CITATION: Durling v. Teskey, 2014 ONSC 1041
DIVISIONAL COURT FILE NO.: 150/13
DATE: 20140224

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: James Durling, Jan Anthony Thomas, John Santoro, Giuseppina Santoro, Anna Manco, Francesco Manco and Cesare Manco, Plaintiffs/Respondents

AND:

Sunrise Propane Energy Group Inc., 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc., 1452049 Ontario Inc., Valery Belahov, Shay (Sean) Ben-Moshe, Leonid Belahov, Arie Belahov, 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., Teskey Concrete Co. Ltd., The Technical Standards and Safety Authority, Felipe De Leon, Ontario Hose Specialties Limited, Peraflex Hose Inc., Peraflex Hose Industries Inc., Dover Corporation, Dover Corporation (Canada) Limited, Societe Dover (Canada) Limitee, Weldex Company Limited, Keddco Mfg. Ltd., Robert Parsons Equipment Trading Inc. and Pro-Par (1978) Inc., Defendants/Appellants

BEFORE: Kiteley, Aston, Whitaker JJ.

COUNSEL: *Theodore Charney and Samantha Schreiber*, for the Plaintiffs/Respondents

John A. Campion, Antonio Di Domenico and Ian Gold, for the Defendants/Appellants

HEARD: February 11, 2014 at Toronto

ENDORSEMENT

[1] Teskey Construction Co. Ltd. and related companies (the "Teskey defendants") appeal the order of Horkins J. dated November 20, 2012 certifying the plaintiffs' class action against them, founded on common law negligence.[1] The motions judge held that it was not plain and obvious that the Teskey defendants, as landlords to a group of propane handling companies allegedly responsible for a series of devastating explosions and fires in 2008 (the "Sunrise

[1] Certification of claims founded on strict liability, nuisance and liability under the Occupier's Liability Act, R.S.O. 1990, c O.2 was refused. The plaintiffs were not granted leave to appeal that decision.

Companies"), did not owe a duty of care to third parties in the residential neighbourhood surrounding the leased property. The defendants were granted leave to appeal the certification order by the order of Lederer J. dated September 27, 2013.

[2] The issue to be decided is a pure question of law reviewable on a standard of correctness.

[3] There is no dispute that the motions judge articulated the correct legal test under s. 5(1)(a) of the *Class Proceedings Act,* 1992, S.O. 1992, c.6. See paragraphs 58 through 61 of her reasons. The question on appeal is whether the motions judge erred in her finding that it was not plain and obvious that the Teskey defendants did not owe a duty of care to third parties in the neighbourhood.[2]

[4] At paragraph 155 of her reasons, the motions judge stated:

> "Teskey Construction had the right, the ability *and the obligation* to inspect, control, monitor and investigate the tenant's "dangerous propane business", the tenant's compliance with various laws, orders, TSSA regulations and the lease, and it failed to do so. The plaintiffs do not plead that Teskey Construction exercised actual control, but rather that it failed to exercise control." (emphasis added)

[5] In granting leave to appeal, Lederer J. was concerned about how the right or ability to inspect, control, monitor and investigate the tenant's use of the premises became an obligation to do so. At paragraph 98 of his decision granting leave to appeal, he observed "as the motions judge saw it, it is the terms of the lease that create the obligation which is reflective of a duty of care".

[6] In our view, the motions judge's reasons are broader than that, when taken as a whole. At paragraphs 152 and 153 of her reasons, the motions judge focused on the allegations in paragraphs 275 and 276 of the Statement of Claim. The plaintiffs allege that Teskey knew the Sunrise Companies had leased the property "for a highly dangerous propane business", that it knew the class members resided in close proximity, that it knew there was a risk of escaping gas, explosion and fire "which would likely result" in property damage and personal injury to the class members and that Teskey retained a measure of control through its lease. The Statement of Claim and the reasons of the motions judge go on to say how Teskey ought to have acted in these circumstances.

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[2] The Teskey defendants sought leave to appeal the finding they were all landlords for the purposes of the action. Leave to appeal that finding was denied.

[7] A duty of care is not a duty to do anything specific. The question of whether a duty of care exists is a question of the relationship between the parties, rooted in foreseeability and proximity. The question of what conduct is required to satisfy the duty is a question of the appropriate standard of care.[3] However, the question of whether a person is under a duty to act at all can also be part of the duty of care analysis.[4]

[8] In this case Teskey never exercised any of its rights under the lease in response to what it is alleged to have known about the dangerous business operations of the Sunrise Companies. The defendant submits that the ability to take some action does not create an obligation to do so, emphasizing the difference between misfeasance and nonfeasance. Teskey submits that the Supreme Court of Canada decision in *Childs v. Desormeaux,* [2006] S.C.J. No. 18 makes it plain and obvious that the claim by the class members cannot succeed.

[9] The *Childs* case was not brought to the attention of the motions judge. However, in our view it does not preclude the possibility of a successful claim in this case. First, *Childs* is distinguishable. There was no finding in *Childs* that the social host knew or ought to have known that Desormeaux was impaired. On the facts of that case, and as an explicit foundation for the result, the harm was not reasonably foreseeable. In this case, at this stage at least, it is to be assumed that the harm which occurred was reasonably foreseeable, as alleged. Moreover, the facts of this case may ultimately be found to be analogous to, or a modest extension of, one of the non-exhaustive list of situations in paragraphs 34 to 39 of the *Childs* decision.

[10] A landlord will rarely owe a duty of care to third parties for the negligence of a tenant but the circumstances of this case are out of the ordinary. It is alleged that this landlord knew or ought to have known that inherently dangerous, unsafe and illegal conduct of the tenant over an extended period of time amounted to foreseeability of the catastrophic harm that eventually occurred. In addition to foreseeability, the requirement for legal proximity seems met in this case simply by geographic proximity.

[11] It is not plain and obvious at this stage that Teskey had no obligation to act. Whether the Teskey defendants ought to have acted, and if so what they ought to have done, are questions which need to be decided on a full evidentiary record.

[12] The role of the defendant TSSA, and its alleged failure to protect the public, including class members, may be relevant with respect to whether Teskey breached an appropriate standard of care but it is not relevant to whether Teskey owed the class members a duty of care. TSSA's duty of care does not insulate Teskey from a duty of care.

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[3] See Rausch v. Pickering (City), 2013 ONCA 740 at para. 38

[4] See Childs v Desormeaux, noted below

[13] The pleading of the defendant's knowledge and the foreseeability of the risk of catastrophic harm to the class members coupled with an alleged ability to control, manage or reduce the risk is a sufficient basis upon which to conclude that it is not plain and obvious the class members' common law negligence claim must fail.

[14] The appeal is therefore dismissed with costs fixed in the amount of $5,000 all inclusive, as agreed.

Kiteley J.

Aston J.

Whitaker J.

Date: February 24, 2014