs, an amendment ought to be permitted: *Fox Lake Indian Band, above* at para. 13**;** *Almecon Industries Ltd. v. Anchortek Ltd*. (1999), 85 C.P.R (3d) 216 (F.C.T.D.).

[8] The Court must also consider whether the proposed amendment would be capable of being struck out under Rule 221 of the *Federal Courts Rules*: *1340232 Ontario Inc. v. St. Lawrence Seaway Management Corp*., 2004 FC 209 at para. 12. Rule 221(1)(a) provides that the Court may, on motion, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the grounds that it discloses no reasonable cause of action.

[9] The test to strike pleadings is a stringent one; the pleading must be found to be certain to fail as it contains a "radical defect". The moving party must meet a very high threshold, demonstrating that it is plain and obvious that the claim does not disclose a cause of action. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with its claim: *Hunt v. Carey, above*. However, in circumstances where no cause of action is disclosed, proposed amendments to pleadings will be refused: *VISX Inc. v. Nidek Co.* (1996), 72 C.P.R. (3d) 19 at 24 (F.C.A.); *Chrysler Canada Ltd. v. The Queen*, [1978] 1 F.C. 137 at 138 (T.D.); *Johnson & Johnson Inc. v. Boston Scientific Ltd.* (2001), 14 C.P.R. (4th) 512 at 516 (F.C.T.D.).

Whether the proposed amendments meet the requirements of the tort

[10] The concept of an action for interference with economic relationships outside the scope of contracts finds its early roots in 18th century British law. Over the past two decades economic interference torts have increasingly appeared on the Canadian legal landscape, as courts recognize that liability may exist even in instances where no breach of contract has occurred.

[11] The tort of interference with economic relations may arise where the defendant acts in a manner that interferes with or disrupts the plaintiff's economic interests without reference to a particular contract already entered into by the plaintiff with a third party, but by doing something that affects intended contracts, or that affects the plaintiff's economic situation generally: *G.H.L. Fridman, The Law of Torts in Canada,* 2nd Ed., Carswell, 2002, at pages 808-809.

[12] Canadian courts have generally embraced a simple three-element test for the tort of intentional economic interference (see *Canada Steamship Lines Inc. v. Elliott*, 2006 FC 609; *Lineal Group Inc. v. Atlantis Canadian Distributors* (1998), 42 O.R. (3d) 157 (Ont. CA)), namely:

1. an intention to injure the plaintiff;
2. interference with another's method of gaining its livelihood or business by unlawful or illegal means; and
3. economic loss caused thereby.

[13] The first element of the test requires that the Court inquire into the quality of the intention accompanying the impugned conduct. The defendant’s motive is irrelevant to the analysis of the intent element of the test: *Daishowa Inc. v. Friends of the Lubicon* (1996), 27 O.R. (3d) 215 at para.

63 (Ont. Div. Ct.). Nor is it necessary at this stage for the plaintiff to show that the predominant purpose of the defendant was to cause the plaintiff damage: *Therien v. Int'l Brotherhood of Teamsters et al.*, [1960] SCR 265.

[14] Some uncertainty remains with respect to other aspects of the quality of intention necessary to make out the intentional interference tort. Canadian courts have been closely following the development of British law, and appellate courts have largely adopted the analytical approach espoused by the English Court of Appeal in *Millar v. Bassey*, [1994] Entertainment & Media LR 44, a case dealing with indirect interference with contract. The majority (Ralph Gibson and Beldam L.JJ.) held that there had to be the deliberate interference with a contract with a view to bringing about its breach rather than interference causing a breach when that interference was merely the incidental consequence of the defendant's conduct.

[15] The "targeting the plaintiff" approach to the intent analysis dictates that mere knowledge of an unlawful action on the part of the defendant is not enough; intention to cause damage to the plaintiff is required. Courts taking this approach have explicitly warned against conflating intention to cause damage with mere foreseeability that such damage may result from unlawful conduct. In sum, the impugned conduct must be directed at the plaintiff.

[16] This approach was adopted by the Nova Scotia Court of Appeal in *Cheticamp Fisheries Co-op Ltd. v. Canada* 123 D.L.R. (4th) 121 at para. 42:

> **…**What the case law requires is an intention to cause the damage. Mere knowledge of D.F.O. officials that their actions were unlawful or recklessness as to whether or

> not they were unlawful is not, in itself, sufficient evidence of intention to do harm. I have already referred to the fact that the purpose or intention of inflicting injury is an essential element of the tort. The courts have stopped short of substituting for an intention to cause damage to the plaintiff a mere foreseeability that such damage may result from the unlawful conduct. A constructive intent to injure or foreseeable injury may have a place in the tort of conspiracy but not in my opinion in the tort of interference with economic relations. See Canada Cement LaFarge v. B. C. Lightweight Aggregate Ltd. et al (1983), 145 D.L.R. (3d) 385 at 398 - 9 (S.C.C.), Fleming, The Law of Torts, 7th Edition, (1987), p. 663, note 45, p. 665 especially note 59. I think that recklessness is more akin to foreseeability than it is to intention. If any lesser standard of intention were required, it still seems clear that the offending conduct must be "directed at" the plaintiff. [Emphasis added].

[17] The same approach was endorsed by the Ontario Court of Appeal in *Lineal Group Inc. v. Atlantis Canadian Distributors*, above, which held that even if the defendant's actions were intentional, such action must target the plaintiff in order for intentional interference to be made out. Similarly, in *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (2003), 227 D.L.R. (4th) 458 at para. 46, the Ontario Court of Appeal discussed the first element of the tort of economic interference as follows:

> To satisfy the first element, Reach need not prove that PMAC's predominant purpose was to injure it. This first element of the tort will be met as long as PMAC's unlawful act was in some measure directed against Reach. That is so even if - as PMAC claims - its predominant purpose was to advance its own interest and those of its members. In short, "The defendant's manoeuvre must have been targeted against the plaintiff, although its predominant purpose might well have been to advance his own interests thereby rather than to injure the plaintiff". See John G. Fleming, The Law of Torts, 9th ed., (1998) at p. 769. [Emphasis added].

[18] Some lower courts have taken an analytical approach that puts more emphasis on foreseeability when considering the quality of the intent. However, even in these cases, the courts require that the perpetration of unlawful acts be *directed against* the plaintiff for the tort of

interference with economic interests to be made out: (see for example *Alford v. Canada* (1997), 31 B.C.L.R. (3d) 228 at paras. 43-45).

[19] In summary, it is not sufficient that the damage suffered by the plaintiff is merely a consequence of the defendant's actions; negligent interference with the plaintiff's interests does not amount to intentional interference: *Lineal Group Inc. v. Atlantis Canadian Distributors, above*. Given that unlawful interference is an *intentional* tort, the conduct of the defendant must be *aimed or directed* at the party who suffers damage.

[20] In some instances, the tort of economic interference may be justified as a means to extending remedies to parties who have suffered damage as a result of another party's unlawful act and have no other recourse. However, in the case at bar, the Plaintiffs' claim cannot succeed as the requisite intention has not been pleaded. There is no allegation that the construction or maintenance of the dikes by the Defendants was done with the deliberate intention of targeting the Plaintiffs with flood damage so as to reduce their tax revenues. While the decrease in the value of the tax base may have been a consequence of flooding caused by dikes, the quality of intention necessary to satisfy the first element of the test of the tort of interference with economic relations is completely lacking.

[21] The proposed amendments are simply not capable of supporting an allegation of intentional economic interference, as the essential elements of the tort are not alleged. In the circumstances, I conclude that the proposed amendments contain a radical defect and should not be allowed.

Policy considerations

[22] The courts have typically been very reluctant to allow claims for pure economic loss for a number of public policy reasons, including the view that economic interests are less compelling of protection than bodily security or proprietary interests, that such losses are often seen as ordinary and expected business risks, and that allowing the recovery of economic loss encourages a multiplicity of inappropriate lawsuits: *D'Amato v. Badger*, [1996] 2 S.C.R. 1071 (*D'Amato*) at paras. 17-20.

[23] The primary reason for this cautionary approach, however, is concern over the unbridled recognition of economic losses raising the spectre of indeterminate liability. As the Supreme Court of Canada writes in *D'Amato* at para.18:

> The second, and perhaps main reason for limiting recovery is that expressed by Cardozo J., in Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931), who feared "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (p. 444). A negligent act or omission can have a ripple effect, causing economic loss to a potentially wide circle of individuals. Widgery J., in Weller, supra, disallowed pure economic loss and opined that if auctioneers could recover for damage to farmers' cattle, so might butchers, transport workers, and dairy workers. This view reflects the reluctance of courts to burden business and other activity with the indeterminate expense of all potential economic losses.

[24] There would be broad ramifications in permitting tax authorities to claim against any defendant who causes a decrease in the value of a taxpayer's asset. The effect of recognizing such a claim would be to create indeterminate liability to a tax authority anytime the value of a third party's property was decreased due to the act or omission of a defendant. In my opinion, this is precisely the type of liability of "an indeterminate amount for an indeterminate time to an indeterminate class" that the Supreme Court has explicitly warned against.

[25] For all the above reasons, I conclude that the allegations made in the proposed amendments are doomed to fail.

ORDER

THIS COURT ORDERS that:

1. The motion to join the Township of St. Joseph as a Plaintiff is granted.

2. The motion to withdraw the Notices of Discontinuances of the Township of Walhalla, the City of Neche, the Township of Neche, and the Township of Felson, is granted.

3. The motion is otherwise dismissed, with costs to the Defendants.

"Roger R. Lafrenière"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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