

LEDERER J.:

Introduction

[1] These reasons consider two motions for leave to appeal a decision made with respect to a motion to certify a class action as against four of many defendants. The motions judge certified one cause of action, but refused to certify the others. Both the plaintiffs and the four defendants seek leave to appeal.

Background

[2] On August 10, 2008, there was a series of explosions at a propane handling facility located in the city of Toronto. The explosions caused several massive fireballs to be released into the air and over the surrounding neighbourhood. People were injured. Property was damaged. This action was commenced. It is a class action. A motion was brought to certify the class. It was first before the court from May 14, 2012 to May 18, 2012. On July 12, 2012, a decision was released¹ which certified the action against all the defendants except Teskey Construction Co. Ltd. (“Teskey Construction”), Teskey Concrete Co. Ltd. (“Teskey Concrete”) 2094528 Ontario Inc. (“209 Ontario”) and HGT Holdings Ltd. (“HGT Holdings”). Each of these companies is, in some fashion, owned or controlled by members of the Teskey family. For the purposes of the motion, they were referred to, collectively, as the “Teskey defendants”.

[3] The initial decision struck the claim against the Teskey defendants, but granted leave to the plaintiffs to amend the Statement of Claim. The judge concluded that the plaintiffs had failed to satisfy s. 5(1)(a) of the *Class Proceedings Act, 1992*,² which requires that the pleadings disclose a cause of action. The certification motion against the Teskey defendants was adjourned. On October 1, 4 and 5, 2012, the court re-convened and heard motions to amend the Statement of Claim and to certify the action. It was plain and obvious that the actions in nuisance, strict liability and negligence under the *Occupiers' Liability Act*,³ would fail. For these causes of action, the judge held that the Statement of Claim did not satisfy the s. 5(1)(a) criterion. The common law negligence cause of action was certified.

[4] It is this decision which the parties seek to appeal. For their part, the plaintiffs ask for leave to appeal the refusal to certify the actions in nuisance, strict liability and negligence under the *Occupiers' Liability Act*. The Teskey defendants wish to appeal the certification of the action for common law nuisance.

¹ *Durling v. Sunrise Propane Energy Group Inc.*, 2012 ONSC 4196, [2012] O.J. No. 3408 (first appearance).

² 1992, S.O. 1992, c. 6.

³ R.S.O. 1990, c. O.2.

Motions for Leave to Appeal

[5] Motions for leave to appeal are brought and considered pursuant to rule 62.02. Leave to appeal will only be granted where there is a conflicting decision or where there is good reason to doubt the correctness of the order being questioned. Where the former is relied on, the judge must go on to decide whether it is desirable for leave to be granted. If the latter is the basis for the motion, a determination must be made that the proposed appeal involves matters of such importance that, in the opinion of the judge, leave should be granted.⁴

The Role of the Teskey Defendants

[6] In the Statement of Claim, as initially prepared and when the question of certification first came to court, the plaintiffs asserted that the Teskey defendants were operated as one economic unit or enterprise. It was alleged that 209 Ontario and HGT Holdings were operated as alter egos of Teskey Construction and Teskey Concrete. It was alleged that the four Teskey defendants were each the agent of the others and vicariously liable for the acts and omissions of the others.⁵

[7] When the issue of certification returned, the causes of action were no longer advanced against the Teskey defendants as a group. The one economic unit and alter ego theory had been abandoned. The plaintiffs did continue to allege various agency relationships between these four defendants.⁶

[8] On the motions for leave to appeal, the foundation for the allegations of liability made against each of the Teskey defendants was that they were or should be treated as the landlords of those operating the propane handling facility (referred to in the certification decisions as the "Sunrise defendants"). This is despite the fact that there was only one lease entered into between a Teskey defendant and the operators of the propane handling facility. The lease is dated September 1, 2004. It is between Teskey Construction, as landlord, and 1367229 Ontario Inc., (one of the Sunrise defendants), as tenant. It purported to lease all of a property identified as 54 Murray Road and part of a property identified as 48 Murray Road. Pursuant to the lease, Teskey Construction agreed that the tenant would be permitted to use the leased premises as a propane handling facility.

[9] To understand how it is that the other three Teskey defendants are said to be landlords, it is necessary to understand the history of the ownership of the two properties. Teskey Construction bought 54 Murray Road on March 1, 1996. On the same day, Teskey Concrete purchased 48 Murray Road. On July 30, 2007, Teskey Concrete sold 48 Murray Road to HGT Holdings. On December 28, 2007, Teskey Construction sold 54 Murray Road to 209 Ontario. It will be apparent that these sales took place after the lease between Teskey Construction and the

⁴ rule 62.02(4) of the Rules of Civil Procedure.

⁵ *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (first appearance), at paras. 19 and 20.

⁶ *Durling v. Sunrise Propane Energy Group Inc.* 2012 ONSC 6570 (second appearance).

Sunrise defendant had been executed. It will also be apparent that, in signing a lease which included part of 48 Murray Road, Teskey Construction was leasing property it did not own.

[10] At the time the properties were sold by Teskey Concrete and Teskey Construction, they were each leased back to the company which sold them. On January 1, 2007 (which was six months before the property was transferred), HGT Holdings, as landlord, leased 48 Murray Road to Teskey Concrete as tenant. On December 28, 2007, 54 Murray Road was leased by 209 Ontario, as landlord, to Teskey Construction, as tenant.

[11] Accordingly, on the day the explosion occurred, the properties were owned by 209 Ontario and HGT Holdings. They were subject to the two leasebacks, to Teskey Concrete and Teskey Construction, and the lease between Teskey Construction and the Sunrise defendant. How Teskey Construction could lease a property it did not own is a question raised by the motions judge in both of the decisions she rendered.

[12] It is from this foundation that the plaintiffs say that each of the Teskey defendants is, and for the purposes of the action should be treated as, a landlord. In short:

- Teskey Construction signed the lease as landlord and, as a result of the leaseback, became a sub-landlord at least with respect to 54 Murray Road;
- 209 Ontario, as the purchaser of 54 Murray Road, succeeded Teskey Construction as landlord of that property;
- Teskey Concrete was a landlord under the lease. In making this allegation, there are a number of factors on which the plaintiffs rely. Among them is the fact that the lease defines landlord as meaning the owners of the leased premises. At the time the lease was entered into, Teskey Concrete was the owner of 48 Murray Road. It is alleged that it was due to “inadvertence, oversight or mistake” that Teskey Concrete was not formally included as a landlord under the lease. It remained as a landlord or became a sub-landlord as a result of the leaseback of 48 Murray Road;
- HGT Holdings, as the purchaser of 48 Murray Road, succeeded Teskey Concrete as landlord of that property.

[13] The question of whether, as a matter of law, each or which of the Teskey defendants may be, or could be landlords, is dealt with in the analysis concerning the second of the two motions.

The Plaintiff's Motion for Leave to Appeal

(a) Strict liability

[14] Strict liability is the imposition of liability on a defendant without a finding of fault. All that is necessary is that damages occurred and that the defendant is responsible. In this case, the plaintiffs rely on the seminal case of *Rylands v. Fletcher*.⁷ In that case, water stored in a reservoir broke out and flooded a neighbouring mine. Ultimately, the House of Lords ruled in favour of the plaintiff (the owner of the mine) on the basis that “the person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.”⁸

[15] The legal import of *Rylands v. Fletcher*, in Ontario, was considered in *Smith v. Inco Ltd.*⁹ For 66 years, from 1918 to 1984, Inco operated a nickel refinery. Public concerns developed about nickel levels in the vicinity of the refinery. In March 2001, a class action was commenced. The claims initially advanced included claims for personal injuries and adverse health effects based on the emission of a wide variety of pollutants, including nickel particles. By the time the action reached trial, the only claim left related to property values. The claimants alleged that their property values had not increased at the same rate as comparable property values in other cities located nearby. They alleged that the facts gave rise to a claim in, among others, the strict liability doctrine found in *Rylands v. Fletcher*. At trial, the claim succeeded and the class was awarded damages totalling \$36 million. The appeal was allowed. In particular, the findings of the trial judge, with respect to the application of the doctrine of strict liability, were set aside.

[16] In considering the application of the rule in *Rylands v. Fletcher*, the Court of Appeal referred to the following four prerequisites for its operation:

- the defendant made a “non-natural” or “special” use of his land;
- the defendant brought onto his land something that was likely to do mischief if it escaped;
- the substance in question, in fact, escaped; and,
- damage was caused to the plaintiff's property as a result of the escape.¹⁰

⁷ (1866), L.R. 1 (Ex. Ct.), affd (1868) L.R. 3 H.L. 330 (H.L.).

⁸ *Ibid*, at pp. 279-80.

⁹ 2011 ONCA 628, 107 O.R. (3d) 321.

¹⁰ *Ibid*, at para. 71.

[17] In referring to these requirements for the proper application of the doctrine of strict liability, the Court of Appeal addressed a broader understanding of the rule as enunciated in *Rylands v. Fletcher* by referencing, as the trial judge had done, the following:

This emerging theory can be termed strict liability for abnormally dangerous activities. Pursuant to this principle, there are a limited number of activities so fraught with abnormal risk for the community that the negligence standard is felt to provide insufficient protection against them. Consequently, these abnormally risky or extra-hazardous activities should be governed by a stricter form of liability that insists on compensation for all losses they generate, even when they are conducted with reasonable care.¹¹

[18] The Court of Appeal went on. It commented:

The strict liability theory favoured by Linden and Feldthusen (and others, for example, see Restatement of Torts (2d), ss. 519, 520) is considerably broader than the strict liability rule under *Rylands v. Fletcher*. Under their theory, it is not necessary that the dangerous substance ‘escape’ from the defendant’s property or that the use of the defendant’s land be characterized as ‘special’ or ‘non-natural’. Strict liability flows entirely from the nature of the activity conducted by the defendant. Linden and Feldthusen acknowledged that the theory of strict liability they present goes beyond *Rylands v. Fletcher*. According to them, support for their theory ‘lies hidden in the cases waiting to be openly embraced by Canadian courts’.¹²

[19] The Court concluded:

We do not accept that strict liability based exclusively on the ‘extra hazardous’ nature of the defendant’s conduct is or should be part of the common law in this province.¹³

[20] This left the judge on the motion to certify this class action to consider the four prerequisites to which these reasons have already referred. She found that, with respect to each of the Teskey defendants, there were allegations made that would, if proved, satisfy two of the four prerequisites (that a substance escaped from 54 and 48 Murray Road and that it caused damage to the plaintiffs), but there were no allegations made in respect of the other two (that the Teskey defendants made an unnatural or special use of their land or brought the escaping propane on to the land). The motions judge noted that the only use mentioned was the use of the

¹¹ *Ibid*, at para 76, quoting Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law for*, 8th ed. (Markham, Ont.: LexisNexis Butterworths 2006, 1t pp. 540-41.

¹² *Ibid*, at para. 77, in part, quoting from Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law for*, 9th ed. at p. 556.

¹³ *Ibid*, at para. 78.

land by the tenants. In her view, the pleading focussed on the characterization of the propane business as “highly dangerous”. This was contrary to the direction in *Inco v. Smith* to the effect that strict liability is not to be based exclusively on the extra-hazardous nature of the conduct of the defendant. On this basis, she found that the requirements to succeed in an action for strict liability were not satisfied and refused to certify the class proceeding, as against the Teskey defendants. As the motions judge saw it, the plaintiffs had failed to satisfy s. 5(1)(a) of *Class Proceedings Act*.

[21] The plaintiffs do not deny that the prerequisites, as set out in *Inco v. Smith*, have not been met. They do not allege that the Teskey defendants made a non-natural or special use of the property or brought the escaping propane onto those lands. The plaintiffs are not seeking to establish a generalized strict liability tort for ultra-hazardous activities. Instead, it is pleaded that the Teskey defendants authorized the Sunrise defendants to make a non-natural use of the land. The question is whether, relying on the doctrine in *Rylands v. Fletcher*, the landlord can be held jointly liable for authorizing its tenant to carry out a non-natural use of the land and to bring a dangerous substance onto the property which subsequently escapes.

[22] It is not that the motions judge did not consider this issue. She understood that the plaintiffs alleged strict liability on the basis that the Teskey defendants were landlords and, as such, pursuant to the lease, maintained a right to exercise control over the property and were strictly liable because they failed to exercise that control. The motions judge noted these submissions and rejected them. As she saw it, the fact remains that the four criteria, as set out in *Inco v. Smith*, were not met. For the motions judge, this determined the issue.

[23] Is there a case which conflicts with this finding or is there good reason to doubt the correctness of her decision?

[24] Before going further, it may be of value to account for the policy considerations that determine when and where the doctrine of strict liability should apply. There are circumstances where our law imposes liability, in the absence of fault, based solely on the presence of harm (damages) and an assessment of the cause of that harm. Among the most obvious examples is the vicarious liability of car owners for damages caused when the car they own is involved in an accident and is being driven by another, albeit with the owner’s consent. This liability is responsive to the broad reliance we, as a society, place on automobiles, the frequency of accidents and the need to ensure that those who suffer damages have a reasonable expectation of being properly compensated. Making landlords liable for the non-natural use of their land speaks to a very different relationship. It would require a clear understanding of when or what uses are to be considered “non-natural”. As was pointed out in *Inco v. Smith*, this is a question that has “vexed lawyers and judges since the phrase was first penned by Lord Cairns”. The Court of Appeal went on to point out that the uncertainty and vagueness of the phrase led the High Court in Australia to abandon the rule entirely.¹⁴ The imposition of strict liability into the landlord/

¹⁴ *Ibid*, at para. 70, in part, referring to *Burnie Port v. General Jones Pty. Ltd.* (1994), 179 C.L.R. 520, at p. 540.

tenant relationship would, in the situations to which it applied, profoundly impact its nature. To protect itself from liability, the landlord would be required to maintain a considerable measure of control over the activities being carried out on its property. It would have a say in a business in which it had no direct investment and, possibly, no expertise. In a fashion, the landlord would become part of a joint venture, with its tenant. Counsel for the plaintiffs pointed to certain sections of the lease which, he suggested, demonstrated the right of the landlord to exercise control over the property. It is one thing to maintain a right; it is quite another to make it an obligation. I shall have more to say about this later in these reasons. In *Inco v. Smith*, the Court of Appeal, in considering whether to expand strict liability to damages flowing from “extra-hazardous” conduct, concluded that this was fundamentally a policy decision best left to the Legislature.¹⁵ As an example of this kind of liability, it pointed to the *Environmental Protection Act*.¹⁶ It is the *Highway Traffic Act*¹⁷ that authorizes the vicarious liability of the owners of motor vehicles.¹⁸ The approach taken by the plaintiffs would ask the court to make the policy determinations necessary as the foundation for an extension to the law that would make landlords strictly liable for the acts of their tenants.

[25] The plaintiffs rely on *Fenn et al. v. City of Peterborough et al.; Peterborough Utilities Commission et al., Third Parties*¹⁹ as demonstrating that it is not plain and obvious that an action against a landlord, for strict liability, cannot succeed. In that case, the court addressed questions of liability relating to a natural gas explosion that killed three children, injured their mother and traumatized their father. The explosion was the result of a gas leak that occurred in the pipe through which the gas was travelling. The pipe had not been properly supported when work was being done on a nearby water line. The work on the water line had been undertaken by the Peterborough Utilities Commission. The gas pipe was owned by The Consumers’ Gas Company. It ran through land that was owned by the City of Peterborough. Among the issues reviewed was whether strict liability could be imposed on the City based upon the principles of *Rylands v. Fletcher*. The situation was not dissimilar from this one. The court observed that, as far as the City was concerned, the facts did not come within a literal application of the language of that case. “The City did not (a) bring the gas into its land (b) for its purposes”. The court went on to note that “...the plaintiffs’ argument is, essentially, that the City is liable because it *permitted* Consumers to bring the gas onto its lands”. [Emphasis added]²⁰ In *Fenn*, the City bore no liability. Despite this, the plaintiffs say the question of whether a landlord can be strictly liable for the acts of its tenants is left open. They rely on the following observation:

Cases in which an owner leases land for a hazardous purpose, or for a purpose that inevitably has to amount to a nuisance, may be distinguished on the ground

¹⁵ *Ibid*, at paras. 85-93.

¹⁶ R.S.O., 1990, c. E. 19, s. 99.

¹⁷ R.S.O. 1990 Ch. H. 8.

¹⁸ *Ibid*, s. 192(2).

¹⁹ [1979] O.J. No. 4312, 25 O.R. (2d) 399.

²⁰ *Ibid*, at para. 142.

that in such cases it can be said that the owner, in a sense, shares the use of the land for such purpose.²¹

[26] This statement is made without any reference to the facts as presented in *Fenn*. It was not necessary and was not relevant to the decision being made. It was *obiter dictum* and, thus, not binding. This is all the more apparent when the sentences which immediately precede this quotation are read. They say:

For a combination of reasons we think that it is not appropriate that the *Rylands v. Fletcher* principle be applicable to the City. The gas distribution enterprise was entirely that of Consumers, with all of its attendant benefits and risks. Consumers had the ownership not only of the gas but also, together with the control and care thereof, of the pipe from which the gas could escape. In light of these considerations we do not think that the mere fact that the City has permitted Consumers to assume ownership of a chattel on its lands, for the purposes of Consumers, should entail strict liability on the part of the City.²²

[27] In the same way, it is the Sunrise defendants which own, operate and control the propane handling enterprise. In a business context, the Teskey defendants take none of the risk and obtain none of the benefit associated with it. To make them strictly liable for the damage caused as a result of its operation is to invite a party, who otherwise would have no responsibility, to play an active role in the day-to-day operation of the business. Typically, a lease grants the tenant exclusive use or quiet enjoyment of the lands. The lease of the lands by Teskey Construction to its tenant specifically provides for quiet enjoyment.²³ It is difficult to see how this covenant can have much meaning if the landlord is to be strictly liable for the acts of its tenant. Clearly, if the idea is to have another responsible party to assist in ensuring that these horrific accidents are prevented, the covenant can have no substantive impact. The landlord will want to be, and have to be, directly involved. On the other hand, if the covenant is to be effective, the landlord will be left simply hoping everything works out.

[28] In *Fenn*, strict liability was not imposed despite the fact that the defendant City was arguably the only occupier of the land from which the escape had occurred. The pipe was merely a chattel placed on property owned by the City. Unlike a tenant, Consumers Gas was not granted exclusive possession or quiet enjoyment and the land remained in the care and control of the City. Strict liability was not imposed because it was only Consumers Gas that could be said to have brought the dangerous substance onto the land, and it had done so only for its own benefit. Understood in this way, *Fenn* does not assist the plaintiffs in answering the proposition that it is plain and obvious that a landlord, in the circumstances of the Teskey defendants, will not be found strictly liable for the damages caused by an explosion on the lands they own.

²¹ *Ibid*, at para. 143.

²² *Ibid*, at para. 143.

²³ Lease between Teskey Construction Company Limited and 1367229 Ontario Inc. made September 1, 2004 at Article 8.01.

[29] The plaintiffs also rely on *Aldridge and O'Brien v. Van Patter, Martin and Western Fair Association*.²⁴ A stock car race took place on a track that was ill-suited for the purpose. It was intended for harness racing and did not have banked turns. During the race, a car went off the track injuring the parties who commenced the action. The race was run, pursuant to an agreement between Martin, the operator of the race, and the Western Fair Association, the owner of the track. Van Patter was the driver of the car. The owner of the land was found to be liable based on the principles in *Rylands v. Fletcher*.

[30] In *Aldridge*, the court observed that, in order to determine the liability of Martin and the Western Fair Association, it was necessary to consider their relationship. Counsel for the plaintiffs says that the agreement in *Aldridge* (a licence of one day's duration) was analogous to a lease. In *Aldridge*, the counsel for the two parties characterized the agreement as a lease. The judge did not agree:

...I am very far from convinced that the document is in its legal effect, a lease. It is true that para. 2(a) reads: 'To pay the Party of the First Part the sum of Five Hundred Dollars (\$500.00) rental, such sum to be due and payable upon the execution hereof'.

The use of language that is appropriate to a lease does not of itself create the relationship of landlord and tenant or attach the incidents that normally flow from a lease....²⁵

[31] The judge found that the document was, "in effect", a licence granted by the Western Fair Association to Martin to use the race-track "on the 24th May 1951" for the purpose of conducting the races. There were provisions in the document which would not have been necessary in a lease and not appropriate in a lease of only one day.²⁶ A licence is not a lease. A licensor gives permission for the use; it does not give exclusive possession or provide a right to quiet enjoyment. A lease confers an interest in the real property that binds the property owner. A licence is a right or privilege to enter upon and use the land in a certain manner or for a specified purpose. It is a personal right between the licensor and licensee and does not create any estate or interest in the property.²⁷ A licence is not analogous to a lease.

[32] In reaching the conclusion that the licensor (the owner) of the racetrack was strictly liable, the court, in *Aldridge*, relied upon *Shubert v. Sterling Trusts Corporation*²⁸. In that case, a property owner, who had engaged an independent contractor to fumigate two apartments using

²⁴ [1952] O.R. 595.

²⁵ *Ibid*, at p. 609.

²⁶ *Ibid*, at p. 609.

²⁷ Distinction Between Lease, Licence and Similar Arrangement: Canada Revenue Agency GST/HST Policy Statement P-062.

²⁸ [1943] O.R. 438, [1943] 4 D.L.R. 584.

cyanide gas, was strictly liable when the contractor allowed the gas to escape into a third apartment killing the occupants. Applying the rule in *Rylands v. Fletcher*, the court said:

For the acts of a person, employed by the owner or occupier of land to deal in any way with dangerous things on the land, even though the person employed is an independent contractor, and though such contractor acts in excess or disregard of his authority, the owner or occupier of the land is liable...²⁹

[33] In *Schubert*, liability was imposed, not solely on the basis that the defendant owned the property, but because the defendant remained an occupier of the property. In its capacity as manager of the apartment building, it employed a third party to enter onto the property to perform fumigation services. The defendant was vicariously liable under *Rylands v. Fletcher* when the inherent risks of the independent contractor bringing a dangerous substance onto the property materialized in the escape of that substance. As a licensor (as opposed to a lessor), the owner of the property continues as an occupier of the property. It is on this basis that, in *Aldridge*, the owner of the race track was found to be strictly liable.

[34] It is true that the judge in *Aldridge* also referred to a text, Findlay, *Property Owners' and Occupiers' Liability, 1928*, which says:

Again, if land is let for the purpose of building a reservoir on it both owner and occupier will be liable if the water escapes and does damage.

A difficult question arises when artificial water is brought to the property by tenant. The principle of law applicable to such a case is that the landlord is liable if he has himself brought danger to the property or *has authorized* the tenant to do so....³⁰

[Emphasis added]

[35] To understand the import of this comment it must be considered in the context of the case to which it was applied. That would be *Aldridge*. Although referred to as such, the owner of the land was not a landlord. Although referred to as such, the race operator was not a tenant. In the absence of a demonstration of a case where a landlord has been found liable, solely as a landlord, under the rule in *Ryland v. Fletcher*, the reference in a text (which goes back to 1928) does not assist the plaintiffs in contradicting the proposition that it is plain and obvious that an action, in strict liability, against a landlord cannot succeed.

[36] Finally, with respect to strict liability, the parties referred to *Boudreau v. Irving Oil Co. Ltd.*³¹ Gasoline leaked from underground storage tanks. The property was owned by the

²⁹ *Ibid*, at para. 19 (D.L.R.).

³⁰ *Aldridge and O'Brien v. Van Patter, Martin and Western Fair Association, supra*, at p. 609.

³¹ [1974] N.B.J. No. 101 (N.B.S.C. Appeal Div.).

defendant oil company and was leased as a gas station. A neighbouring property owner commenced an action for property damage caused by contamination from the escaping gasoline. The plaintiff alleged that the defendant oil company was the owner and lessor of the lands on which the gasoline was stored. It was alleged that the gasoline was permitted by the defendant to escape onto the property of the plaintiff. The Court of Appeal held that no liability could be imposed on the defendant oil company, as owner of the property:

The lessee Raymond Roy was the occupier of the premises held by him under the lease from the defendant Company. The Company as lessor and in accordance with the terms of the lease cannot be deemed to be the occupier of the service station premises even though it is the owner thereof. The gasoline which escaped to the premises owned by the plaintiff was brought on the service station premises and stored by and under the control of Mr. Rory the occupier of the premises.

The principle of *Rylands v. Fletcher* (cited above) is based on an 'escape' from the land in occupation of the defendant. In *Read v. Lyons* [1947] A. C. 156, it was held that the escape must be from land under the control of the defendant.

In *Rainham Chemical Works Limited v. Belvidere Fish Guano Company Limited*, [1921] 2 A.C. 465, at 479 while the court questioned the necessity of establishing the premises, from which the escape of the dangerous substance occurred, must be occupied by the defendant it confirmed the principle that the substance must be found under the control of the defendant at the relevant time.

No evidence was adduced to establish occupation of the service station premises or control of the gasoline which escaped to be in the defendant Company at the relevant time period to make the defendant liable for the escape while the lessee was in occupation it would be necessary to show the lessee occupied the premises as agent of the defendant. There was no such evidence. See *Rainham Chemical Works Limited v. Belvidere Fish Guano Company Limited*, *supra*.

...

The action based on the escape of gasoline relying on *Rylands v. Fletcher*, if enforceable would be against the lessee of the service station premises as according to the evidence he and he alone was the occupier of the premises and had control of the gasoline which escaped.³²

[37] Counsel for the Teskey defendants says that this supports his submission that there can be no claim, in strict liability, against his clients, as landlords. Counsel for the plaintiffs submits that this demonstrates that there can be such liability where the operations of the tenant are under the

³² *Ibid*, at paras. 12, 13, 14, 15 and 17.

control of the landlord. As a result of terms in the lease, counsel sees the operations of the tenant as being under the control of the Teskey defendants as landlords. I repeat what I have already said. It is one thing to maintain a right to enter the property you own; it is quite another to make it an obligation to which liability attaches if it is not exercised. Generally, the rights maintained by a landlord in a lease are directed to its own interests as owner and not to taking on a prospective liability for the failures of its tenants. Again, I will return to this later in these reasons.

[38] I complete the analysis of strict liability by pointing out that nothing I have said here should be taken as finding that the use of propane is necessarily dangerous. This was debated at length. Ultimately, this does not affect whether, as a general proposition, a landlord can be liable under the principles of *Rylands v. Fletcher*. It may or may not be relevant in respect of the possibility of the liability of other defendants. If it is, it will be an issue the judge at a trial will have to decide.

[39] I find that it is plain and obvious that an action in strict liability brought against the Teskey defendants cannot succeed. There is no liability to be found against any of them as landlord and owners of the property. There is no decision that conflicts with the ruling of the motions judge and no reason to doubt the correctness of her decision. There is no need to go on to consider whether it is desirable for leave to be granted or that the proposed appeal involves matters of such importance that leave should be granted.

(b) Nuisance

[40] Nuisance, as it applies to this case, is the tort of private nuisance.³³ This is an interference with a person's enjoyment and use of his land:

A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.³⁴

[41] The law recognizes that landowners, or those in rightful possession of land, have the right to the property in an unimpaired condition and to reasonable comfort and convenience in its occupation³⁵. The plaintiffs are all owners and, save one (John Santora), occupants of lands located in the vicinity of the propane handling site. The prospective class is made up of: "All

³³The law recognizes two types of nuisance. Apart from private nuisance with which this case is concerned, there is also public nuisance. Public nuisance is a criminal wrong. It is an act or omission that obstructs, damages, or inconveniences the rights of the community at large.

³⁴*St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906, at para. 10, as quoted in *Smith v. Inco, supra*, and in *Durling v. Sunrise Propane Energy Group Inc., supra*, (second appearance), at para. 96.

³⁵ <http://legal-dictionary.thefreedictionary.com>.

persons who were present or who owned, leased, rented and/or occupied any properties...³⁶ located in the vicinity of the propane handling facility when the explosion occurred. The nuisance, which is the subject of the claim, is the alleged interference with the land or use of land owned, leased or occupied by the members of the prospective class.

[42] In the circumstances of this case, it may be as well to consider, however briefly, the relationship between claims of strict liability under the rule in *Rylands v. Fletcher* and nuisance. They are not “mutually exclusive”.³⁷ The liability that arises under nuisance is often difficult to separate from the liability arising under the principle of *Rylands v. Fletcher*. These liabilities overlap and are dealt with in a similar fashion in many cases.³⁸ Nuisances can include vibration or blasting, the pollution of soil, a stream, or an underground water supply, foul odours, noxious gases, smoke, dust, loud noises and excessive light which originate on one property and interfere with its neighbours. The relationship is self-evident; some activity or disturbance occurs on one property to the detriment of other nearby lands. In common parlance, nuisance refers not to a single event, but to a continuing state or wrong:

...Nuisance is commonly a continuing wrong – that is to say, it commonly consists in the establishment or maintenance of some state of things which continuously or repeatedly causes the escape of noxious things on to the plaintiff’s land (e.g., a stream of foul water, or the constant noise or smell of a factory). An escape of something on a single occasion, however harmful and wrongful (e.g., the escape of water from the bursting of a reservoir), would not in common speech be termed a nuisance.³⁹

A nuisance, in law, does not recognize this limitation. The quote goes on:

This distinction, however, is not one which admits or requires any legal recognition for the purposes of the law of nuisance. All wrongful escapes of deleterious things, whether continuous, intermittent or isolated, are equally to be classed as nuisances in law; for they are all governed by the same principles.⁴⁰

[43] The difference lies, not in the nature of the escape, but in whether it could be foreseen. Thus, where a plaintiff was struck by a cricket ball hit out of the cricket grounds, where there was evidence that, over thirty years of play only five balls had passed over the applicable barrier and no one had been injured before, it was held not to be a nuisance.⁴¹ On the other hand, where

³⁶ Statement of Claim: para. 33.

³⁷ Philip H. Osborne, *The Law of Torts*, 4th ed. (2011), Irwin Law Inc., Chapter 5, *Strict Liability*, p. 22.

³⁸ *Aldridge and O’Brien v. Van Patter, Martin and Western Fair Association*, supra, at p. 11 of 17.

³⁹ *Salmond on Torts 10th ed.* 1945, at p. 222, quoted in *Aldridge and O’Brien v. Van Patter, Martin and Western Fair Association*, supra, at p. 11 of 17.

⁴⁰ *Ibid*, at p. 11 of 17.

⁴¹ *Stone v. Bolton et al.*, [1950] 1 K.B. 201, [1949] 2 All E.R. 851 at p. 208, as referred to in *Aldridge and O’Brien v. Van Patter, Martin and Western Fair Association*, supra, at p. 11 of 17 In the House of Lords sub nom. *Bolton et al.*

the windshield of a car passing by a golf course was hit by a golf ball, judgment was given against the golf club. The judge was certain that the directors knew that balls driven from the tee in question frequently landed on the highway.⁴²

[44] Foreseeability introduces a degree of fault into a claim for nuisance which is not present in a claim for strict liability. The basis for the distinction is more easily understood by remembering that actions relying on the rule in *Rylands v. Fletcher* can only succeed where a non-natural use is being made of the property. There is no such limitation for an action in nuisance.

[45] How broad is this concept of fault? In *Aldridge*, the court reviewed a series of cases that contribute to an understanding of this question.

[46] In *Earl v. Reid*⁴³, a tenant, as a term of the lease, agreed to make certain repairs to the building that was being rented. The tenant did the repairs but, as a result, the building on the adjoining land collapsed. In the ensuing action, it was held that the landlords, who had given up control to tenants, were not liable unless nuisance was plainly contemplated *in the lease*.⁴⁴

[47] In *Rich v. Basterfield*⁴⁵, a field was let to be used as a lime quarry. The ordinary way to get limestone was by blasting and then burning the lime in kilns. *In the lease*, the landlord authorized the quarrying and the erection of the kilns. The landlord was liable, to a neighbour, for nuisance because the agreement authorized the tenant to create the nuisance. *The nuisance was a necessary consequence of the purpose for which the land was being occupied*.⁴⁶

[48] In *White v. Jameson*⁴⁷, the defendant owned and operated a brickyard. He permitted Proffitt to remove clay from the property and took as compensation “well-burned bricks”. To burn the bricks, Proffitt erected and lit a kiln. The burning of the bricks was found to be a nuisance. The landowner was liable. He had not leased the land; he had merely granted a revocable licence to burn bricks on it. *He had brought Proffitt on to the land and allowed him to commit a nuisance*.⁴⁸

v. Stone, [1951] A.C. 850, [1951] 1 All E.R. 1078, counsel for the plaintiff expressly refrained from urging the ground of nuisance.

⁴² *Castle v. St. Augustine Links, Limited et al.* (1922), 38 T.L.R. 615, as referred to in *Aldridge and O'Brien v. Van Patter, Martin and Western Fair Association*, *supra*, at pp. 11 and 12 of 17.

⁴³ (1911), 23 O.L.R. 453.

⁴⁴ *Ibid*, at p. 466, as referred to in *Aldridge and O'Brien v. Van Patter, Martin and Western Fair Association*, *supra*, at p. 12 of 17.

⁴⁵ (1874), 4 C.B. 783, 136 All E.R. 715.

⁴⁶ referred to in *Aldridge and O'Brien v. Van Patter, Martin and Western Fair Association*, *supra*, at p. 12 of 17.

⁴⁷ (1874), L.R. 18 Eq. 303.

⁴⁸ referred to in *Aldridge and O'Brien v. Van Patter, Martin and Western Fair Association*, *supra*, at p. 13 of 17.

[49] What these cases suggest is that, in respect of nuisance, fault of the landowner flows from foreseeability measured at a level close to the nuisance being expected and that expectation accepted. The nuisance was authorized as part of the arrangement by which the land was being used by another. The nuisance was within the contemplation of the parties when the agreement was made. The measure of the required foreseeability is that the nuisance be inherently part of the activity to be undertaken on the property. If a landowner leases property for a use that would, by its nature, cause a nuisance, it bears part of the blame and shares in the responsibility for it.

[50] Introducing the concept of fault, in this way, puts nuisance on a policy continuum that begins with strict liability (no fault), for nuisance moves on to a level of fault (fault based on a high degree of foreseeability) and on to negligence which imports a complete consideration of fault flowing from the duty of care that is owed.

[51] In considering nuisance, the motions judge concluded that the essential elements were not present. As pleaded, the nuisance against the Sunrise defendants was the escape of the propane that substantially and unreasonably interfered with the plaintiffs' and other class members' use and enjoyment of their lands and property. The motions judge certified this claim. The pleading of nuisance as against the Teskey defendants was decidedly different. It relied on the "dangerous propane condition" defined as or dependent on "unlawful truck to truck transfers of propane and other unlawful and unsafe practices". The motions judge observed that this pleading, as it stands, omits any reliance on the escape of the propane or the interference with the use of lands in the vicinity. "The dangerous propane condition *per se* is not a nuisance".⁴⁹ In the absence of reliance on the escape of the propane or the explosion, no interference was pleaded with respect to the Teskey defendants. The motions judge found that "[w]ithout interference there can be no nuisance".⁵⁰ Thus, an essential element for a claim of nuisance is missing and, as a result, she held it was plain and obvious that the claim could not succeed.

[52] Nonetheless, she went on to consider the claim as if the pleading attributable to the Sunrise defendants was applicable to the Teskey defendants. Could the Teskey defendants be liable for any interference caused by the explosion and the escape of the propane? This returns these reasons to the question of whether a landlord or landowner can be liable for the actions, now the nuisance, of its tenants. It is here that the issue of foreseeability becomes relevant. As the plaintiffs see it, the motions judge relied on the proposition that the illegal use of truck-to-truck transfers of propane was not authorized or contemplated by the Teskey defendants (this is alleged to be the cause of the explosion) and that it was, on this basis, that she found the claim, in nuisance, as against them could not succeed. The factum filed on behalf of the plaintiffs says that "such a plea was not advanced" and refers to it as "patently ridiculous".⁵¹ Rather, they say that

⁴⁹ *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance) at para. 106.

⁵⁰ *Ibid*, at para. 106.

⁵¹ *Moving Party Factum of the Plaintiffs Motion for Leave to Appeal*, at para. 42.

the Teskey defendants became aware of the illegal truck-to-truck transfers and contemplated the illegal activity would lead to an explosion and the concomitant nuisance.⁵²

[53] This approach is flawed. There are no facts pleaded that demonstrate that the Teskey defendants contemplated that illegal truck-to-truck could or would be the cause of explosions or the escape of propane such that it would interfere with other lands. It appears to be the fact of the illegal truck-to-truck transfers alone that is the foundation for the asserted contemplation that the nuisance would occur. Is this demonstrative of the foreseeability the case law suggests can be the basis for finding a landlord or land owner liable for a nuisance caused by its tenant? The proposition appears to be that, because the Teskey defendants were aware that something illegal was going on, they are taken to have understood the danger it represented and to have contemplated that the accompanying risk would manifest itself in a release of propane that would cause a nuisance. This is so despite the fact that the defendant, the Technical Standards and Safety Authority (the "TSSA"), the party that is charged with providing safety services associated with the safe transportation, storage, handling and use of fuels such as propane had made orders prohibiting truck-to-truck transfers at the propane handling facility and was aware that the Sunrise defendants were contravening the order.

[54] This is not the level of contemplation to which the cases speak. It is not what the defendants thought might happen or should have foreseen as possible that informs the nature of the contemplation required. It is what the agreement between the parties foresees and authorizes that provides the contemplation necessary to raise, for the landowner, the prospect of liability. This was made clear as far back as the decision in *Earl v. Reid*, where the court said:

The mere fact that there is a possibility, even a manifest possibility, that the work would be done in such a way as to do harm, cannot fix the landlord with liability.

and then, after referring to the applicable citations, went on to say:

In the case of landlords who have given up to the tenant control of the premises in the matter out of which the damage arises, the Court has never gone further than to hold them liable when the use from which the damage or nuisance necessarily arises was plainly contemplated *by the lease*...⁵³

[Emphasis added]

[55] This is confirmed by a more recent text and decision. Both were referred to by the motions judge:

Owners are not responsible for any nuisance created by tenants unless the premises were let for a purpose calculated to cause a nuisance. The nuisance must

⁵² *Ibid*, at para. 43.

⁵³ *Supra*, (fn. 41) at p. 466.

have been either expressly authorized or a necessary consequence of the purpose for which the property was let.⁵⁴

and

In general, an owner is not liable for the nuisance committed by his tenant. To this rule there is one exception. Where the nuisance arises 'from the natural and necessary result of what the landlord authorized' the tenant to do, then the owner-landlord is liable: *Harris v. James*, [1878-80] All E.R. Rep. 1142. This exception to the general rule has been expressed in different terms. In *Earl v. Reid* (1911), 23 O.L.R. 453, Riddell J. at p. 466, said the landlord was not liable unless 'the use from which the damage or nuisance necessarily arises was plainly contemplated by the lease'. In *Aldridge et al. v. Van Patter et al.*, [1952] O.R. 595, [1952] 4 D.L.R. 93, Spence J. held the owner liable because the possibility of an automobile, during the course of a race, plunging through the fence around the track and injuring someone in the park (the nuisance that actually occurred) was in the immediate contemplation of the owner when the lease was executed. In *Smith v. Scott et al.*, [1972] 3 W.L.R. 783, it was suggested that the owner will be held liable if there is 'a very high degree of probability' that a nuisance will result from the purposes for which the property is let.⁵⁵

[56] On this basis, the approach taken by the motions judge cannot be faulted. She found that, for a claim of nuisance to survive, the parties to the lease would have to have contemplated that Sunrise would allow unlawful truck-to-truck transfers of propane contrary to an order of the TSSA, that it would allow smoking in the vicinity, and that this would create the possibility of an explosion causing extensive fires and damage in the neighbourhood. The motions judge concluded it was absurd to say that this was within the immediate contemplation of any of the Teskey defendants and yet they agreed to lease the property.⁵⁶ The logic cannot be questioned. The idea that, at some time after the lease was signed, the Teskey defendants (the landlords) became aware of the illegal transfers and, at that point, would have or should have "contemplated" that this would lead to an explosion and are thus liable, cannot stand. It proposes a continuing responsibility of the landlord for the activities that are undertaken on its property after it has ceded exclusive use and quiet enjoyment of the land to a tenant. In fact, it suggests that the landlord would bear responsibility for the failures, not only of its tenant, but on those responsible for overseeing the activity in issue, in this case, the TSSA.

⁵⁴ from Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law for*, 9th ed. (fn. 10), at p. 594, as quoted in *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance) at para. 109.

⁵⁵ *Banfai v. Formula Fun Centre Inc.* (1984), 51 O.R. (2d) 361 (H.C.J.), as quoted in *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance) at para. 112.

⁵⁶ *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance) at para. 125.

[57] This is not, as counsel for the plaintiffs would have it, “the degree of contemplation that was required to establish liability in nuisance against a landlord”.⁵⁷ This notion of contemplation is not consistent with the case law or the available texts. This was summarized by the motions judge in her reasons. It may be as well if I repeat it here. The cases and text to which she referred have all been referenced in these reasons:

In summary the above facts pleaded do not assist in holding the owner/landlord liable for the nuisance that the tenant created. It is plain and obvious that the nuisance cause of action against the Teskey defendants will fail given the following observations about the pleading:

- The nuisance that Sunrise created did not arise “from the natural and necessary result of what the landlord authorized the tenant to do” (*Banfai*, at p. 375).
- The nuisance was not “plainly contemplated by the lease” (*Banfai*, at p. 375). The opposite is true: the parties contemplated that there would be no nuisance.
- The nuisance was not “expressly authorized or a necessary consequence of the purpose for which the property was let” (*Linden*, at p. 594).
- The nuisance did not result from Sunrise operating the propane facility or using the land exactly as Teskey knew it was intended to be used. By entering into the lease, Teskey did not authorize Sunrise to “use the land in the manner that caused a nuisance” (*Banfai*, at p. 376).
- The nuisance was not a “necessary consequence of the mode of occupation contemplated in the lease” (*Aldridge*, at p. 613).
- The possibility of Sunrise allowing the dangerous propane condition to exist, leading to the explosion and substantially interfering with the neighbours’ rights, was not “in the immediate contemplation of the [parties to the lease] when the agreement was executed” (*Aldridge*, at p. 613).
- The Teskey defendants did not authorize the behaviour that led to the nuisance as in *Aldridge* (at p. 614).

⁵⁷ *Moving Party Factum of the Plaintiffs Motion for Leave to Appeal*, at para. 43.

- There was no “certainty that a nuisance would be created” when Teskey leased the Murray Road properties to Sunrise (*Banfai*, at p. 377).⁵⁸

[58] There is no case which conflicts with the decision of the motions judge and no reason to doubt the correctness of her decision. It is plain and obvious that an action, in nuisance, against the Teskey defendants cannot succeed.

(c) Negligence under the *Occupiers’ Liability Act*⁵⁹

[59] Negligence is the failure to exercise the care that a reasonably prudent person would exercise in the circumstances. To be liable in negligence, a party must be sufficiently related to or close to the injured party such that the former owes the latter a duty of care and to have failed to exercise the level of care the duty imports to the circumstances. This extends the continuum that started with strict liability, includes nuisance and ends with negligence. To be liable in negligence, a defendant who breaches an applicable duty of care owed to the plaintiff and as a result is the cause of the harm, is at fault.

[60] By its own terms, the *Occupiers’ Liability Act* was enacted to stand in place of what is provided by the common law:

2. Subject to section 9, this Act applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier’s liability in law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons.⁶⁰

[61] It was intended to harmonize the duty owed by persons occupying real property with the duty owed by persons in other contexts:

In writing for the Court of Appeal, Blair J.A. noted that this was the first occasion that the Court had considered the [*Occupiers’ Liability Act*] and quoted extensively from the introduction to the 1972 Ontario Law Reform Commission Report, *supra*. These extracts emphasize that one of the principal purposes of the legislation was to replace the somewhat obtuse common law of occupiers’ liability by a generalized duty of care based on the ‘neighbour’ principle set down in *Donoghue v. Stevenson*, [1932] A.C. 562. Blair J.A., at p. 722, also quoted Professor Fleming from *The Law of Torts*, (7th ed. 1987), at p. 450, as to the success of the reform brought to this area of the law by occupiers’ liability legislation:

⁵⁸ *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance), at para. 133.

⁵⁹ R.S.O. 1990, c O.2.

⁶⁰ *Ibid*, at s. 2.

Its central feature was to abandon the timorous distinction between categories of entrants and subsume the law of occupiers to the unifying principle of a 'common duty of care'. The dearth of reported decisions over 25 years of operation bespeaks success in at least one of its objectives.⁶¹

[62] The duty of care imposed by the legislation is stated as:

3. (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.⁶²

[63] Where a landlord is responsible for the maintenance of the premises he, she or it owes the same duty of care:

8. (1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show towards any person or the property brought on the premises by those persons, the *same duty of care* in respect of dangers arising from any failure on the landlord's part in carrying out the landlord's responsibility as is required by this Act to be shown by an occupier of the premises.⁶³

[Emphasis added]

[64] Following from its words, the motions judge found that the *Occupiers' Liability Act* has no application to the facts as pleaded in the proposed Statement of Claim. The duty owed by an occupier was to "persons entering on the premises". The duty of care found in the *Act* does not extend to those who are not *on the premises*. As the motions judge observed, there is no allegation in the Statement of Claim that the plaintiffs or anyone in the class entered on to the propane handling facility. "The pleading is crystal clear and it is obvious that the *Occupiers' Liability Act* is not engaged."⁶⁴

⁶¹ *Waldick v. Malcolm*, [1991] S.C.J. No. 55 (S.C.C.), at para. 19.

⁶² *Occupiers' Liability Act*, *supra* at s. 3.

⁶³ *Ibid*, at s. 8.

⁶⁴ *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance) at para. 138.

[65] This adheres to a fundamental approach to statutory interpretation:

In resolving the interpretive issue raised by the Crown, I take as my starting point the proposition that where no ambiguity arises on the face of a statutory provision, then it's clear words should be given effect. This is another way of asserting what is sometimes referred to as the 'golden rule' of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms. Where the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise (*Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 29).⁶⁵

and

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.⁶⁶

[66] The plaintiffs suggest that understanding the *Act*, in its full context, would lead to a determination that the protection it offers was to extend beyond those who enter the premises. This contorts the language. The legislation simply does not say this. Just because application of the duty of care to those who have not entered the premises would not require more of those who occupy the land⁶⁷ or because this extension would respond to a "hope" expressed by the Ontario Law Reform Commission⁶⁸ does not change the purpose or scope of the statute. As referred to, the purpose of the legislation has been found to be the abandonment of the distinction between categories of entrants and to include the law of occupiers in the unifying principle of a 'common duty of care' (see: para. [61], above). It can do this without extending the duty of care owed to those who do not enter on the property.

⁶⁵ *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 18, as quoted in *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance) at para. 144.

⁶⁶ *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 2118, as quoted in *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance), at para. 145.

⁶⁷ *Moving Party Factum of the Plaintiffs Motion for Leave to Appeal*, at para. 62.

⁶⁸ *Ibid*, at para. 61.

[67] Despite what seems clear, the plaintiffs do not accept the findings made by the motions judge. They say that the duty imposed by the *Occupiers' Liability Act* is to be extended beyond those who enter on the premises to those who have not. One might wonder how this is given the clear words of the legislation (s. 3(1)). Counsel for the plaintiffs submitted that the section “when properly construed” imposes not only a duty of care, but also a standard of care. The duty of care is demonstrated by a determination of whether the premises are reasonably safe for persons who enter them. This is also the standard of care that is required of the occupier. If the standard is not met, that is to say, if the premises were not reasonably safe for people who enter, the people harmed may include those who have not entered the premises and the occupier should bear the liability for that harm. There is nothing in the words of the section which supports this idea.

[68] In the factum of the plaintiffs, it is suggested that, if the legislation was intended to be limited in this way, the Legislature would have inserted the words “to occupants” in the first line so that the s. 3(1) would read:

An occupier of premises owes a duty to occupants to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.⁶⁹

[69] This makes no sense. For the purposes of the *Occupiers' Liability Act*, the word “occupant” is synonymous with the word “occupier”. The definition of “occupier”, as found in the legislation, ends with the word “occupant” in parenthesis:

‘occupier’ includes,

(a) a person who is in physical possession of premises, or

(b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

despite the fact that there is more than one occupier of the same premises; (“occupant”).⁷⁰

[Emphasis added]

[70] This being the case, if the legislation reads as the plaintiffs suggest it should, it would mean that “occupiers” owe a duty to themselves to see that people entering the premises are safe. Why that is better, wiser or different than the duty being owed directly to those who enter the premises is not apparent to me.

⁶⁹ *Moving Party Factum of the Plaintiffs Motion for Leave to Appeal*, at para. 60.

⁷⁰ *Occupiers' Liability Act*, *supra*, at s. 1.

[71] Finally, the plaintiffs submitted that there is some support for a construction of the *Occupiers' Liability Act* which includes off-premises liability. There is not. In *Oyagi v. Grossman*⁷¹, the plaintiff went to a party that took place despite the parents of the host forbidding him to hold one. The host lost control of the party. Personal items were stolen, including the wallet of the plaintiff. She saw someone running from the premises with a sack over his shoulder. She heard that the individual was the thief. She pursued him. Several houses away, the individual got into an automobile. He put the vehicle in motion, striking and seriously injuring the plaintiff. Although the injury occurred off the premises, the fact remained that the plaintiff had entered the property. The alleged breach of the standard of care did concern the failure of the defendants (the parents) to manage operate and control the property so as to ensure the safety of the plaintiff while she was on the premises. The motions judge concluded:

This case does not assist the plaintiffs' in their interpretation of the *Occupiers' Liability Act*. The court refused to strike the action on the motion but in doing so noted that while the injury occurred off the property, it was arguable that Geoff and his parents as owners and occupiers 'owed a duty of reasonable care to those coming onto their property and that to leave their 17 year old son in charge of the home with minimum oversight (especially with a warning not to hold a party suggesting that there may have been earlier difficulties with Geoff in this regard) was negligent' (emphasis added). In contrast, the plaintiffs in this class action did not come onto the Teskey property.⁷²

[72] *Axa Insurance (Canada) v. Brunetti*⁷³ confirms the fundamental understanding that the duty of care is owed to those who enter on the premises and not those who do not. In that case, the landlords of a residential property were liable for damages caused to a neighbouring property. The tenant negligently started a fire and allowed it to spread. The court explained that no claim could be sustained under the *Occupiers' Liability Act* because the duty imposed was restricted to persons entering onto the premises:

In *Waldick v. Malcolm* (1991), 83 D.L.R. (4th) 114 (S.C.C.) Iacobucci J., writing for the court, described the purpose of the Act, p. 116, as follows:

In general terms, the Act sets out the duty of care owed by occupiers of premises to persons who come upon those premises and specifies certain exceptions to the duty of care.

The *Occupiers' Liability Act* thus creates no duty of care owed to the owners or occupiers of the adjoining property.⁷⁴

⁷¹ [2007] O.J. No. 1087 (S.C.J.).

⁷² *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance), at para. 141.

⁷³ [1998] O. J. No. 2009 (Gen. Div.).

⁷⁴ *Ibid*, at paras. 59-60.

[73] There are no cases that conflict and there is no reason to doubt the correctness of the decision of the motions judge. It is plain and obvious that the action, as against the Teskey defendants, in negligence brought pursuant to the *Occupiers' Liability Act*, cannot succeed.

[74] It follows that the motion of the plaintiffs is dismissed in all its parts.

The Teskey Defendants' Motion for Leave to Appeal

[75] I turn now to the second of the two motions for leave to appeal. The motions judge held that it was not plain and obvious that the cause of action in negligence at common law (that is, negligence outside of the *Occupiers' Liability Act*), as against the Teskey defendants, would not succeed and certified the class action in respect of that cause of action. The Teskey defendants seek leave to appeal that ruling.

[76] The submissions took some time and covered considerable ground but, in the end, this motion raises two issues:

1. Is it plain and obvious that any or all of the Teskey defendants were not landlords such that any duty of care that could be owed by a landlord was not engaged and, on that basis, the action in negligence cannot succeed?
2. Is it plain and obvious that none of the Teskey defendants, as landlords, owed a duty of care to its or their neighbours, to act to prevent the gas explosion, such that, on that basis, the action in negligence cannot succeed?

(i) Is it plain and obvious the Teskey defendants are not landlords?

Teskey Construction

[77] There is no doubt that Teskey Construction was a landlord. It was the owner of 54 Murray Road and, in that capacity, executed the lease of September 1, 2004. The plaintiffs plead that, after the sale of 54 Murray Road to 209 Ontario and the leaseback, by it, to Teskey Construction, both of which took place on December 28, 2007, Teskey Construction was the sub-landlord under the leaseback and remained the landlord under the lease. On this basis, it could not be argued that it is plain and obvious that Teskey Concrete was not a landlord in respect of 54 Murray Road. It bore whatever liabilities would attach to it as a landlord.

Teskey Concrete

[78] At the time that the lease of September 1, 2004 was entered into, Teskey Construction did not own the portion of 48 Murray Road that was included as part of the leased lands. Those lands were owned by Teskey Concrete. The Teskey defendants rely on the legal maxim, *nemo dat quod non habet* ("nemo dat"), (you cannot give what you do not have) to say that the lease, insofar as it touched on 48 Murray Road, was not valid. On this basis, it is said that Teskey Concrete cannot be a landlord. The plaintiffs answer by relying on the principle of "tenancy by estoppel". It stands for the idea that a landlord cannot deny a tenant's interest in the property that has been let and, at the same time, prevents a tenant from denying the landlord's title to the property the

tenant occupiers. The lease had been acted on and could not, as a result, be denied. The motions judge found that this is an “undeveloped area of law” and that it was open to the plaintiffs to argue this as an answer to *nemo dat*.⁷⁵

[79] Moreover, it was arguable that the lease contained provisions which support the pleading that Teskey Concrete was a landlord. The motions judge observed that Article 13.01 of the lease says that the term “landlord” includes owners of the property. On this basis, it could be said that Teskey Concrete, as the owner of 48 Murray Road, was a landlord. Under Article 13.06 of the lease, all notices the tenant intended to provide to the landlord were to be provided to Teskey Concrete.⁷⁶

[80] The plaintiffs also alleged that the parties to the lease and Teskey Concrete intended and reasonably expected that Teskey Concrete would be named as a landlord, together with Teskey Construction, and that it was only due to inadvertence, oversight or mistake that the lease failed to do so. The plaintiffs plead that it was open to Teskey Concrete to enforce its rights through rectification, requesting that it be formally named as a landlord. The motions judge considered the requirements to obtain rectification. She observed that there was conflicting law as to whether a third party to a contract can request rectification. She considered the case law and concluded that the law is not set.

[81] Finally, the plaintiffs allege that Teskey Construction was acting as the agent of Teskey Concrete. The motions judge reviewed the objections of the Teskey defendants that the pleading cannot succeed because the agency agreement was not in writing, as required by the *Statute of Frauds* and the “sealed contract rule”, which prevents plaintiffs suing an undisclosed principal when the contract executed by his or her agent was executed under seal. The motions judge observed that the plaintiffs pleaded that there was an agreement “in writing or orally” and what the plaintiffs were seeking to rely on was the relationship between a party to a contract and an undisclosed principal, rather than to enforce the contract directly. She found that this was a novel issue that should not be decided on the motion.

[82] Quite apart from everything else, the motions judge concluded there was a further issue as to whether Teskey Concrete was a “disclosed” or “undisclosed” principal and, if disclosed, whether the sealed contract rule applies equally to disclosed and undisclosed principals.

[83] From all of this, it cannot be said to be plain and obvious that Teskey Concrete could not be found to be a landlord. Accordingly, the motions judge cannot be faulted, on this account, for her determination to certify the action in common law negligence, insofar as that finding relies on Teskey Concrete being a landlord and subject to any liability that may accrue to a landlord in the circumstances of this case.

⁷⁵ *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance) at para. 180.

⁷⁶ *Ibid*, at paras. 166 and 167.

209 Ontario and HGT Holdings

[84] The properties were sold by Teskey Construction to 209 Ontario (54 Murray Road) and by Teskey Concrete to HGT Holdings (48 Murray Road). Each of the properties was leased back to the two sellers (Teskey Construction and Teskey Concrete). Following the sales and the leasebacks, 209 Ontario and HGT Holdings were owners of the land. They were also landlords, but their tenants were Teskey Construction and Teskey Concrete, the companies that purchased the property. The question is whether, in the circumstances, it is plain and obvious that 209 Ontario and HGT Holdings could not, in respect of the lease, be landlords of the propane handling facility?

[85] The motions judge found that it was possible 209 Ontario and HGT Holdings could be landlords under the lease with the operators of the propane handling facility. For the most part, she accepted the submissions made on behalf of the plaintiffs. Again, she noted that, pursuant to the lease, the term landlord “shall” include only owners of the premises leased (see: Article 13.01). The motions judge went on to observe that the same article states that the lease will be binding on the “Landlord, its successors and assigns” during their “respective successive periods of ownership”.⁷⁷

[86] The plaintiffs also referred to and the motions judge relied on the *Commercial Tenancies Act*⁷⁸. Sections 7 and 8⁷⁹ provide “... that a purchaser who buys with notice of a tenancy is charged with all obligations to the tenant, binding the land, by which the vendor was bound”.⁸⁰ The motions judge found that this was, “arguably”, a way to plead that 209 Ontario and HGT Holdings were landlords under the lease to the operators of the propane handling facility.⁸¹

⁷⁷ *Ibid*, at para. 195.

⁷⁸ R.S.O. 1990, CHAPTER L.7.

⁷⁹ 7. All lessees and grantees of lands, tenements, rents, portions, or any other hereditaments for term of years, life or lives, their executors, administrators, and assigns shall and may have like action, advantage, and remedy against all and every person who shall have any gift or grant of the Queen, or of any other persons, of the reversion of the same lands, tenements and other hereditaments so let, or any parcel thereof, for any condition, covenant, or agreement, contained or expressed in the indentures of their leases as the same lessees or any of them, might and should have had against their said lessors, and grantors, their heirs, or successors.

8. The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, despite severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise, and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, such obligation may be taken advantage of and enforced against any person so entitled.

⁸⁰ *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance) at para. 197.

⁸¹ *Ibid*, at para. 197.

[87] She made this finding despite the submission of the Teskey defendants that, as a result of the leasebacks, Teskey Construction and Teskey Concrete remained in possession of the lands and that this prevented the plaintiffs from relying on s. 7 and s. 8 of the *Commercial Tenancies Act*. Section 7 makes clear (in an obtuse way) that the operator of the propane handling facility (the tenant under the lease of September 1, 2004) has rights against the holders of “the reversion of the same lands”. The reversion, insofar as the lease to the operators of the facility is concerned, remained with Teskey Construction and Teskey Concrete. When the lease expires, the lands will be returned to them, not as owners of the fee simple, but as the subsequent tenants of those owners. Those owners (209 Ontario and HGT Holdings) are the holders of a further reversion that will occur when the leasebacks (the lease between Teskey Construction and 209 Ontario, as well as the lease between Teskey Concrete and HGT Holdings) end. The Teskey defendants submit that this demonstrates that there is no relationship between the new owners (209 Ontario and HGT Holdings) and the original tenant (the operator of the propane handling facility). Thus, it is said the former cannot be the landlords of the latter, at least arising out of the terms of the *Commercial Tenancies Act*. They say that this separation of the reversion is recognized by s. 8 of that *Act*. It refers to the “reversionary estate immediately expectant on the term granted by the lease” and to the “severance of that reversionary estate”.

[88] The motions judge concluded that it was not plain and obvious that the leasebacks prevented 209 Ontario and HGT Holdings from being landlords of the operator of the propane handling facility. She relied on *nemo dat* to say that it may be that the properties could not be leased to Teskey Construction and Teskey Concrete because they were already leased to the operator at the time the lands were sold to 209 Ontario and HGT Holdings. The Teskey defendants say that this is plainly wrong. It fails to acknowledge that the new owners were entirely free to lease what they had; that is, the land subject to the lease or, to put it differently, the reversionary interest they owned, as of the date the lease with the operator of the propane handling facility expired.

[89] This may or may not be so. As the plaintiffs suggest, there is uncertainty created by the conveyances and the leasebacks.⁸² The proposition that the lease defines 209 Ontario and HGT Holdings as landlords, as a result of being “owners”, remains. This and the debate over the impact of s. 7 and s. 8 of the *Commercial Tenancies Act* and the impact of *nemo dat* serves to confirm the ultimate conclusion of the motions judge that: “Given the uncertain legal and factual situation of this pleading, it is not plain and obvious that the leasebacks defeated the pleading against [209 Ontario] and HGT [Holdings]”.⁸³

[90] It is not plain and obvious that 209 Ontario and HGT Holdings cannot be found to be landlords of the operator of the propane handling facility. There are no conflicting decisions and

⁸² *Responding Factum of the Plaintiffs/Responding Parties (Teskey Defendants' Motion for Leave to Appeal)*, at para. 79.

⁸³ *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance), at para. 204.

there is no reason to doubt the correctness of the decision of the motions judge insofar as it deals with this issue.

[91] This leaves me to deal with the second of the two issues raised by the second motion for leave to appeal.

(ii) Is it plain and obvious the Teskey defendants, as landlords, did not owe a duty of care?

[92] It is axiomatic that liability in negligence depends on the existence of a duty of care. There is no generalized duty to act reasonably so as to avoid causing foreseeable harm to all other persons; such a duty is owed only between persons in a relationship with the requisite degree of proximity:

However, as acknowledged in *Donoghue* and affirmed by this Court in *Cooper*, foreseeability alone is not enough to establish the required relationship. To impose a duty of care ‘there must also be a close and direct relationship of proximity or neighbourhood’: *Cooper*, at para. 22. The proximity inquiry asks whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care. The focus is on the relationship between alleged wrongdoer and victim: is the relationship one where the imposition of legal liability for the wrongdoer’s actions is appropriate?⁸⁴

[93] The prospective duty of care in this case is a duty owed by the landlord to those who live, work or own property in the vicinity of the propane handling facility. It stands to reason that the mere fact of ownership of land where, through a lease, exclusive possession and quiet enjoyment have been given to another, cannot be enough to demonstrate the proximity necessary to establish a duty of care owed by the landlord to neighbours. The idea that it could do this raises concerns similar to those reviewed in these reasons in the context of the claim for strict liability (*Rylands v. Fletcher*). It would change the nature of the landlord/tenant relationship. To protect itself from liability, the landlord would be required to play a role in the activities being carried out on the property. The mere fact that a party is a landlord does not demonstrate the proximity necessary to establish a duty of care.

[94] The issue is whether any of the Teskey defendants, found to be landlords, had sufficient control of the lands and the propane handling facility to demonstrate the presence of a duty of care. The Statement of Claim alleges that they did. It says that the necessary proximity was demonstrated by, among other things:

[T]he circumstances of the Property and Facility used for a dangerous propane business, located in close proximity to a residential neighbourhood are such that

⁸⁴ *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 S.C.C. 41, at para. 23.

Teskey Construction was under an obligation to be mindful of the safety of the Class Members, *when exercising its control* over the Tenant's operations and compliance with the Lease⁸⁵, and

Teskey Construction *exercised control over the Tenant by virtue of the rights granted under the Lease.*⁸⁶

[95] The control relied on as demonstrative of a duty of care arises from the lease. The provisions of the lease to which the motions judge referred say it is "lawful" for the landlord to enter, inspect and make repairs that are necessary⁸⁷ and that the landlord has the right to inspect the premises at any time.⁸⁸ The issue is whether the fact that it is "lawful" for the landlord to

⁸⁵ *Statement of Claim*, at para. 276, as quoted in *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance), at para. 153 (e).

⁸⁶ *Ibid*, at para. 153 (g).

⁸⁷ *Lease Between Teskey Construction Company Limited and 1367229 Ontario Inc.*, dated September 1, 2004, Article 2.15 which says:

INSPECTION BY LANDLORD

It shall be lawful for the Landlord and its agents, at all reasonable times during the Term, to enter the Leased Premises to inspect the condition thereof, provided such inspection does not interfere with the Tenant's business operations, in any material way. Where an inspection reveals repairs are necessary, the Landlord shall give to the Tenant notice in writing and thereupon the Tenant will, within fifteen (15) days from the date of the delivery of the notice, commence the necessary repairs in a good and workmanlike manner and complete same in a reasonable time period taking into consideration the nature of the repairs.

⁸⁸ *Ibid*, at Article 6.09, which says, in part:

ENVIRONMENT

...

The Tenant covenants not to carry on any business or operation or permit anything to be done which contravenes any of the provisions of the Environmental Protection Act, R.S.O. 1990, as amended and shall not permit any noise or odours waste and damage in contravention of the applicable by-laws, etc., on the Premises which may be deemed as a nuisance or injurious to the Premises or to the Building or to any surrounding buildings or surrounding environment, taking into consideration the nature of the business and the Tenant's permitted use of the Premises.

....

The Landlord and its agents, servants, employees and representatives shall have the right to inspect the Premises at any time or times for the purposes of determining whether the operation of the Tenant complies with the provisions included in this Rider, provided the Landlord provides the Tenant with forty-eight (48) hours written notice of such inspection and such

inspect or that the landlord has a right to enter creates a duty of care such that it is obligated it to do so. The motions judge determined that it would. She held that Teskey Construction, a landlord, "...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."⁸⁹ [Emphasis added].

[96] She refused to accept that the action in negligence would fail because it was premised "on a pleading that the Teskey defendants had failed to act."⁹⁰ She held:

Also, the plaintiffs plead that there was an 'obligation' for the Teskey defendants to inspect, control, monitor and investigate the tenant's 'dangerous propane business'. If we take this pleading to be true, a failure to fulfill the obligation could be negligent.⁹¹

inspection is done in a manner that does not interfere with the Tenant's business operations. In the event that an inspection by a reputable company that specializes in such inspections reveals a breach of the above covenant, then the Landlord shall provide the Tenant with notice in writing of the breach and the Tenant shall within five (5) business days after receipt of such notice immediately commence to rectify such breach at the tenant's expense. In the event that the Tenant does not immediately commence to rectify such breach within five (5) business days, then the Landlord at its option and in its sole discretion may terminate the Lease without any further notice or may rectify such breach at the cost of the Tenant, and the Tenant shall forthwith upon demand reimburse the Landlord for the cost of the rectification and such sum shall be considered to be Additional Rent under the Lease and collectible as Additional Rent. Provided further that in the event that the Tenant takes action to rectify such breach as noted above, the Tenant shall complete such rectification not later than thirty (30) days after receipt of notice given above by the Landlord, provided such rectification can be complete within such period (or as expeditiously as possible thereafter in the event that such rectification cannot be completed within such period). In every event, the Tenant shall be fully responsible for all damage which may be caused as a result of the breach right it or by those to whom it is in law responsible of applicable environmental laws and regulations pertaining to the Premises and agrees to indemnify the Landlord and its directors and officers and hold each of same harmless from and against all costs, losses or damages arising from a breach of the tenants obligations hereunder. It is hereby expressly acknowledged by the Tenant that its obligations under this Section shall survive the termination of the Lease for a period of 90 days in respect of any breach of the Tenant, its employees, agents and customers and invitees occurring during the Term.

⁸⁹ *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance) at para. 155.

⁹⁰ *Ibid*, at para. 158.

⁹¹ *Ibid*, at para. 159.

[97] She did not accept that the cases⁹² relied on by the Teskey defendants as standing for the proposition that a failure to act by a landlord could not lead to a finding of negligence. She distinguished these cases on the basis that they “...did not involve facts where the landlord/owner exercised control by virtue of rights granted under a written lease”.⁹³ This returns us to her view that the terms of the lease could or did *oblige* Teskey Construction, as a landlord, to enter the premises and act to safeguard the neighbours. It accepts the possibility that the fact that it was “lawful” for it to enter and “had a right to inspect” obliged it to do so at the risk of liability for ensuing harm to third parties if it did not.

[98] This requires some further consideration. 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. If the lease did not contain these provisions, the control the motions judge perceives they provide to the landlord would not be present. The basis on which she distinguishes the cases on which the Teskey defendants rely (see: fn. 92) would not exist. Articles like 2.15 (see: fn. 86) and 6.09 (see: fn. 87) are in place for the protection of the landlord. They provide the landlord with the right to enter lands in which it has a reversionary interest. If, in seeking a right to enter to protect its interest in the property it takes on a duty of care and is obligated to enter at risk of a broader liability to third parties, it would be better off without these paragraphs being present at all. It could not act to acquire a right to protect itself for fear of taking on an obligation to protect third parties.

[99] In this case, the landlords, whichever of the Teskey defendants may be included, could only protect themselves by actively engaging in overseeing the activities, not only of the tenant but also of those responsible for overseeing compliance with the applicable legislation, in this case, the TSSA. This is made clear by the motions judge when she observed:

Teskey Construction knew or ought to have known that Sunrise was ‘running a dangerous propane business’ in contravention of the applicable laws and standards. It should have known that Sunrise was not complying with the lease and that it was conducting unlawful and unsafe activities.

As a result of Teskey Construction’s failure ‘to monitor and inspect the Property and Facility for compliance with the Lease and enforce its powers under the Lease to compel compliance with 2.15 and 6.09 of the Lease, Teskey Construction caused an unsafe and dangerous condition to continue at the Property and Facility, which ultimately led to the explosions and fire, causing damage and loss to the Class Members.’⁹⁴

⁹² *O’Leary v. Smith*, [1925] M.J. No. 19 (C.A.); *Earl v. Reid*, *supra*; and, *Ward v. Caledon*, [1892] O.J. No. 18 (C.A.).

⁹³ *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance), at para. 158.

⁹⁴ *Durling v. Sunrise Propane Energy Group Inc.*, *supra*, (second appearance), at paras. 156 and 157.

[100] If correct, what is said in these paragraphs would require the active involvement of the landlord in the activities on the property in order to protect itself from liability for damage to neighbouring properties despite having given up possession and quiet enjoyment of the lands.

[101] To my mind, there is good reason to doubt the finding of the motions judge that the lease serves to demonstrate a duty of care that obliges the landlord to act in the face of dangerous or even illegal activities being undertaken on the lands such that its failure to do so may make it liable, in negligence, to the plaintiffs or other members of the prospective class. The issues raised involve matters that are of such importance, both to this case and to the law generally, that, in my opinion, leave to appeal should be granted.

Conclusion

[102] The plaintiffs' motion for leave to appeal is dismissed in each of its elements.

[103] The Teskey defendants' motion for leave to appeal is granted, but only as to the issue of whether it is plain and obvious that the Teskey defendants could not be found to have owed a duty of care to their neighbours to act to prevent the gas explosion.

Costs

[104] Pursuant to the agreement between the parties, costs in the amount of \$5,000 will be awarded to the Teskey defendants, if so ordered by the panel of the Divisional Court that hears the appeal.


LEDERER J.

CITATION: Durling v. Sunrise Propane Energy Group Inc., 2013 ONSC 5830
DIVISIONAL COURT FILES NO.: 49/13 & 150/13
COURT FILE NO: CV-08-363271-00CP
DATE: 20130927

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LEDERER J.

BETWEEN:

JAMES DURLING, JAN ANTHONY THOMAS, JOHN SANTORO, GIUSEPPINA SANTORO, ANNA MANCO, FRANCESCO MANCO and CESARE MANCO

Plaintiffs

– 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

JUDGMENT

LEDERER J.