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August 9, 2008

Putting oil in wrong tank adds fuel to this warning

A decision of the Ontario Superior Court earlier this year provides a valuable lesson to property owners whose homes were once heated with fuel oil.

Back in 1979, Mary and Francis Bingley decided to replace their old oil furnace and convert their heating system to natural gas.

They hired Stanzel Plumbing to perform the work and remove the oil furnace. For reasons nobody seems to remember almost 30 years later, the basement oil tank was left in place, along with the exterior oil fill pipe and the vent pipe.

Donald Stanzel tightened the cap on the oil fill pipe so it could not be removed by hand. He then bent the pipe down towards the ground to prevent it from being filled and to indicate that it was no longer to be used.

One day in 2001, 22 years later, John McDougall was making the rounds with his tanker truck, delivering furnace oil to various homes in the town of Smith Falls. As an employee of Morrison Fuels, he had been trained and certified for the transport and delivery of fuel oil.

On his 10th or 11th delivery of the day, he unfortunately misread a delivery ticket for a house on William St., thinking it said Russell St. In a hurry to complete the delivery at the house on Russell St., he missed a number of warning signs on the ticket and the house itself.

McDougall brought out a wrench, banged the cap loose, and straightened the pipe so he could pump fuel into it.

After he had pumped 933.4 litres of furnace oil into the wrong house, he looked at the delivery ticket and realized his mistake.

The old oil fill pipe was still connected to the tank in the basement, but unfortunately that tank had leaks. Even worse, the basement floor consisted of large exposed blocks of bedrock with vertical and horizontal soil seams. When the oil was pumped into the tank, it leaked onto the basement floor where it entered the soil and the groundwater.

The house was immediately rendered uninhabitable and serious environmental contamination occurred. Extensive remediation efforts have taken place since 2001, and are ongoing.

Total cost to date for the environmental cleanup is more than $767,000.

The Bingleys sued Morrison Fuels, which admitted negligence and reached a settlement with the homeowners on damages. That settlement did not, however, end the litigation.

Morrison Fuels brought a third party claim against Stanzel Plumbing, alleging that the Bingleys' damages were caused in part by the negligent actions of Stanzel when it failed to remove or permanently plug the fill pipes at the time the oil furnace was removed.

The trial of the third party action took place over four days earlier this year before Justice Lynn Ratushny.

After hearing the evidence, the judge ruled that Stanzel's decommissioning work in 1979 complied with the gas installation Code at the time. (It has since been changed to require removal of the fill pipes and tank.)

She wrote in her judgment that the old system was left in a "safe and secure" condition, and that Stanzel Plumbing could not reasonably have foreseen that an unauthorized fuel delivery would be made into the tightened and turned-down pipe.

The case against Stanzel Plumbing was dismissed and in a subsequent ruling, it was awarded $53,000 in costs against Morrison Fuels.

The lesson of the case is clear: If you have an old oil fill pipe or storage tank it should be removed immediately. Having your basement filled with fuel oil can ruin your whole day.

Bob Aaron** is a Toronto real estate lawyer. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818. **Visit the column archives at http://aaron.ca/columns/toronto-star-index.htm for articles on this and other topics.

Bingley v. 503373 Ontario Limited (Morrison Fuels), 2008 CanLII 5958 (ON S.C.)

Date: 2008-02-20
Docket: 02-CV-20535 02-CV-20535A
URL: http://www.canlii.org/en/on/onsc/doc/2008/2008canlii5958/2008canlii5958.html
Noteup: Search for decisions citing this decision
Reflex Record (related decisions, legislation cited and decisions cited)

Related decisions

- **Superior Court of Justice**

  Bingley v. 503373 Ontario Limited (Morrison Fuels), 2008 CanLII 13789 (ON S.C.)

Decisions cited

- Ryan v. Victoria (City), 1999 CanLII 706 (S.C.C.) [1999] 1 S.C.R. 201 (1999), 168 D.L.R. (4th) 513 [1999] 6 W.W.R. 61 (1999), 59 B.C.L.R. (3d) 81
- Stewart v. Pettie, 1995 CanLII 147 (S.C.C.) [1995] 1 S.C.R. 131 [1995] 162 A.R. 241 (1995), 121 D.L.R. (4th) 222 [1995] 3 W.W.R. 1 (1995), 25 Alta. L.R. (3d) 297
- The Queen (Can.) v. Saskatchewan Wheat Pool, 1983 CanLII 21 (S.C.C.) [1983] 1 S.C.R. 205

COURT FILE NOS.: 02-CV-20535/02-CV-20535A

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
MARY PATRICIA BINGLEY and FRANCIS BINGLEY and LUCIE BINGLEY, a Minor, by her Litigation guardian, Mary Patricia Bingley	))))	Donna M. Crabtree for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
MORRISON FUELS, a Division of 503373 Ontario Limited, 503373 ONTARIO LIMITED and JOHN McDOUGALL	)))	Mark M. O Donnell and Karl W. Scholz for the Defendants
	)	
Defendants	))	
- and -	)	
	)	
D. W. STANZEL PLUMBING AND HEATING LIMITED and DONALD WRIGHT STANZEL	)))	Fiona E.S. Porter and Sara Collins for the Third Parties
	)	
Third Parties	)	
	)	
	)	
	)	**HEARD:** February 4-7, 2008
	)	

RATUSHNY, J.

-

DECISION

[1] At issue in this case is whether damages caused by the defendants wrongful pumping of fuel oil into a home were caused in part by negligent actions of the third parties when they converted the plaintiffs heating system from fuel oil to gas and did not remove or permanently plug the fuel oil system s exterior pipes.

[2] The defendants (Morrison Fuels) have admitted their negligence, reached agreement with the plaintiffs (the homeowners) on damages and now claim contributory negligence and apportionment of damages from the third parties (Stanzel Plumbing).

The Facts

[3] The facts are quite simple.

[4] In 1979, the homeowners decided to have their old oil furnace removed and to convert their heating system to natural gas. They hired Stanzel Plumbing to perform this work. Stanzel Plumbing removed the homeowners oil furnace. According to its practice at the time if the customer chose this less costly option and for reasons not remembered by either the homeowners or Stanzel Plumbing, the oil tank was left in the basement. The two exterior oil heating system pipes, the oil fill pipe and the vent pipe, were also left in place. Stanzel Plumbing tightened the cap on the oil fill pipe so that it could not be taken off by hand and then turned this pipe down towards the ground to prevent it being filled in this position and to indicate that it was no longer to be used.

[5] Twenty-two years later in March 2001, John McDougall was delivering furnace oil to various residences in his hometown. He had been working for Morrison Fuels for just over two months. Fuel oil deliveries are deliveries of dangerous goods and regulations were in place to safeguard their handling. John McDougall had been trained and certified for their transport and delivery. He had finished delivering furnace oil to 86 Russell Street in the Town of Smiths Falls which had been his tenth or eleventh delivery of the day. He was in a hurry. He had more deliveries to make that day.

[6] He grabbed one of his remaining delivery tickets and thought he saw the address 38 Russell Street. It actually said 38 William Street. He had always mixed up those two street names and today was no different. He only concentrated on the number 38 on the ticket.

[7] If he had read any of the other information on the ticket aside from the number 38, he would have seen a number of indicators to warn him that he was not at the right place. He would have seen that the exterior vent and oil fill pipes were supposed to be at a different corner of the house than where he found them at 38 Russell Street. He would have noticed, and this was highlighted on the ticket because it was unusual and, presumably, warranted extra care to avoid overfilling the customer s oil tank, that there was no whistle in the vent pipe to indicate the oil tank had air, and, therefore, space in it to receive oil. He was, instead, to have listened at the vent pipe at the correct address for a gurgle to tell him when the system was full. He also would have seen the indication on the ticket that the expected delivery amount was to be around 560 litres.

[8] He did not know any of this. He simply hurried to complete his delivery at number 38. He didn t check to make sure he was at the right address. He found the homeowners old oil fill pipe in a downward position with its cap end pointing to the ground at approximately a 45 degree angle. It was not an uncommon occurrence that homes in the Smiths Falls area using gas still had their old oil heating system pipes attached to their exteriors. He had seen similar bent over exterior pipes in the town before, but he did not know and had not been trained as to their significance. He simply thought this oil fill pipe was loose.

[9] He had trouble getting the cap off of the oil fill pipe and moving the pipe into more of an upright position to be able to fill it, but he managed with the help of a wrench that he retrieved from his truck, banging the cap loose and moving the pipe to a 45 degree angle pointing the opposite way from its position when he first saw it. He began his pumping and heard the usual whistle sound from the vent pipe, usually indicative of air coming out of the oil tank and pipes. After he thought the filling process had taken longer than he expected, he returned to his truck to turn off the pump. It was only then that he looked at the delivery ticket for a second time and saw that he was at the wrong home. He had pumped 933.4 litres of furnace oil into the wrong residence.

[10] That wrong residence belonged to the homeowners. They had never been customers of Morrison Fuels even when they had been heating with oil. They weren t home at the time. Their old oil fill pipe had clearly been in a downward position, perhaps with its cap just one inch away from the ground surface, for as long as Francis Bingley, one of the homeowners, could remember ever since he had organized their conversion to gas in 1979. His wife, Mary Bingley, was less sure of its downward position.

[11] John McDougall had pumped the furnace oil into the old oil fill pipe that was still connected in some fashion to the homeowners old oil tank in the basement. Unfortunately, that tank had leaks. Even more unfortunately, the basement surface consisted of exposed large blocks of bedrock with vertical and horizontal soil seams. When the oil was pumped into the tank, it was discharged through the leaks and onto the basement surface where it entered the soil and the groundwater.

[12] The house was rendered uninhabitable and serious environmental contamination occurred. Extensive remediation efforts have taken place since 2001 and are ongoing, at a total cost to date for the environmental clean-up portion of more than $767,000.00.

Duty of Care and Standard of Care

[13] There is no issue that a duty of care was owed by Morrison Fuels to the homeowners on the day of the delivery of the furnace oil and that its proper performance was not met by Morrison Fuels, resulting in damages caused by its negligence.

[14] I do not understand that Morrison Fuels claims the existence of any duty of care owed by Stanzel Plumbing to it or to anyone else who might come onto the homeowners property on any day subsequent to the 1979 conversion work including on that delivery day.

[15] There is also no issue, I do not believe, that there was also a separate duty of care owed by Stanzel Plumbing to the homeowners in 1979 to perform the conversion work safely, including the decommissioning of the old fuel oil heating system.

[16] The only issue is the measurement of the standard of care expected of Stanzel Plumbing in 1979 for this decommissioning and whether Stanzel Plumbing met the proper performance of its standard of care to the homeowners. If it did not, it was negligent and Morrison Fuels claims that the damages caused by its own mistaken furnace oil delivery were contributed to by Stanzel Plumbing s negligence.

[17] The relevant regulatory provision governing conversion from oil to gas heating systems in 1979 in Ontario was section 3.3.3 of the *Canadian Gas Association Installation Code for Natural Gas Burning Appliances and Equipment, CGA B149.1-1976* (the *Code*):

> 3.3.3 When the installation of an appliance constitutes a conversion from another form of energy including oil, gas, propane and electricity it shall be the responsibility of the installer to ensure that the means of supply of the other form of energy has either been removed or left safe and secure from accidental discharge.

[18] Evidence at trial has established that while the *Code* changed in 1982 in Ontario to require removal or plugging of the oil fill pipe when converting to gas, it was not uncommon in 2001 for homeowners in the Smiths Falls area who were using gas, to still have their old oil fill and vent pipes attached to the exterior of their homes with the fill pipes left in a turned down position.

[19] Donald Stanzel, the owner of Stanzel Plumbing, could not remember the work he had performed in 1979 for the homeowners. He testified, however, that it was his practice in the 1970s to give his customers a choice as to how much of the old oil heating system they wished to pay for to have removed. He said usually the tank and filler pipe were removed but that the *Code* allowed other options including the option of leaving either of them in place provided they were left safe and secure from accidental discharge as stated in the *Code*. When customers chose to leave them in place, his practice was to leave the vent pipe in its upright position because it could never be filled with oil, but the fill pipe would have its cap tightened so it could not be turned by hand and the pipe would be turned pointing to the ground, usually in a 90 degree position.

[20] Donald Stanzel said he believed this tightening of the cap and turning down of the fill pipe complied with the *Code* requirement that the old system be left safe and secure from accidental discharge and the intention of this measure was to give oil delivery persons the message that they should be asking questions before putting oil in through that pipe. He had never before heard of a problem with this procedure.

[21] Francis Bingley, one of the homeowners, also could not remember very much about the conversion work in 1979 and the reason for the choices he had made in his discussions with Stanzel Plumbing, except that the leftover oil tank, fill pipe and vent pipe, were never an issue for him. He testified that after the conversion, the top of the fill pipe with its cap attached had always been pointing in a very downward direction toward the ground and it had never moved from its downward direction to his knowledge. He was never told to move or remove it.

[22] There is no disagreement from the evidence at trial that the better conversion method, especially with the benefit of hindsight, would have been to remove or plug the fill pipe to prevent any possibility of oil going into that pipe and that these options would not have incurred too many extra costs.

[23] The issue is how to measure the proper performance of the standard of care owed by Stanzel Plumbing to the homeowners for the decommissioning work performed in 1979.

[24] I have relied, in particular, on certain passages from *Ryan v. Victoria (City)*, 1999 CanLII 706 (S.C.C.), [1999] 1 S.C.R. 201 (S.C.C.) where Major J. reviewed the existence of a duty of care owed by railways and the standard of care, being the content of that duty of care, required for the proper exercise of the duty. He said, at paras. 28 and 29,

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *Saskatchewan Wheat Pool v. Canada*, 1983 CanLII 21 (S.C.C.), [1983] 1 S.C.R. 205 (S.C.C.). Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. See, e.g. *Stewart v. Pettie*, 1995 CanLII 147 (S.C.C.), [1995] 1 S.C.R. 131 (S.C.C.), at para. 36, and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. See Linden, *supra*, at p. 219. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

[25] In *Ryan*, *supra,* Major J. considered whether the railways in that case were liable in negligence to a member of the public crossing their tracks even though they had been statutorily compliant regarding those tracks and the long-standing common law rule had been that the standard of care owed by railways to the public was normally limited to the discharge of statutory obligations. He found, summarizing his conclusions at para. 58, that the duty of care owed by railways to the public was not replaced or exhausted by compliance with regulatory standards and that duty required them to exercise reasonable care in all of the circumstances that went beyond regulatory compliance.

[26] In considering the issue of fault despite compliance with regulations, he said the following at paras. 39 and 40:

The weight to be accorded to statutory compliance in the overall assessment of reasonableness depends on the nature of the statute and the circumstances of the case. It should be determined whether the legislative standards are necessarily applicable to the facts of the case. Statutory compliance will have more relevance in ordinary cases i.e., cases clearly within the intended scope of the statute than in cases involving special or unusual circumstances It should also be determined whether the legislative standards are specific or general, and whether they allow for discretion in the manner of performance. It is a well-established principle that an action will lie against any party, public or private, for doing that which the legislature has authorized, if it be done negligently It follows that a party acting under statutory authority must still take such precautions as are reasonable within the range of that authority to minimize the risk which may result from its actions

Where a statute authorizes certain activities and strictly defines the manner of performance and the precautions to be taken, it is more likely to be found that compliance with the statute constitutes reasonable care and that no additional measures are required. By contrast, where a statute is general or permits discretion as to the manner of performance, or where unusual circumstances exist which are not clearly within the scope of the statute, mere compliance is unlikely to exhaust the standard of care.

[27] For Stanzel Plumbing, the question, then, to be asked is what would have been the standard of care expected of an ordinary, reasonable and prudent person in the same circumstances, having regard to the likelihood of a known or reasonably foreseeable harm, the gravity of that harm, the burden or cost which would be incurred to prevent the harm, industry practice and regulatory standards.

Analysis

[28] I am satisfied from the evidence of Donald Stanzel and the expert witness, John Butler, that in the 1970s before the *Code* was changed, one of the industry practices in decommissioning an oil fuel heating system and if the old oil tank and piping was not to be removed, was to turn down the oil fill pipe to the ground to signal to any fuel delivery person that he was not to move it or he would loosen the supply system and cause a leak.

[29] Donald Stanzel did not state, as was submitted he did, that he continued to turn down oil fill pipes during subsequent decommissioning work for his customers even after the *Code* was changed and in violation of the *Code*. He simply stated that this was his practice around 1979.

[30] There is no disagreement, as stated before, that the better decommissioning method would have been to remove or plug the oil fill pipe. Shawn Morrison, the general manager of Morrison Fuels, testified that this has been his company s practice since the 1970s and that their customers had never had a choice. Oil tanks and the pipes were always removed as part of a conversion to gas performed by Morrison Fuels. He was also aware, however, that others performed their decommissioning work differently, including by turning the oil fill pipe down. He said it is not uncommon at the present time to see homes in Smiths Falls that are on gas with oil fill pipes left outside and turned down. He agreed that with this knowledge, it was important that furnace oil delivery persons understand what this configuration meant. Unfortunately, John McDougall did not.

[31] I find that Stanzel Plumbing s decommissioning work for the homeowners, notwithstanding that the best or even the better option was not chosen by either of them as is now obvious with the benefit of hindsight, was compliant with the *Code* at the time. The *Code* allowed the installer his choice as to how to leave the old system safe and secure from accidental discharge . In 1979, Stanzel Plumbing did leave the old system safe and secure for the homeowners within the ordinary meaning of those terms, from accidental discharge when it tightened the cap so it could not be manually taken off, and pointed the oil fill pipe as close as possible to the ground where it could not be filled. I accept, as Mr. Butler said, that an ordinary meaning of safe is to keep free from hazard and that an ordinary meaning of secure is not to have access.

[32] Because the *Code* in 1979 permitted discretion as to the manner of performance, mere compliance, as stated in *Ryan*, *supra,* does not necessarily exhaust the assessment of the proper standard of care to be exercised. It is at this stage of the analysis that the objective risk of harm also has to be considered, namely, the standard of care that would be expected of an ordinary, reasonable and prudent person in the circumstances, including the reasonable foreseeability of the harm.

[33] Those circumstances are the following. In 1979, industry practice that was *Code* compliant allowed for tightly capped and turned down oil fill pipes as part of a decommissioning method. The homeowners were able to choose this method and did. Stanzel Plumbing heard of no problem associated with this method. In 2001 a fuel oil delivery was made by a man who, having been trained in the safe handling of dangerous goods ignored the most basic safety rule from his training that the fuel was to be delivered to the right address. He never checked to see if he had the right address. He had not been trained as to the significance of down-turned oil fill pipes within his delivery area. Nothing about the state of the residence that he should have noticed had he read the delivery ticket or known of the significance of those down-turned oil fill pipes, served to give him any warning that not only was he at the wrong place, but that place had no fuel oil heating system. He did not ask any questions of his office when he noticed the down-turned pipe and its very tight cap, even though that option was easily available to him through the use of his two-way phone. He did not seem to understand that moving an oil fill pipe as much as he did, even if this had been at a home that used furnace oil, could cause leaks in the piping system.

[34] The duty of care and the proper performance of its content was an obligation that Stanzel Plumbing owed to the homeowners in 1979. It was not a duty of care that extended to Morrison Fuels or to any other furnace oil delivery company, to save them from making an egregious mistake in the face of all indications to the contrary and delivering furnace oil to a place with no oil furnace.

[35] In terms of the objective and reasonable foreseeability of this kind of harm, I cannot find that an ordinary, reasonable and prudent tradesperson in 1979 who is aware of and who complies with the *Code* and whose choice of measures is concurred in by the homeowners would reasonably foresee this kind and degree of mistake and negligence by someone who had nothing to do with the homeowners.

[36] In other words, I find that in exercising its standard of care owed to the homeowners, Stanzel Plumbing could not have reasonably foreseen that a delivery of fuel oil that was not authorized by anyone and that was made in the face of many indicators to the contrary would be made into that tightened and down-turned oil fill pipe.

[37] If, however, I am wrong and instead, Stanzel Plumbing should have removed or permanently plugged the oil fill pipe as part of its conversion work for the homeowners because it created a reasonably foreseeable risk that there could be a delivery of furnace oil into that oil fill pipe, I would assess the degree of Stanzel Plumbing s fault or negligence at 5%, the degree of Morrison Fuels fault at 20% and the degree of John McDougall s fault at 75%.

[38] I arrive at this apportionment in the event I am wrong in concluding no fault by Stanzel Plumbing, by comparing the degree of fault in the actions and omissions of each of the parties contributing to the damages. John McDougall s fault is the major contributing cause. However, Morrison Fuels had not trained him regarding the significance of those down-turned oil fill pipes that were common within their delivery area. That is an extra measure of fault Morrison Fuels must take responsibility for quite apart from its vicarious liability for the negligence of its employee. I assess Stanzel Plumbing s fault to be far less of a contributing cause to the damages and set it at 5%.

Conclusions

[39] I conclude that Stanzel Plumbing by its decommissioning work at the homeowners residence did not create an objectively unreasonable risk of harm, to use the language of Major J. in *Ryan, supra.*

[40] I find, therefore, that Stanzel Plumbing was not negligent and the action against the third parties is, therefore, dismissed.

[41] If there is an issue of costs that the parties cannot agree upon before February 29, 2008, written submissions (a maximum of 3 written pages each excluding attachments) can be sent to me before March 10, 2008.

Justice Lynn Ratushny

DATE RELEASED: February 20, 2008

COURT FILE NOS.: 02-CV-20535/02-CV-20535A

DATE HEARD: February 4-7, 2008

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARY PATRICIA BINGLEY and FRANCIS BINGLEY and LUCIE BINGLEY, a Minor, by her Litigation guardian, Mary Patricia Bingley

Plaintiff

- and -

MORRISON FUELS, a Division of 503373 Ontario Limited, 503373 ONTARIO LIMITED and JOHN McDOUGALL

Defendants

- and -

D. W. STANZEL PLUMBING AND HEATING LIMITED and DONALD WRIGHT STANZEL

Third Parties

DECISION

RATUSHNY, J.

Bingley v. 503373 Ontario Limited (Morrison Fuels), 2008 CanLII 13789 (ON S.C.)

COURT FILE NO.: 02-CV-20535/02-CV-20535A

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARY PATRICIA BINGLEY and FRANCIS BINGLEY and LUCIE BINGLEY, a Minor, by her Litigation guardian, Mary Patricia Bingley, Plaintiffs
v.
MORRISON FUELS, a Division of 503373 Ontario Limited, 503373 ONTARIO LIMITED and JOHN McDOUGALL, Defendants
v.
D. W. STANZEL PLUMBING AND HEATING LIMITED and DONALD WRIGHT STANZEL, Third Parties

BEFORE: RATUSHNY, J.

COUNSEL: Mark M. O Donnell and Karl W. Scholz, for the Defendants.
Fiona E.S. Porter and Sara Collins, for the Third Parties

ENDORSEMENT REGARDING COSTS

[1] Written costs submissions have been received from the parties as a result of the dismissal of Morrison Fuels (the defendants) action against the third parties.

[2] I accept there has been no Rule 49 offer to settle from the third parties, as the defendants have stated.

[3] The defendants object to the claimed costs of the third parties on a number of bases, including that a portion of their counsel s docketed time is related to the defence of the plaintiffs action that was settled, that another portion of the docketed time is related to the separate Hallett action not involving either of the defendants or the third parties, that was also settled, and that counsel for the third parties has claimed excessive time and disbursements.

[4] The defendants submit that for these reasons, the determination of costs should be referred to an assessment.

[5] I agree that the third parties are entitled to costs on a partial indemnity basis.

[6] I do not agree, however, that an assessment is necessary so as to fairly achieve the procedural and substantive justice referred to in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 29 (Ont. C.A.), at paragraphs 15 and 16.

[7] As stated in *Boucher* at paragraph 15, there is a presumption that costs are to be fixed by the court unless the court is satisfied that it has before it an exceptional case and the court exercises its discretion to refer costs for assessment, as allowed by Rule 57.01(3.1).

[8] The present case is not exceptional with respect to costs. I am able to fix costs on a reasonable review of the work completed by counsel for the third parties as set out in their costs submissions, without the necessity of an assessment. Even if some of that work does include the cost categories objected to by the defendants, the controlling parameter enunciated in *Boucher*, (paras. 26, 37 and 38) of fair and reasonable for the unsuccessful party to pay responds to those issues, as do the general principles for the awarding of costs set out in Rule 57.01(1).

[9] With respect to the defendants objection that the third parties awarded costs should only relate to the defence of the third party claim, this takes too narrow a view of the appropriate scope of that defence. It was entirely reasonable and, also, necessary that the third parties made themselves cognizant of the main action as well as of the separate Hallet action that was to have been tried at the same time. I accept, therefore, that the costs awarded ought to be primarily, but not solely, related to the third party defence.

[10] The defendants submit as an alternative to the assessment process, that costs of $37,500.00 for fees and $7,500.00 for disbursements would be fair and equitable, for a total amount of $45,000.00 on a partial indemnity basis. The third parties had requested from them the payment of $50,727.25 for fees and $19,597.56 for disbursements, for a total amount of $70, 324.81, inclusive of GST. However, the third parties request rested on the existence of a valid Rule 49 offer to settle, which was not the case.

[11] The trial took four days to complete. There was a last minute settlement of the main action and a preceding settlement of the separate Hallett action. The third parties were required to assess their liability and adjust their defence according to these other actions, thereby increasing the amount of counsel time spent that would otherwise have been reasonable for a four day trial matter. That two of the third parties witnesses had to incur travel expenses to come from Florida was not unreasonable, given the interaction and complexity of scheduling arising out of the multitude of other parties in the other actions.

[12] In my view, taking into account all of these factors, costs fixed on a partial indemnity basis in the total amount of $53,000.00 inclusive of disbursements

and GST is a fair and reasonable sum for the defendants to pay.

[13] I order, therefore, that the defendants pay costs to the third parties in the amount of $53,000.00.

_____
Justice Lynn Ratushny

DATE RELEASED: April 2, 2008

COURT FILE NO.: 02-CV-20535/02-CV-20535A

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARY PATRICIA BINGLEY and FRANCIS BINGLEY and LUCIE BINGLEY, a Minor, by her Litigation guardian, Mary Patricia Bingley, Plaintiffs
v.
MORRISON FUELS, a Division of 503373 Ontario Limited, 503373 ONTARIO LIMITED and JOHN McDOUGALL, Defendants
v.
D. W. STANZEL PLUMBING AND HEATING LIMITED and DONALD WRIGHT STANZEL, Third Parties

BEFORE: RATUSHNY, J.

COUNSEL: Mark M. O Donnell and Karl W. Scholz, for the Defendants.

Fiona E.S. Porter and Sara Collins, for the Third Parties

ENDORSEMENT REGARDING COSTS

RATUSHNY, J.

DATE RELEASED: April 2 , 2008