

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Skeir v. Bluewave Energy Ltd., 2013 NSSM 4

Claim No. SCCH No. 405501

BETWEEN:

TODD SKEIR and TINA SKEIR

CLAIMANT

- and -

BLUEWAVE ENERGY LTD.

DEFENDANT

Claim No. SCCH 409021

BLUEWAVE ENERGY LIMITED

CLAIMANT

- and -

TERRY BENJAMIN FUELS

FIRST DEFENDANT

- and -

TERRY BENJAMIN

SECOND DEFENDANT

- and -

SUSAN BENJAMIN

THIRD DEFENDANT

**Adjudicator: David TR Parker
Heard: December 19, 2012
Decision: January 17, 2013**

Counsel:

**Todd and Tina Skeir were represented by Michael P. Scott and
Alayna Kolodziechuk;**

Bluewave Energy Ltd. was represented by Christopher Madill and Tipper McEwan;

Terry Benjamin Fuels, Terry Benjamin and Susan Benjamin were represented by Steve Hiscock;

DECISION

\.

Both of these cases [**Claim No. SCCH No. 405501 and Claim No. SCCH 409021**] involved the same matter and therefore they were heard at the same time with the consent of counsel and as provided by the *Small Claims Court Act*;

Joinder of hearing of claims

25 Where an adjudicator is satisfied that there are two or more claims before the adjudicator which would be best dealt with together, the adjudicator may in his discretion hear the claims at the same time. R.S., c. 430, s. 25.

In the Case Number 409021, Bluewave Energy Limited and Susan Benjamin and Terry Benjamin the parties agreed to the following:

1. Terry Benjamin Fuels is a partnership, registered to do business in Nova Scotia.
2. The partners in Terry Benjamin fuels are the defendants, Terry Benjamin and Susan Benjamin;
3. Bluewave Energy Limited and Terry Benjamin Fuels entered into a "Trucking Services Agreement" on September 1, 2010;
4. Paragraph 9 of the "Trucking Services agreement" provides that Terry Benjamin Fuels as the Contractor shall indemnify Bluewave Energy Limited. It reads:
Contractor agrees to indemnify, defend, and save harmless Bluewave, its employees, officers and agents from and against any

and all claims and liability for injury to or death of persons (including, without restriction, Contractor's employees) or loss of or damage to property (including, without restriction, Contractor's property) caused by or happening in connection with Contractor's business or operations or any act or omission of Contractor or Contractor's employees, including those performed in execution of this Agreement. Contractor waives all rights of subrogation against Bluewave, its employees, officers and agents.

5. In the event that Bluewave Energy Limited is found to be liable for any sum owing to the Claimants' in Todd Skeir and Tina Skeir v. Bluewave Energy Limited and Terry Benjamin Fuels SCCH 405501, the Defendants Terry Benjamin Fuels, Terry Benjamin and Susan Benjamin will indemnify Bluewave Energy Limited for that sum.

As a preliminary matter Mr. Hiscock, Counsel for Terry Benjamin Fuels et al, confirmed with the court that in the event Bluewave Energy Limited is found liable in the Small Claims Court action Claim No. SCCH 405501 that his clients the Benjamin's are prepared to indemnify Bluewave Energy Limited.

This case involved the escape of fuel oil on July 14, 2011 from an above ground oil tank owned by the Skeir's and located at the rear of their property. This resulted in environmental damages to the Claimant Skeir's property resulting in damages in excess of \$20,000.00.

The Claimants claimed the escape of oil and resulting contamination as a result of an overflow of their oil tank when oil was delivered. The last time oil was delivered to the Skeir's property was May 3, 2011.

The insurer responded to the loss and had Metro Burner Services Ltd. attend the scene. Steve Burns of Metro Burner Services attended the scene, removed the oil from the tank, removed the tank from its current position at the back of the Skeir's home, and placed the tank its side and at the side of the Claimant Skeir's home. Metro Burner then went on and installed a new tank at the side of the Claimant Skeir's home.

Mr. Scott, Counsel for the Claimants Skeir argued that Bluewave Energy's oil delivery people caused an overfill on May 3, 2011 resulting in a relatively small spill and as such Bluewave Energy is responsible for the environmental cleanup. Mr. Scott backs his assertions up through foundation support of two experienced and expert witnesses.

Chris Smith is a senior project manager with Stantec Consulting Ltd. ("Stantec"). Mr. Smith has over 30 years' experience in site investigation of above ground oil tanks and supervision and removal of domestic fuel oil spills and environmental remediation projects. Mr. Smith attended the scene in order to try and determine the cause of the spill. He was first contacted by the insurance adjuster on July 14 or 15th 2011. When he visited the site he indicated that the tank and fittings were moved From where the tank had been originally located and that this was unusual. He also noted that the existing patio blocks on which the tank had originally been placed were turned upside down. Mr. Smith took several photographs and show the court staining on the tank that was half way down the side of the tank. He said it looked like the stains came from the top of the tank. He indicated that stains can stay there for five months to three years. He could not determine when the spill occurred and on cross examination indicated he could not tell if the oil spill was fresh or not.

J Scott MacIntyre was a professional engineer who worked with Atlantic Metallurgical Consulting Limited. He was contacted on July 14 or 15th 2011 and was asked to determine the condition of tank and if the tank was leaking or not. If there was a leak he was asked to determine the cause. Mr. McIntyre said that most leaks from oil tanks were from corrosion inside the tank. He said he examined the tank visually on the outside for any corrosion impact. He said that there were some scratches and externally the tank was good and there was no corrosion to the naked eye. Mr. McIntyre had the tank cut one third from the top

and the top portion removed. He said he noticed corrosion at the bottom of the tank. After cleaning the inside of the tank Mr. McIntyre but 100 Litres of water in the bottom of tank and detected no leakage.

Todd Skeir the homeowner noted a problem when he along with a friend were working near the oil tank on July 14, 2011. The claimant Skeir was intending to replace a fence near the back of his house when he noticed a fuel smell near the tank. He contacted his insurance agent immediately. He said that he noticed oil dripping from the bottom of the tank and witness this with his friend and Steve Burns who later arrived on the scene. He said that prior to this time he never noticed any smell of oil in the area and that he would often uses back deck for barbecuing etc. which deck was just above and beside the oil tank.

Steve Burns arrived on the scene as an employee of Metro Burner Services Limited. He has been with that company for eight years and is witnessed over 100 spills according to his estimate. He said it appeared that oil was leaking out of the tank and every few seconds there was a drop. Mr. Burns met with Dave Fisher of Bluewave Energy Limited and they set up a temporary tank and hooked up the existing oil line to give the homeowners hot water. He thought there must be a hole at the bottom of the tank as there was constant dripping at the one end.

Dave Fisher is a sales representative with Bluewave Energy. He has been in sales end of the business for six years and did burner service for 25 years. When he arrived at the scene he looked at the tank and saw the tank dripping oil. Mr. Fisher said "it was drip, drip, drip". He said that when there is an overfill of oil there is a red stain on top of the tank but in this case that was not there. In terms of the side of the tank on cross examination he said that is not staining it is worn paint, discoloring.

Terry Benjamin has 28 years' experience as an oil truck driver. He indicated he regularly takes courses in relation to filling tanks and oil spills that may occur. These courses are required by the Department of Transportation. Mr. Benjamin said that when filling a tank there is a whistle sound that stops 6 to 8 inches from the top and the tank is 95% full. He said procedurally when there is this an oil spill he would contact Bluewave energy. He said "the outside tanks are idiot proof really. If it does spill it stains everything."

The experts Mr. McIntyre and Mr. Smith concluded that there was no leaking of oil from the bottom of tank and that stains on the tank would indicate there was an over flow during the fill up that occurred on May 2011. There is conflicting evidence what Mr. Smith said and what Mr. Fisher said with respect to the "staining" on the tank. There is also the evidence of Mr. Benjamin who has several years' experience in delivering oil and follows a protocol in order not to lose his contract with Bluewave Energy. Mr. McIntyre never ruled out a leak could be higher up in the tank. As counsel pointed out he only put 100 L of water in the tank when testing it for leaks and that is one ninth of the capacity of the 900 L tank.

While the tank was fairly new that is to say under 10 years old, the ULC tank on it indicated the year 2005, the most convincing evidence in this case are the people on the scene that experienced a dripping of oil from the tank. They were not able to determine where in the tank the oil was emanating from however at least three people saw the oil dripping from the tank.

Therefore I would dismiss both as are insufficient proof on the civil standard to show Bluewave Energy Ltd or Terry Benjamin or Susan Benjamin are responsible for the leakage to the oil tank.

It Is Therefore Ordered that claim number 405501 and 409021 in the Small Claims Court of Nova Scotia be dismissed with no order as to costs

Dated at Halifax, this 17 day of January, 2013.

David T.R. Parker
Adjudicator of the Small Claims Court