IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Antigonish (County) v. Harvey Myatt Enterprises Ltd., 2006 NSSC 333

Date: 20061109
Docket: S.AT. 215554
Registry: Antigonish

Between:

Municipality of the County of Antigonish

Plaintiff

v.

Harvey Myatt Enterprises Limited, a body corporate and Vern MacLeod, carrying on business as Vern's Tire Service

Defendants

Judge: The Honourable Justice Hilroy S. Nathanson

Heard: May 10, 11 and 12, 2006, at Antigonish, Nova Scotia

Counsel: Donald Macdonald, Esq., for the plaintiff
Coline Morrow, Esq., for the defendant Harvey Myatt Enterprises Limited
Ray E. O'Blenis, Esq., for the defendant Vern MacLeod

By the Court:

[1] The municipality alleges that the defendant MacLeod operates an automotive tire service at a property which he rents from the defendant Harvey Myatt Enterprises Limited, and claims against both defendants: (a) a declaration pursuant to s. 347 of the *Municipal Government Act*, R.S.N.S. 1998, c. 18, as amended, that the property is dangerous and unsightly, together with an order specifying the work required to remedy the condition; and (b) an order under s. 184 of the *Act* enjoining production

of noise from the property in contravention of s. 11 of the *Mischiefs and Nuisances By-law* of the Municipality.

[2] The defendant Harvey Myatt Enterprises Limited denies that the premises are dangerous and unsightly. It pleads that it has offered to fence the exterior area where the tires are stored, and that the property is zoned commercial.

[3] The defendant MacLeod does not explicitly deny the Municipality's allegations, but pleads that he carries on business to 6:00 p.m. on weekdays and to 1:00 p.m. on Saturdays; 99% of the services provided are effected with very little noise; tires are stored in the rear exterior area only until picked up for recycling by the Resource Recovery Fund Board; the property consists of two acres; he has offered to build at the rear a fence or a corral for short-term storage of tires; and the property is zoned commercial.

APPLICABLE STATUTES

[4] S. 344 of the *Municipal Government Act, supra*, requires that:

> 344. Every property in a municipality be maintained so as not to be dangerous or unsightly.

[5] If a property is not so maintained, the *Act* provides a remedy:

> 347(1) A municipality may apply to a court of competent jurisdiction for a declaration that a property is dangerous or unsightly and an order specifying the work required to be done to remedy the condition by removal, demolition or repair.

[6] The phrase "dangerous or unsightly" is a term of art which is defined in s. 3(r) of the *Act* as follows:

> (r) **"dangerous or unsightly" means** partly demolished, decayed, deteriorated or **in a state of disrepair so as to be dangerous, unsightly** or unhealthy, **and includes property containing**
>
> (i) ashes, junk, cleaning of yards or other rubbish or refuse or a derelict vehicle, vessel, **item of equipment or machinery**, or bodies of these or parts thereof,

(ii) an accumulation of wood shavings, paper, sawdust, dry and inflammable grass or weeks or other combustible material, **or**

(iii) **any other thing that is dangerous, unsightly**, unhealthy **or offensive to a person**,

and includes property, a building or structure

(iv) that is in ruinous or dilapidated condition,

(v) the condition of which seriously depreciates the value of land or building in the vicinity,

(vi) that is in such a state of non-repair as to be no longer suitable for human habitation or business purposes,

(vii) **that is an allurement to children who may play there to their danger**,

(viii) constituting a hazard to the health or safety of the public,

(ix) **that is unsightly in relation to neighbouring properties because** the exterior finish of the building or structure or **the landscaping is not maintained**,

(x) that is a fire hazard to itself or to surrounding lands or buildings, **or**

(xi) that has been excavated or had fill placed on it in a manner that results in a hazard; [emphasis added]

[7] The *Mischiefs and Nuisances By-law* was passed by the Municipal Council of the Municipality of the County of Antigonish on February 12, 1971, and approved by the Minister of Municipal Affairs on December 20, 1973. S. 11 of the *By-law* provides as follows:

> **Garages or body shops**
> 11. No person shall establish, maintain or operate or cause to be established, maintained or operated a garage or body repair shop so as to cause annoyance to the public or to the occupants of neighboring properties.

ISSUES

[8] The issues requiring adjudication are:

(1.) Is the property dangerous or unsightly?

(2.) If so, what work is required to remedy the condition by removal, demolition or repair?

(3.) Should an order issue under s. 184 of the *Municipal Government Act* enjoining production of noise from the property in contravention of s. 11 of the Municipality's *Mischiefs and Nuisances By-Law?*

FACTS

(A.) The Defendants' Property

[9] The defendants' property consists of a lot of approximately two acres together with a commercial building thereon situate at the intersection of the west side of No. 7 Highway (commonly referred to locally as Lochaber Road) with the southeast side of Tamara Drive. The civic address of the property is 104 Lochaber Road. The property is zoned commercial.

[10] At the front of the building, adjacent to No. 7 Highway, is an unpaved front yard used primarily for customer parking. At the back of the building is an unpaved rear yard where trucks and other vehicles park while work on their tires proceeds out of doors or until the truck or vehicle is moved in whole or in part into the rear of the building through a large doorway. This rear yard is also the site where tires of various sizes and miscellaneous vehicle parts and equipment are stored temporarily for various periods of time. Large vehicles sometimes enter or exit the property via one of two short driveways off Tamara Drive.

[11] There is exhibited in evidence a lease agreement between Harvey Myatt, as Lessor, and Vernon A. MacLeod, as Lessee, purporting to lease the building at 104 Lochaber Road for a term of one year commencing September 6, 2002, and ending on September 6, 2003. MacLeod testified that the term was subsequently renewed.

(B.) Adjacent and Nearby Properties

[12] Directly across Tamara Drive, also fronting on No. 7 Highway, is Highland Marine Company. This lot is also zoned commercial.

[13] Tamara Drive runs in a southwesterly direction beyond the rear of the defendants' property to an area of Tamara Drive which is lined on both sides with approximately 30 residential properties. This area is zoned residential. Some of the residents of this area have been complaining that the defendants' property is unsightly, dangerous and a source of excessive noise during daylight hours, at night, on weekends and holidays.

[14] To the southeast of the properties fronting on the southeastern side of Tamara Drive, including the commercial property where Vern's Tire Service operates, is a trailer park. Across No. 7 Highway from its intersection with Tamara Drive there are two streets which run parallel with No. 7 Highway. These streets are lined with approximately 50 residential properties. One resident of the trailer park and two residents of the streets on the far side of No. 7 Highway testified about what they could see and hear from their properties.

(C.) Complaints of Residential Neighbours

[15] A number of persons testified about complaints they had made to the Municipality: Dr. and Mrs. Michael Brennan, 22 Tamara Drive; Andrea Thomson, 26 Tamara Drive; Gilbert Landry, 29 Tamara Drive; Steven L. Wardrope, 45 Tamara Drive; Mr. and Mrs. Peter Whitmee, 40 Tamara Drive. I will attempt to summarize their testimony.

[16] The defendants' property was previously occupied by a company known as Elco Equipment until sometime in the year 2000. During such occupation, the property was generally kept neat and tidy.

[17] When Vern's Tire Service commenced operations there in 2003, everything changed. A great deal of noise emanated from the property. The complainants could hear airguns and compressors being used at all hours of the day from 7:00 a.m. to after 7:00 p.m., on weekends and on holidays, and trucks idled for long periods. The complainants could hear hammering and ratchet guns being used to get tires off their rims. This was a common occurrence. The noise permeated the homes of the complainants such that they were forced to close their windows in summer. The noise was significant; it affected children's sleep, interrupted conversations, made it difficult to work at home, and even more difficult to entertain friends. Occasionally the noise was heard as late as 11:00 p.m. It appeared that business was being conducted on the defendants' property on Sundays.

[18] The noise went on all year round. The noise emanated from both inside and outside the building on the defendants' property. It affected the complainants' enjoyment of their respective properties. It was often constant, and always intrusive.

[19] The complainants also noted tires stockpiled in the rear yard. Sometimes they were stacked in piles, sometimes strewn about. Upwards of 200 tires were counted upon occasion, although the number decreased in recent months. Some of the tires are very large and heavy. The tires are often present on the property, and remain for various periods of time. The defendants' property often appears to be cluttered. Also, water has been noted on numerous occasions accumulating in and about the tires there.

[20] Some complainants noted the presence of children on the defendants' property playing among the tires. One complainant believed the piles of tires attracted kids who played among the tires piled high. Playing children were seen there during daylight hours and also after dark, on weekends and during the summer.

[21] Some complainants noted trucks turning off No. 7 Highway onto Tamara Drive and then turning from there onto the rear lot of the defendants' property. Sometimes trucks backed onto the rear of the lot from Tamara Drive. Sometimes large tractor trailers, when turning, would require up to three men to direct them. Some trucks swung wide in order to enter the rear yard. It was felt that this created potential danger for children walking on Tamara Drive, approaching and leaving school buses which parked near the defendants' property, and going to and from a mailbox which is located below Dr. Brennan's property. The complainants believed that if it were not for these vehicles, Tamara Drive, which is a cul-de-sac, would be quiet and quite safe.

[22] The movement of large vehicles on and off the rear yard of the defendants' property to or from Tamara Drive, and to or from Tamara Drive by turning off or onto No. 7 Highway, was also given as the cause of danger and inconvenience for cars and other vehicles. Traffic is delayed or disrupted by large vehicles which back into or from the rear yard of the defendants' property to or from Tamara Drive. Other vehicles must dodge onto the other side of the roadway or stop and wait for the manoeuvring to be completed.

[23] There was entered into evidence on behalf of the plaintiff a large number of photographs, taken at different dates, of various parts of the defendants' property. These photographs generally tended to confirm and support the testimony of the complainants.

[24] There was also entered into evidence some photographs taken by Gary Wong, building inspector employed by the Eastern District Planning Commission. He testified at trial that, at the request of the Municipal Clerk, he had visited and inspected the defendants' property in 2003 and again in 2005 for the purpose of documenting the condition of the property. However, he never checked allegations of excessive noise, nor examined the tires at the rear of the property.

[25] A number of witnesses testified on behalf of the defendants.

[26] Paul Colton, an engineer employed by the Department of Transportation, is area manager for highway maintenance. He testified that he has no record or recollection of complaints concerning traffic flow in the vicinity of Tamara Drive.

[27] Donald J. Cameron has resided since 1980 at 32 Ponderosa Drive, across No. 7 Highway from the Tamara Drive intersection. He estimated that the rear of his house is approximately 260 feet from the front of the building on the defendants' property. He testified that vehicles rarely enter the defendants' property via the second driveway from Tamara Drive, traffic is never disrupted on Tamara Drive, and he has never heard loud noises emanating from the defendants' property or from inside the building there. He also testified that there are a row of pine trees, approximately 20 feet high, growing along the rear boundary of his property, and that he can see somewhat the building on the defendants' property through openings in the trees. He has never seen people working there on Sundays.

[28] Winfred B. MacKenzie has resided for the past six years in the trailer park to the southeast of the defendants' property. His trailer is located 400 feet to 500 feet from the defendants' building. He testified that he hears noise from vehicles there but it does not bother him because it is not very loud. He does not see trucks coming and going from the property and he does not see tires in the rear yard. It is quiet most evenings. The rear deck of his trailer faces the building on the defendants' property. He can see the rear yard, but does not see what is stored there.

[29] Hugh MacFarlane is a service station manager and volunteer Fire Chief. He knows Vern's Tire Service and last visited the site in February, 2005. He has no knowledge of any complaints concerning Vern MacLeod's business and, in particular, has not received any complaints from the Municipality. When visiting the defendants' property, he took no notice of the rear yard.

[30] Nancy Stewart resides at 40 Ponderosa Drive, across No. 7 Highway and up a hill from the defendants' property. She testified that she has never attended at the defendants' property. She has never heard noise emanating from it. She cannot see it from her property; a line of trees along the road precludes that. She hears noise from vehicles operating along No. 7 Highway, which is a busy thoroughfare, but not from the defendants' property.

[31] Darren Turple is a salesman at Highland Marine Products. He testified that he has not noticed noise emanating from the defendants' property, and he has not seen any trucks going up Tamara Drive to enter that property. In cross-examination, he stated that most of his work is performed indoors.

[32] Mary Ann Duggan has resided at 34 Tamara Drive for 15 years. She is a neighbour of Dr. Brennan. She testified that she knows the defendants' property and is not concerned about the operation of the tire service there. In cross-examination, she said that she seldom goes outside and went to Halifax a great deal last year. She opens her windows in the summer. Any noise from the defendants' property does not bother her. It is not that noisy. She has no concern about the tires located in the rear yard of the defendants' property. She has never seen children there.

[33] David Reed has been shop coordinator at Vern's Tire Service for the past 2 ½ years. He testified about the method used for repairing tires, the hours of operation of the business, and persons who have access to the building on the defendants' property. Nine-five percent of the time tires are changed inside the shop. There is

room inside for one vehicle at a time; others must wait outside. An impact gun is used to remove lugnuts of which there are about 12 on each tire, and it takes 5 to 10 minutes on average to do this work. The work is done inside and then the tires are rolled out and placed on the vehicle. The discarded tires are stored outside to be picked up soon after for recycling. When stored outside, the tires are no longer their responsibility. They have been unable to put discarded tires outside for the past year and one half; they must go to the dump. Large vehicles access from the first driveway off Tamara Drive; only once has he seen a vehicle backing off Tamara via the second entrance. The hours of operation of the business are from 8 a.m. to 5 p.m. weekdays, and from 8 a.m. to 12:00 noon on Saturdays; the business is closed on Sundays. An exception is made when there are emergencies or a flood of customers; then they will stay until 1:00 p.m. on Saturdays and 7:00 p.m. on weekdays. This work is never done outside. Vern MacLeod and he have keys to the premises. So does Ralph Penny who is one of Vern's larger accounts. Penny is authorized, if stuck, to help himself, even on Saturdays, but never on Sundays. Reed also testified that he has never seen children playing in the rear yard. He acknowledged seeing vehicles sometimes obstructing traffic on Tamara Drive, on which occasions he goes to help; it usually takes only two to three minutes and it occurs possibly twice per month. Upon cross-examination, Reed testified about the method of removing tires from the vehicle, the hours of operation and the noise resulting from tire removal. Chopping hammers are used to remove tires from their rims which, on average, takes 5 to 15 minutes. Impact guns are used to remove lugnuts which, on average, takes 5 to 10 minutes. No one ever stays to work after 7 p.m., and on Saturdays never beyond 2 p.m. No one ever works at night. Ralph Penny usually attends when employees are not present; no records of his attendance are kept; he opens and uses the equipment for his own purpose and then leaves. About one and a half years ago, Vern's Tire Service started removing tires from the rear yard to the trailer park side of the building because neighbours were complaining. Tires which are repaired and resold are stored for three or four weeks. No one is responsible for cleaning the site; everybody works at it.

[34] The defendant Vern A. MacLeod also testified. Impact wrenches, large and small, are used to remove tires. After complaints from the Municipality, he tried to get mufflers for them, but found that there was no such thing in existence. So, he tied rags around their air outlets; this reduced the noise by about 50 percent. It takes about three to five minutes to take off the nuts on each side. The hours of operation of the business are from 8:00 a.m. to 5:00 p.m. on weekdays, sometimes to 6:00 p.m., and rarely later. When they stay late, no work is done outside. On Saturdays, closing time is 1:00 p.m at the latest. He and his wife clean up after that. The business is not open

on Sundays or holidays. He allows Ralph Penny, who is a good friend and a good customer, to attend and enter the building on Sundays to put on tires. He implied that this had occurred only once or twice, and he had little knowledge of it. On the Sunday prior to trial, the R.C.M.P. came, and he told Penny that he could not work there again. In the past, passenger tires were allowed to accumulate outside but, in December 2005, he received a notice from the Municipality and, thereafter, he stored the tires inside and then moved them to another location where they accumulated. He has cleaned up the premises. He tries to keep nothing outside. Now there are only three to four tires per week. Only what is necessary is left in the rear yard. He also testified that he has seldom seen large trucks back into the property from Tamara Drive. Access is via the first driveway off Tamara or via the front yard off Highway No. 7. He said that he has never seen children playing on the premises. In cross-examination, he said that he has never seen more than 80 to 100 tires in the rear yard at any time. At one point he had offered to build a corral for the storage of tires and a fence in back, but the Municipality backed out of an agreement with him to do so. When asked why he did not go ahead and just do it, he stated that he did not know.

(C.) Credibility and Findings of Fact

[35] The testimony of the witnesses called on behalf of the plaintiff is preferred to that of the witnesses called on behalf of the defendants insofar as that testimony deals with noise, tires and miscellaneous equipment in the rear yard, children playing in the area of the tires, the movement of trucks and other vehicles between No. 7 Highway and the defendants' property.

[36] Three reasons are offered for this preference. First, the defence filed by the defendant MacLeod does not deny the allegations of fact set out in the statement of claim; this is tantamount to an admission that those allegations are true. Second, the denials of statements made by witnesses called on behalf of the plaintiff are weak; the denials do not deny that certain events occurred but, rather, are limited to asertions that a particular witness did not notice the event or the event did not bother the witness or the witness does not spend much time out of doors. Third, a careful review of the testimony of Vern McLeod and David Reed reveals that they disagree with the frequency of the occurrence of some alleged activities, but do not contradict the substance of the testimony of plaintiff's witnesses; indeed, in some instances they confirm it.

[37] In addition, the allegations of fact set out in the defences have not been substantiated.

[38] I find that the defendants' pleas that the property is zoned commercial are irrelevant. So are the pleas of offers to build a fence or corral. I also find that the plea as to the hours of business and the plea that 99% of the services were provided with little noise are exaggerated.

ISSUE # 1: Is the property dangerous or unsightly?

[39] The plaintiff has the burden of proving that the defendants' property is either dangerous or unsightly as defined in s. 3(r) of the *Act* or, more specifically, as defined in the emphasized words in s. 3(r) of the *Act*. A problem for the plaintiff is that the concept of "dangerous or unsightly" is obviously subjective. This has no doubt prompted Nova Scotia courts to require the application of an objective standard. In **Aloni** v. **Chester District (Municipality)**, 1996 145 N.S.R. (2d) 56 (N.S.S.C.) MacAdam, J. summarized that standard as that which "a reasonable person viewing that property in that setting at that time would find it to be unsightly". The Court of Appeal subsequently confirmed this test in **County of Cumberland** v. **D.B. Wells**, (2004) 223 N.S.R. (2d) 368 and stated that "whether a property is unsightly is a finding of fact for the trial judge to make". I propose to apply an objective standard to both aspects of the concept.

[40] The evidence discloses that equipment and tires were placed in the rear yard of the property until they could be sold, repaired, recycled or discarded. Sometimes they were neatly stacked to a considerable height, and sometimes strewn about the yard. The weight of the evidence is that children played on occasion in the area where the tires were kept. There is no indication in the evidence of signs on the property warning children to stay away, nor of barriers to prevent children from entering upon the property. There is also evidence of stagnant water accumulating in and around the tires in the rear yard. There is no indication in the evidence of any effort to cover the tires or prevent the accumulation of water in their vicinity.

[41] The weight of the evidence is that vehicles, some of very large size, upon occasion entered or exited the defendants' property via Tamara Drive and, in doing so, interfered with other vehicular traffic, caused potential danger for children living in the residences on Tamara Drive in the process of going to or from a nearby mailbox and going to or from school buses parked at or near the intersection with No. 7

Highway. There is no indication in the evidence of posted warnings or adult supervision, except for occasional help in directing movement of large vehicles.

[42] Considering the setting of the Defendants' property, I find that a reasonable person viewing the property in that setting at that time would consider it to be a dangerous property.

[43] The evidence discloses that tires and old equipment were allowed to accumulate about the property. I find no evidence or any plan or program to maintain the property in a clean and orderly condition and, further, no evidence of any but the barest landscaping and maintenance.

[44] The fact that the property is zoned commercial should not be interpreted as permission to use or maintain the property in an unsightly manner. It is noted that s. 344 of the *Municipal Government Act*, *supra*, does not exempt or restrict its application to properties of any particular zoning.

[45] Considering the setting of the defendants' property, I find that a reasonable person viewing the property in that setting and at that time would find it to be an unsightly property.

[46] Therefore, I hold that the defendants' property is dangerous or unsightly as contemplated by, and defined in, the *Municipal Government Act*, *supra*.

ISSUE #2: If so, what work is required to remedy the condition by removal, demolition or repair?

[47] Based upon evidence which this Court accepts that tires of various sizes and various vehicle parts and equipment have often been allowed to accumulate upon the property, especially the back yard thereof, where they might remain for various periods of time, this Court considers it desirable and necessary in the circumstances to require that the defendant MacLeod remove all such tires, parts and equipment from the exterior areas of the property each day no later than one hour after the ususal closing time of the business which the defendant MacLeod carries on there.

[48] This Court finds no evidence necessitating a requirement of demolition of any part of the property.

[49] The statutory power set out in s. 347(1) of the *Act* is to order the removal, demolition or repair of the property, and not merely the building located on the property. The statutory power to require repair should be interpreted in its broadest sense, that is, as applying to a property as a whole and should not be limited to repair of buildings only.

[50] Based upon evidence which this Court accepts that large trucks and other vehicles exit and enter the property via Tamara Drive, thereby at times impeding or causing danger to vehicular traffic and danger to children walking there, this Court considers it desirable and necessary in the circumstances to require that the defendant MacLeod repair the property by erecting barriers across the two driveways leading to and from Tamara Drive and the defendants' property so as to prevent large trucks and other vehicles from exiting the defendants' property directly onto Tamara Drive and from exiting Tamara Drive directly onto the defendants' property, and also deterring children from entering the defendants' property.

ISSUE #3: Should an order issue under s. 184 of the *Municipal Government Act* enjoining production of noise from the property in contravention of s. 11 of the *Mischiefs and Nuisances By-law?*

[51] The *Mischief and Nuisances By-law* does not contain a definition of "garage" or "body-shop". However, these are words in common usage, and their meanings are well-established. The **New Oxford Dictionary of English,** 2001 edition, p. 756,

defines "garage" as "a building or shed for housing a motor vehicle or vehicles" or "an establishment which sells petrol, oil, and diesel or which repairs and sells motor vehicles". And the **Scribner-Bantam English Dictionary**, 1977 edition, p. 378, defines "garage" as a "place for sheltering automobiles; place for servicing and repairing automobiles".

[52] The **New Oxford Dictionary of English**, *supra*, at p. 198, defines "body shop" as "a garage where repairs to the bodywork of vehicles are carried out".

[53] In the present case, the evidence is that vehicles enter upon the property and, after entry, sometimes wholly or partly enter the building located on the property for brief periods of time in order that their tires be serviced, repaired or replaced. The building and the property, in my opinion, come within the definitions in these two dictionaries.

[54] Therefore, s. 11 of the *By-law* applies to the building located on the defendants' property.

[55] I find that the weight of the evidence is that MacLeod's "garage or body repair shop" has been maintained or operated in such manner as to cause annoyance to the occupants of neighbouring residential properties and also members of the public.

[56] Section 16 of the *Mischiefs and Nuisances By-law* provides a penalty for breach not exceeding $100.00 and, in default thereof, to imprisonment not exceeding two months. Vernon MacLeod will pay a penalty of $100.00 within 30 days from the date this decision is filed in the Prothontary's office at Antigonish and, in default thereof, the plaintiff may apply for an order directing imprisonment.

[57] In the event of repetition of a similar breach of this *By-law*, it would appear possible to impose the same penalty for each day during the continuance of the breach.

CONCLUSION

[58] The claims of the plaintiff are maintained as set forth herein. The plaintiff may enter judgment therefor against the defendant MacLeod. The plaintiff may not enter judgment against Harvey Myatt or the defendant Harvey Myatt Enterprises Limited. Harvey Myatt, despite being the landlord of the defendants' property, is not a party

to this proceeding, and it will be noted that none of the evidence was directed toward Harvey Myatt Enterprises Limited.

[59] The plaintiff will have its costs against the defendant MacLeod. The defendant Harvey Myatt Enterprises Limited will have its costs against the plaintiff. If the parties are unable to agree upon amounts or other aspects, they are at liberty to speak to the matter at the time an Order for Judgment is applied for.

J.