CITATION: Durling v. Sunrise Propane Energy Group Inc., 2012 ONSC 6570
COURT FILE NO.: CV-08-363271-00CP
DATE: 20121120

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	
JAMES DURLING, JAN ANTHONY THOMAS, JOHN SANTORO, GIUSEPPINA SANTORO, ANNA MANCO, FRANCESCO MANCO AND CESARE MANCO Plaintiffs	*Harvey Strosberg, Q.C., Harvin Pitch, Theodore P. Charney* and *Ryan Lake* for the 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. and TESKEY CONCRETE CO. LTD., THE TECHNICAL STANDARDS AND SAFETY AUTHORITY, FELIPE DE LEON, ONTARIO HOSE SPECIALTIES LIMITED, PERAFLEX HOSE INC., PERAFLEX HOSE INDUSTRIES INC., BLACKMER OPERATING AS A DIVISION OF DOVER ENERGY INC., WELDEX COMPANY LIMITED, KEDDCO MFG. LTD., ROBERT PARSONS EQUIPMENT TRADING INC. and PRO-PAR (1978) INC. Defendants	*Robert J. Potts* and *Mirilyn R. Sharp*, for the defendants Sunrise Propane Energy Group Inc., 1367229 Ontario Inc., 1186728 Ontario Limited, Valery Belahov, Shay (Sean) Ben-Moshe, Leonid Belahov, and Arie Belahov *John* A. *Campion* and *Antonio Di Domenico*, for the Defendants, 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd. *Lisa La Horey*, for the defendant Technical Standards and Safety Authority *Paul Belanger*, for the defendants Felipe De Leon and 1369630 Ontario Inc. *David Visschedyk* and *Stuart Ghan*, for the defendants Peraflex Hose Inc., Peraflex Hose Industries Inc. *Linda Phillips-Smith* and *Kathleen Urdahl*, for the defendant Blackmer operating as a

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) division of Dover Energy Inc.
)
) *Anne Thompson,* for the defendants,
) Robert Parsons Equipment Trading Inc., and
) Pro-Par (1978) Inc.
)
) *Jasdeep Singh Bal*, for defendant Keddco
) Mfg. Ltd.
)
) **HEARD:** October 1, 4 and 5, 2012

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C. HORKINS J.

INTRODUCTION

[1] The certification motion in this proceeding was heard in May 2012. In reasons released on July 23, 2012 (*Durling v. Sunrise Propane Energy Group Inc.*, 2012 ONSC 4196, [2012] O.J. No. 3408), I certified the action against all of the defendants except the defendants 2094528 Ontario Inc., Teskey Construction Co. Ltd., Teskey Concrete Co. Ltd. and HGT Holdings ("Teskey defendants").

[2] The pleading against the Teskey defendants was struck with leave granted to the plaintiffs to amend the statement of claim. In summary, I concluded that the plaintiffs had failed to satisfy the s. 5(1)(a) criterion because the "very foundation of the causes of action against the Teskey defendants was certain to fail". The certification motion against the Teskey defendants was adjourned.

[3] The plaintiffs bring this motion seeking an order amending the statement of claim and certifying the action against the Teskey defendants. The amendments are set out in a claim titled "Further Fresh Statement of Claim" (I will refer to this pleading as the "proposed statement of claim").

[4] The proposed statement of claim seeks to correct the pleading deficiencies that I identified in my July reasons. The causes of action are no longer advanced against the Teskey defendants as a group. The plaintiffs no longer seek to pierce the corporate veil of these corporate defendants. The one economic unit and alter ego theories have been abandoned. The plaintiffs continue to allege various agency relationships between the Teskey defendants. The cause of action based on trespass has been withdrawn.

[5] The proposed statement of claim also seeks to correct other deficiencies by pleading the essential elements of the alleged agency relationships, including material facts that were missing, and explaining the role of each Teskey defendant at various points in time.

[6] Three causes of action remain: negligence, nuisance and strict liability. Each cause of action is pled against each Teskey defendant individually.

[7] The sole issue for the continuation of this certification motion is whether the proposed statement of claim satisfies the s. 5(1)(a) criterion as against the Teskey defendants. The Teskey defendants say it is plain and obvious that the causes of action against each of them will fail.

[8] For the reasons that follow, the common law negligence cause of action against the Teskey defendants satisfies the s. 5(1)(a) criterion. All other causes of action fail to meet the criterion. On this limited basis, the proceeding is certified against the Teskey defendants.

REVIEW OF THE PROPOSED STATEMENT OF CLAIM

[9] I start with a review of the relevant parts of the proposed statement of claim (paragraph references refer to the proposed statement of claim). This will involve some repetition of what is set out in my July reasons. This review is important because it sets the stage for considering the causes of action against the Teskey defendants.

The Sunrise Defendants

[10] The substance of the allegations against the Sunrise defendants has not changed in the proposed statement of claim. From 2004 until the explosions occurred, the Sunrise defendants operated a business receiving, storing and distributing propane and other industrial gases out of a facility located at 48 and 54/62 Murray Road (the "Sunrise propane facility") (para. 38). The Sunrise defendants did not own this property. It was leased.

[11] The Sunrise propane facility is located on two relevant parcels of land: 48 Murray Road and 54/62 Murray Road (54 and 62 refer to the same piece of land and will be referred to in these reasons as "54 Murray Road"). The north side of 48 Murray Road is adjacent to the south side of 54 Murray Road. The Sunrise propane facility was located primarily on 54 Murray Road. A small part of the Sunrise propane facility occupied the north east corner of 48 Murray Road.

[12] The Sunrise propane facility is located in a "well-established residential community and is open 24 hours a day for the supply of propane." Propane is a gas used as fuel for a variety of purposes, including heating, cooking and as a fuel for certain vehicles. The Sunrise defendants supplied bulk propane as well as propane for home use (para. 38).

[13] Paras. 40-41 allege as follows ("Property" in this excerpt means 48 and 54 Murray Road):

> From approximately 2004 and ongoing the Sunrise Companies have had control of the Property where the Facility is located by virtue of their lease of the Property and operation of a business on the Property.

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> Propane is a highly inflammable material and appropriate precautions should be taken when operating a Facility that stores and distributes propane. The Sunrise Companies permitted certain unsafe practices at the Facility. Specifically, the transfer of propane from one truck to another was a frequent and routine practice at the Facility.

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Ownership of 48 and 54 Murray Road

[14] The basic facts regarding the purchase and sale of 54 and 48 Murray Road remain the same. Teskey Construction bought 54 Murray Road on March 1, 1996 and on the same day Teskey Concrete bought 48 Murray Road (paras. 133-34). On December 28, 2007, Teskey Construction sold 54 Murray Road to Teskey 209. On the day of the explosions, Teskey 209 still owned this property (paras. 163-64). On July 30, 2007, Teskey Concrete sold 48 Murray Road to HGT. On the day of the explosions HGT still owned this property (para. 188).

[15] From September 1, 2004 onwards, Teskey Concrete and Teskey Construction were managed and wholly owned by Mark Teskey and Roy Teskey (para. 135).

Role of Teskey Construction and Teskey Concrete before sale to Teskey 209 and HGT

[16] On September 1, 2004, Teskey Construction, as landlord, agreed to lease all of 54 Murray Road and part of 48 Murray Road to one of the Sunrise defendants, 1367229 Ontario Inc. ("Sunrise") (para. 136). The lease is dated September 1, 2004. It is between Teskey Construction as landlord and 1367229 Ontario Inc. as tenant ("Sunrise lease").

[17] As explained in para. 55 of my July reasons, the three leases dealing with 54 and 48 Murray Road that are referred to in the pleading are incorporated by reference.

[18] The Sunrise lease is the only lease between a Teskey defendant and a Sunrise defendant. The term of the Sunrise lease runs from September 1, 2004 to December 31, 2014. The lease describes the "Leased Premises" as 54 Murray Road and part of 48 Murray Road (paras. 136-37).

[19] Pursuant to Article 3.01 of the Sunrise lease, Teskey Construction agreed that the tenant would be permitted to use the Leased Premises as a propane facility and to distribute industrial gases and propane from the Leased Premises (para. 138).

[20] Teskey Construction did not own 48 Murray Road when this lease was signed. How does it lease a property that it does not own?

[21] It is alleged that pursuant to Article 13.01 of the Sunrise lease, Teskey Concrete is named as a landlord together with Teskey Construction. Article 13.01 provides that the term "landlord" means the owners of the Leased Premises. When the Sunrise lease was entered into, Teskey Concrete owned part of the Leased Premises, namely, 48 Murray Road. Therefore, Teskey Concrete is a landlord according to the terms of the Sunrise lease (para. 139).

[22] Two alternative allegations are made to support the pleading that Teskey Concrete was also a landlord under the Sunrise lease. First, in paras. 140-46, the plaintiffs allege that when the Sunrise lease was signed, Sunrise, Teskey Concrete and Teskey Construction "intended and reasonably expected that Teskey Concrete would be named as a landlord together with Teskey Construction". Facts are alleged to support this allegation:

- the wording of Article 13.01 provided that Teskey Concrete was to be a landlord;
- Teskey Concrete owned 48 Murray Road;
- the Sunrise lease was negotiated with Mark and Roy Teskey on behalf of both Teskey companies;
- if Sunrise had to provide notice under the lease, it was to be given to Teskey Concrete;
- Teskey Concrete permitted Sunrise to occupy part of 48 Murray Road;
- Teskey Construction and Teskey Concrete bought liability insurance for the leased property that named Teskey Concrete and Teskey Construction as landlords and identified Sunrise as operating a propane facility; and
- in its yearly financial statements, Teskey Concrete recorded a portion of the income from the Lease.

[23] It is also alleged that due to "inadvertence, oversight or mistake", Sunrise, Teskey Concrete and Teskey Construction failed to formally name Teskey Concrete as a landlord on page 1 of the Sunrise lease. Despite this fact, Sunrise, Teskey Construction and Teskey Concrete treated Teskey Concrete as if it was named as a landlord under this lease with all the rights and obligations of a landlord. Lastly, Teskey Concrete "considered itself to be a landlord with all rights and obligations" under the Sunrise lease (paras. 141-43).

[24] In support of this first alternative theory the plaintiffs rely on s. 1 of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 that defines "landlord" as including an owner, or the person giving or permitting the occupation of the premises in question. Teskey Concrete was an owner of part of the demised premises and permitted its occupation by Sunrise. Therefore it is alleged that Teskey Concrete was a landlord under s. 1 of the *Commercial Tenancies Act*.

[25] The second alternative theory relies on agency. The plaintiffs allege that Teskey Construction was acting as Teskey Concrete's agent when it entered into the Sunrise lease that included part of 48 Murray Road. Material facts are provided to support this alternative theory (paras. 147-61). The agency pleading is an alternative argument in the event that Article 13.01 of the lease, the reasonable expectations of the parties and s. 1 of the *Commercial Tenancies Act* do not apply.

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Role of Teskey Construction and Teskey Concrete after sale to Teskey 209 and HGT

1. 54 Murray Road

[26] On December 28, 2007, during the term of the Sunrise lease, Teskey Construction sold 54 Murray Road to Teskey 209. As a result, Teskey 209 was the owner of 54 Murray Road when the explosions occurred.

[27] Teskey 209 was incorporated as part of an overall corporate reorganization to hold title to 54 Murray Road and the adjacent property at 20 Murray Road. Teskey 209 is wholly owned by Gertrude Teskey, the mother of Mark Teskey and Roy Teskey. Mark Teskey and Roy Teskey are the sole officers and directors of Teskey 209. They always managed the business of Teskey Teskey 209 (para. 162).

[28] The plaintiffs allege that when Teskey 209 bought 54 Murray Road, it succeeded Teskey Construction as landlord. Article 13.01 of the Sunrise lease provides that the term "landlord" means the owners of the demised premises. Between December 28, 2007 and August 10, 2008 when the explosions occurred, Teskey 209 owned 54 Murray Road, the demised premises, and therefore was a landlord for all purposes under this lease (para. 165).

[29] Alternatively, the plaintiffs rely on ss. 7 and 8 of the *Commercial Tenancies Act*. These sections provide that a purchaser who purchases a property with notice of a lease, such as Teskey 209, is charged with all of the obligations under the lease. Therefore, when the explosions occurred on August 8, 2008, Teskey 209 was the landlord of 54 Murray Road under the Sunrise lease (para. 166).

[30] It is also alleged that after 54 Murray Road was sold to Teskey 209, Teskey Construction acted as Teskey 209's agent for all matters under the Sunrise lease. Teskey Construction was authorized expressly or by implication "to exercise all powers possessed by it with respect to the administration and/or the leasing of 54 Murray Road to the Tenant, including the performance of all rights and obligations granted to the landlord under the Lease and all relations with the Tenant and the Sunrise Companies" (para. 167-75). Material facts are pleaded in support of the agency pleading.

[31] An alternative pleading is made that relies on the December 2007 lease (also referred to as a leaseback) that is dealt with in my July reasons. The proposed statement of claim states that on the day that Teskey Construction sold 54 Murray Road to Teskey 209, this property was leased back to Teskey Construction.

[32] Article 3(1) of the December 2007 lease stated that the term would commence on December 28, 2008. This was a typographical error. In fact, the term commenced on December 28, 2007, the same date that Teskey Construction transferred ownership of 54 Murray Road to Teskey 209. Under the provisions of the December 2007 lease, the rent was due and payable on January 1, 2008 (Article 2(2)) and the term of the Teskey Construction Lease was to run nine years and four days and was to expire December 31, 2016 (Article 3(1)) (paras. 177-78).

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[33] The purpose of the December 2007 lease was to enable Teskey Construction, formerly the landlord of the premises, to become a sub-landlord and to provide that 1367229 Ontario Inc., one of the Sunrise Companies, would become a sub-tenant of Teskey Construction (para.179).

[34] In summary, as a result of the sale of 54 Murray Road and the leaseback, it is pleaded that:

(a) Teskey 209 was the owner and landlord;

(b) Teskey Construction was the sub-landlord; and

(c) 1367229 Ontario Inc., the Tenant, was the sub-tenant to Teskey Construction (para. 180).

[35] It is also alleged that because of the sub-landlord and sub-lease arrangement, Teskey Construction remained the landlord under the Sunrise lease (para. 182).

[36] As the sub-landlord, Teskey Construction had the capacity to enforce all of Teskey 209's rights under the Sunrise lease and perform all of the landlord's covenants and obligations under this lease. As well, Sunrise as the tenant owed all of its responsibilities under this lease to Teskey Construction as the sub-landlord (para. 183).

[37] Alternatively, it is alleged that the December 2007 lease is of no force and effect because 54 Murray Road was already leased to the Sunrise company under the Sunrise lease (para. 185).

2. 48 Murray Road

[38] HGT was incorporated as part of an overall corporate reorganization to hold title to 48 Murray Road. HGT is wholly owned by Gertrude Teskey, the mother of Mark Teskey and Roy Teskey. Mark Teskey and Roy Teskey are the sole officers and directors of HGT. They always managed the business of HGT (paras. 187-88).

[39] On July 30, 2007, Teskey Concrete sold 48 Murray Road to HGT and HGT continued to own 48 Murray Road when the explosions occurred. The plaintiffs rely on Article 13 of the Sunrise lease and ss. 7 and 8 of the *Commercial Tenancies Act* to support the allegation that HGT succeeded Teskey Concrete as landlord of 48 Murray Road under the Sunrise lease (para. 189-90).

[40] Article 13 of the lease provides that "landlord" means the owners of the demised premises. Between December 28, 2007 and August 10, 2008 when the explosion occurred, HGT owned 48 Murray Road, part of the demised premises, and was a landlord for all purposes under the Sunrise lease (para. 189).

[41] Alternatively, pursuant to s. 7 and s. 8 of the *Commercial Tenancies Act*, HGT assumed the role of landlord under the Sunrise lease when it bought 48 Murray Road. These sections

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provide that a purchaser who buys a property with notice of a lease, such as HGT, is charged with all of the obligations under the lease. Therefore, HGT became the landlord of 48 Murray Road under the Sunrise lease (para. 190).

[42] The second alternative theory relies on agency. The plaintiffs allege that after HGT bought 48 Murray Road, Teskey Construction was authorized, expressly or by implication, to exercise all powers possessed by HGT with respect to the administration and/or leasing of 48 Murray Road to the tenant, including the performance of all rights and obligations granted to the landlord under the Sunrise lease and all relations with the tenant (para. 191-99).

[43] The proposed statement of claim also deals with the January 1, 2007 lease (also referred to as a leaseback) that is considered in my July reasons at paras. 96-99. HGT, as landlord, leased 48 Murray Road to Teskey Concrete. However HGT did not take title to 48 Murray Road until July 30, 2007. As a result, the proposed statement of claim pleads that Teskey Concrete authorized HGT to enter into the January 2007 lease or the term of this lease in fact did not start until July 30, 2007 (paras. 201-02).

[44] Under the Sunrise lease, Teskey Concrete provided Sunrise with quiet enjoyment of the premises which included 48 Murray Road (para. 203).

[45] The purpose of the January 2007 lease was to enable Teskey Concrete, formerly the landlord of the premises, to become a sub-landlord and to provide that 1367229 Ontario Inc. (tenant under the Sunrise lease) would become a sub-tenant of Teskey Concrete (para. 204).

[46] In summary, as a result of the sale of 48 Murray Road and the January 2007 leaseback, it is pleaded that:

(a) HGT was the owner and landlord;

(b) Teskey Concrete was the sub-landlord; and

(c) 1367229 Ontario Inc., the tenant, was the sub-tenant to Teskey Concrete (para. 205).

[47] It is also alleged that because of the sub-landlord and sub-lease arrangement, Teskey Concrete remained a landlord under the Sunrise lease (para. 207). As a result, Teskey Concrete had the capacity to enforce all of the rights of HGT as landlord under the Sunrise lease and perform all of the landlord's (HGT's) covenants and obligations under this lease. As well, 1367229 Ontario Inc., the tenant, owed all of its responsibilities under the Sunrise lease to Teskey Concrete as sub-landlord (para. 208).

Events Leading to the Explosions

[48] The events leading up to the explosions are set out in paras. 43-56 and summarized as follows.

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[49] When the explosions occurred on August 10, 2008, Mr. De Leon was in the process of a truck-to-truck transfer of propane from Unit 861 to Unit 1. The Technical Standards and Safety Authority ("TSSA") prohibited such transfers in an order dated October 27, 2006. On November 9, 2006, an inspector from the TSSA conducted a spot inspection of the Sunrise propane facility and determined that the Sunrise defendants had been carrying out truck-to-truck propane transfers. The inspector issued a cease and desist order pursuant to s. 21 of the *Technical Standards and Safety Act, 2000*, S.O. 2000, c. 16 ("*TSSA Act*") that was served on Shay (Sean) Ben-Moshe. The cease and desist order required compliance by November 30, 2006. The Sunrise defendants continued to routinely allow the unsafe practice of truck-to-truck propane transfers and this caused an immediate threat to public safety.

[50] TSSA employees, including inspectors, investigators, deputy directors and directors were aware that the Sunrise defendants were contravening a safety order. Pursuant to ss. 15 and 16 of the *TSSA Act*, the TSSA had the authority to enforce the safety order by suspending the facility's authorization to operate a propane plant or by obtaining an order directing compliance from a judge of the Ontario Superior Court of Justice.

[51] In order to comply with the TSSA order issued on November 9, 2006, it was necessary for the Sunrise defendants to install a 30,000 USGW stationary propane tank for the storage of gas. The installation was approved by the TSSA, but not completed before the explosions. At a meeting held at the Sunrise propane facility in November 2006, Don Hayworth, a TSSA inspector, informed the Sunrise defendants that the 30,000 USGW stationary propane tank would be required to replace truck-to-truck transfers.

[52] From November 2006 until the time of the explosions, a TSSA inspector inspected operations at the Sunrise propane facility approximately every two to three months. During these inspections, the inspector observed illegal truck-to-truck transfers and that the Sunrise defendants were making use of two stationary 2,000 USGW tanks for the storage and transfer of gas. At no time did the inspector issue a further cease and desist order or initiate any steps to enforce the November 9, 2006 cease and desist order. At no time did the inspector require the Sunrise defendants to implement additional precautions to safeguard against the dangers presented by truck-to-truck propane transfers.

[53] By letter dated July 9, 2007, a TSSA inspector and a fuel safety engineer with the TSSA were informed of the Sunrise defendants' intention to install a 30,000 USWG propane tank on a skid frame to replace the two existing 2,000 USWG tanks currently in operation. This was in response to the TSSA Director's public safety order. The letter informed the TSSA that truck-to-truck transfers would continue until the 30,000 USWG propane tank could be installed and placed into operation. The TSSA took no steps to enforce the safety order despite being placed on notice of the Sunrise defendants' intention to breach the order.

[54] It is alleged that a further unsafe practice routinely occurred at the Sunrise propane facility: the lighting and smoking of cigarettes in close proximity to propane and other inflammable substances by employees of the Sunrise defendants and other people accessing the

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Sunrise propane facility with their permission. The Sunrise defendants and their officers and directors failed to take reasonable precautions to prevent lighting and smoking of cigarettes in close proximity to inflammable substances at the Sunrise propane facility. Further, it is alleged that 1452049 Ontario Inc. failed to ensure that the drivers of the trucks which they owned did not smoke while on the property.

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[55] A regulation to the *TSSA Act* requires that the operator of a propane filling facility apply for and receive permission from the Director before expanding or making changes to the operation of the facility. The Sunrise propane facility fell within the definition of "propane filling facility." The officers and directors of the Sunrise defendants directed changes to the Sunrise propane facility without applying for or receiving permission from the Director. Specifically, two existing 2,000 USGW tanks were moved to make room for the 30,000 USWG tank installation. The two 2,000 USGW tanks were moved and then placed back into service without obtaining a permit from the TSSA. The reinstallation required reinstalling pipes, electrical wiring, recalibrating pressure valves, as well as draining the tanks of propane before the move. The 2,000 USGW tanks exploded on August 10, 2008, as did a tanker which was being used to transfer propane to a truck at the site.

[56] TSSA employees, including inspectors, investigators, deputy directors and directors were aware that the 2,000 USGW tanks had been moved without securing the appropriate permit and without the TSSA conducting the appropriate investigation to determine whether the new location for the tanks would be safe and in accordance with the Act and its regulations, while unlawful truck-to-truck transfers continued to occur.

The Explosions and Fire

[57] Paras. 34-37 describe the explosions and fire that occurred on August 10, 2008 as follows:

> On or about August 10th, 2008, at approximately 4:00 a.m. a series of explosions occurred at the Facility and emanated from the Property caused by the release of propane into the atmosphere and resulting in a fire at the Facility. Several massive fireballs were released into the air from the Property and Facility, visible to many of the Class Members.
>
> The series of explosions could be heard and felt by the plaintiffs and other Class Members. From the perspective of area residents, the noise, vibrations and fireballs made it appear as though some kind of bomb had gone off or explosion had taken place.
>
> The explosions and fire caused damage to the surrounding properties, shattering windows and doors and setting buildings on fire. Noxious fumes, smoke, gas and other chemicals and contaminants, including asbestos were released from the facility as a result of the explosion and fire. Waste and debris from the explosion

> landed on the properties of the plaintiffs and Class Members and the residue of fumes, gas and other chemicals have contaminated the properties of the plaintiffs and other class members. At the time of pleading, the properties remain contaminated.
>
> As a result of the explosions and fire, the Toronto Police ordered a non-compulsory evacuation of everyone within 1.6 km of the Facility, encompassing the area bounded by Keele Street, Highway 401, Sheppard Avenue and Dufferin Street.

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THE LEGAL FRAMEWORK – SECTION 5(1)(A)

[58] The first criterion for certification is the disclosure of a cause of action. In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), the Ontario Court of Appeal affirmed that the "plain and obvious" test from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 ("*Hunt*") that is used for Rule 21 motions is also used to determine whether a proposed class proceeding discloses a cause of action. Unlike Rule 21, the burden rests on the plaintiff under s. 5(1)(a).

[59] As directed in *Hunt*, a claim should not be struck unless it has a radical defect and is certain to fail or it is plain and obvious that the claim discloses no reasonable cause of action. This determination is to be made without evidence and claims that are novel or unsettled in the jurisprudence should be allowed to proceed.

[60] All allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and assumed to be true.

[61] The pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: see *Hunt* at p. 980; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at p. 679.

[62] I will now consider each cause of action and decide if the plaintiffs have satisfied the s. 5(1)(a) criterion.

OVERVIEW OF THE ANALYSIS

[63] As explained below, it is plain and obvious that nuisance and strict liability will fail and should be struck. This leaves the negligence cause of action. It is plain and obvious that a cause of action under the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 will fail. It is not plain and obvious that the common law negligence cause of action will fail.

[64] However, this is not the end of the s. 5(1)(a) analysis. The Teskey defendants argue that if a cause of action survives against Teskey Construction, it cannot survive against Teskey Concrete, Teskey 209 or HGT. They argue that Teskey Construction is the sole landlord and the only landlord granting quiet enjoyment and exclusive possession of 54 and 48 Murray Road to

Sunrise under the Sunrise lease. Therefore these defendants say that only Teskey Construction, through the Sunrise lease, had "a relevant landlord and tenant relationship that would give rise to any possible legal connection to the explosion caused by [Sunrise]."

[65] I have already reviewed the proposed statement of claim and how this pleading sets out the basis for a cause of action against Teskey Concrete, Teskey 209 and HGT. Since these defendants are not named on the Sunrise lease, the plaintiffs rely on various arguments in the pleading to support the causes of action against them: the wording of the Sunrise lease; the reasonable expectations of the parties; inadvertence, oversight and mistake; the *Commercial Tenancies Act*; and agency. The Teskey defendants say it is plain and obvious that these arguments will fail because of the nemo dat rule, the *Statute of Frauds* R.S.O. 1990, c. S.19. and the sealed contract rule. I conclude that the common law negligence cause of action survives against all Teskey defendants, not only Teskey Construction. It is not plain and obvious that the negligence cause of action against Teskey Concrete, Teskey 209 and HGT will fail.

[66] My s. 5(1)(a) analysis is organized as follows. I will review each cause of action and explain why all but the common law negligence cause of action must be struck. Having determined that there is a cause of action in negligence, I will explain why it should not be limited to Teskey Construction.

STRICT LIABILITY

The Legal Framework

[67] Recently in *Smith v. Inco Ltd.*, 2011 ONCA 628, 107 O.R. (3d) 321 at para. 68 ("*Smith v. Inco")*, the Ontario Court of Appeal affirmed that "the rule in *Rylands v. Fletcher* imposes strict liability for damages caused to a plaintiff's property (and probably, in Canada, for personal damages) by the escape from the defendant's property of a substance 'likely to cause mischief'."

[68] *Smith v. Inco* clarified the nature and scope of strict liability law in this province. The court rejected a broader approach to strict liability that is "based exclusively on the "extra hazardous" nature of the defendant's conduct" (*Smith v. Inco* at para. 78). Strict liability under *Rylands v. Fletcher* is more limited. Strict liability is imposed "for things that go wrong and produce unintended consequences that damage the property (or perhaps the person) of another." (*Smith v. Inco*. at para. 84). It "aims not at all risks associated with carrying out an activity, but rather with the risk associated with the accidental and unintended consequences of engaging in an activity." (*Smith v. Inco* at para. 82).

[69] *Smith v. Inco* at para. 71 sets out the four prerequisites to the operation of the strict liability rule:

- the defendant made a "non-natural" or "special" use of his land;
- the defendant brought on to his land something that was likely to do mischief if it escaped;

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- the substance in question in fact escaped; and
- damage was caused to the plaintiff's property as a result of the escape.

[70] Following this legal framework, I will now examine the proposed statement of claim.

The Proposed Statement of Claim

[71] Strict liability is only alleged against the Sunrise defendants (paras. 84-86) and the Teskey defendants (paras. 212-34). The proposed statement of claim alleges that each Teskey defendant is strictly liable to the plaintiffs.

[72] The proposed statement of claim states that propane "like dynamite, is inherently dangerous quite apart from any carelessness in handling or working with it. Propane is so dangerous that special precautions have to be taken to prevent danger that is otherwise inevitable. Great care must be taken by the owners of the Property and their Tenant in storing and handling propane. Otherwise, damages will be caused to the neighbours." (para. 212).

[73] As explained below, the basis for the strict liability pleading against each Teskey defendant does not follow the clear direction in *Smith v. Inco*. The plaintiffs have failed to plead the four prerequisites necessary for a strict liability claim. As a result it is plain and obvious that the strict liability causes of action against all of the Teskey defendants will fail and are struck. The plaintiffs have not satisfied the s. 5(1)(a) criterion for this cause of action.

Teskey 209 and HGT

[74] The proposed statement of claim alleges strict liability against Teskey 209 and HGT in paras. 213-22. When the explosions occurred, Teskey 209 owned 54 Murray Road and HGT owned 48 Murray Road. The plaintiffs advance a primary basis for strict liability with two alternative theories.

[75] The primary allegation of the strict liability claim against Teskey 209 and HGT is simply stated in paras. 213 and 218. On the date of the explosions they owned 54 or 48 Murray Road and leased this property to Sunrise for a "highly dangerous purpose".

[76] It is plain and obvious that this primary allegation of strict liability will fail. It focuses on the characterization of the propane business and the ownership of the land. This pleading is contrary to the direction in *Smith v. Inco*: strict liability is not "based exclusively on the 'extra hazardous' nature of the defendant's conduct".

[77] Alternatively it is alleged that strict liability flows because Teskey 209 and HGT had the right to exercise control over the property that Sunrise leased and the Sunrise propane facility and each failed to exercise that control.

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[78] For example, the plaintiffs allege strict liability because Teskey 209 as owner and/or landlord "directly, or through its agent or representative Teskey Construction, had the right to exercise control" over the property that Sunrise leased and the Sunrise propane facility (para. 214). This control was provided through Articles 2.15, 2.17, 6.09 and 11.01 of the Sunrise lease. In particular, para. 214 alleges that Teskey 209 had the right to:

(a) exercise control over the Sunrise propane facility;

(b) monitor and/or inspect the tenant's operations;

(c) insist on compliance with all applicable statutes, laws, by-laws, regulations, ordinances and orders;

(d) insist that the tenant comply with industry standards; and

(e) insist that the tenant comply with the *Environmental Protection Act*, pertaining to the operation of a propane plant.

[79] Teskey 209, directly or through its agent Teskey Construction, is strictly liable because it "failed to exercise control" over the leased property and the Sunrise propane facility. In particular, para. 215 alleges that Teskey 209 failed to exercise control because it:

(a) did not exercise control over the operations at the Property and Facility;

(b) did not monitor and/or inspect the Tenant's operations;

(c) did not insist on compliance with all applicable statutes, laws, by-laws, regulations, ordinances and orders;

(d) did not insist that the Tenant comply with industry standards;

(e) did not insist that the Tenant comply with the *Environmental Protection Act*, pertaining to the operation of a propane plant;

(f) did not inquire of the TSSA about the Tenant's compliance of industry standards and/or compliance of the *Environmental Protection Act* and/or any stop work orders related to the Property and Facility;

(g) knew that an explosion would result in a discharge of contaminant such as propane gas and asbestos and would constitute a breach of s. 6(1) and s. 14(1) of the *Environmental Protection Act*; and

(h) could have prevented the explosion by monitoring and/or inspecting the Tenant's operations.

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[80] The same allegations are made against HGT. Either directly or through its agent or representative Teskey Construction, it had the right to exercise this control and failed to do so.

[81] A second alternative theory of strict liability is made against Teskey 209 and HGT. This theory is premised on the allegation that "when Teskey 209 became the owner of 54 Murray Road and thereafter, Teskey 209 knew that there was a possibility or probability of an explosion of propane and a discharge of pollutants from" the leased property and the Sunrise propane facility (para. 216). This possibility or probability of an explosion of propane and a discharge of pollutants was in the immediate or reasonable contemplation of the parties to the Sunrise lease because (para. 217):

> (a) the Tenant's intended use of the Property and Facility was highly dangerous, namely, to store propane and carry out a business of selling and transferring for the purpose known as a transfer station;
>
> (b) Article 3.01 of the Lease contemplated a "business of distribution of industrial gasses and propane" from the Property and Facility;
>
> (c) Article 3.02(a) of the Lease contemplated expressly "a nuisance or menace to the landlord" and, inferentially, "a nuisance or menace" to the neighbours who are Class Members;
>
> (d) Article 2.17 of the Lease contemplated "Compliance with Fire and Other Regulations";
>
> (e) Articles 2.15 of the Lease contemplated an inspection by the landlord;
>
> (f) Article 6.09 of the Lease imposed upon the Tenant a warranty of compliance with the *Environmental Protection Act* and a warranty of not to "be deemed as a nuisance"; and
>
> (g) Articles 11.01 of the Lease granted to the landlord the right to remedy any default by the Tenant.

[82] The same alternative theory of strict liability is advanced against HGT in paras. 221-22.

[83] The strict liability pleading against Teskey 209 and HGT fails to allege all of the prerequisites that are necessary to support a strict liability claim. Two of the prerequisites are alleged: that a substance escaped from 54 and 48 Murray Road and that it caused damage to the plaintiffs.

[84] There is no allegation in the pleading that Teskey 209 or HGT made a non-natural or special use of their land or brought the escaping propane onto the land. The only use of the land that is mentioned in paras. 213-22 is the tenant's use of the land. These essential elements of a strict liability claim are only alleged against Sunrise. In paras. 38-40, the plaintiffs allege that

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Sunrise operated the propane business and brought the propane onto the land. In para. 84, it is alleged that Sunrise is strictly liable because the Sunrise propane business was a non-natural use of the land:

> The propane and other industrial gases distributed by the Sunrise Companies through the Facility are highly dangerous. Under the common law of Ontario, the storage and distribution of such large quantities of propane and other combustible and inflammable gases constitutes a non-natural use of the Property and the Facility. The Sunrise Companies are therefore strictly liable for damage caused by the escape of propane and other gases.

[85] It is plain and obvious that the strict liability cause of action against Teskey 209 and HGT will fail.

Teskey Construction

[86] The plaintiffs advance a primary basis for strict liability against Teskey Construction with two alternative theories (paras. 223-28).

[87] First the plaintiffs allege that Teskey Construction is strictly liable because it either represented the landlords "Teskey 209 and HGT with respect to the Lease, the Property and the Tenant's highly dangerous business" or was a sub-landlord and tenant at 54 Murray Road and assumed the role of landlord under the Sunrise lease (paras. 223-24).

[88] It is plain and obvious that this first allegation of strict liability will fail. It focuses on the characterization of the propane business and the ownership of the land. This pleading is contrary to the direction in *Smith v. Inco* that strict liability is not "based exclusively on the "extra hazardous" nature of the defendant's conduct". Further, the focus is on the "Tenant's highly dangerous business". Once again the pleading fails to plead the four prerequisites necessary to support a strict liability claim and for this reason the pleading in paras. 223-24 will fail.

[89] The same two alternative theories of strict liability advanced against Teskey 209 and HGT are alleged against Teskey Construction. It had the right to exercise control over the property that Sunrise leased and the Sunrise propane facility, and it failed to exercise that control. Alternatively, Teskey Construction knew there was a possibility or probability of an explosion of propane and a discharge of pollutants from the leased property and the Sunrise propane facility and such knowledge was in the immediate or reasonable contemplation of the parties to the Sunrise lease.

[90] These alternative pleadings fail for the same reasons expressed above when assessing the strict liability claim against Teskey 209 and HGT. There is no allegation in the pleading that Teskey Construction made a non-natural or special use of the land or brought the escaping propane onto the land. As already noted the plaintiffs allege that Sunrise brought the propane onto the land because, of course, it was Sunrise's business and Sunrise's non-natural use of the land.

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Teskey Concrete

[91] The plaintiffs advance a primary basis for strict liability against Teskey Concrete with two alternative theories (paras. 229-34). The strict liability claim is virtually identical to the claim against Teskey Construction and therefore suffers from the same fatal flaws.

[92] First the plaintiffs allege that Teskey Concrete "was a sub-landlord and a tenant at 48 Murray Road". Therefore, the tenant became "Teskey Concrete's sub-tenant and, in this capacity, Teskey Concrete assumed the role of landlord under and with respect to the Lease and the Tenant's highly dangerous business." (para. 229).

[93] The same two alternative theories of strict liability advanced against Teskey 209, HGT and Teskey Construction are advanced against Teskey Concrete. The plaintiffs allege that Teskey Concrete had the right to exercise control over the property that Sunrise leased and the Sunrise propane facility, and that it failed to exercise that control. Alternatively, Teskey Concrete knew there was a possibility or probability of an explosion of propane and a discharge of pollutants from the leased property and the Sunrise propane facility and such knowledge was in the immediate or reasonable contemplation of the parties to the Sunrise lease.

[94] For the reasons already expressed, the strict liability pleading against Teskey Concrete will fail.

NUISANCE

What is a Nuisance?

[95] As the Court of Appeal stated in *Smith v. Inco* at para. 41, "[s]cholars and judges agree that the uncertain origins and the protean nature of the tort of private nuisance make it difficult to provide an exhaustive definition of the tort". In G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto: Thomson Reuters Canada, 2010) at p. 147, the author acknowledges that "[n]uisance is a vague doctrine, very difficult to define accurately."

[96] Despite this challenge, the Supreme Court of Canada provided the following working definition of nuisance in *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906 at para. 10, and this was adopted in *Smith v. Inco* at para. 42:

> 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 of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.

[97] From this definition the essential elements of a nuisance cause of action are clear. As Fridman explained in his text at page 149, to succeed in a private nuisance action the plaintiff

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must prove "either (1) some significant interference with the beneficial use of his premises, or (2) some injury…to those premises or the property located thereon."

How is the Nuisance Described in the Pleading?

[98] The proposed statement of claim alleges that the Sunrise and Teskey defendants are liable for the nuisance that occurred.

[99] The proposed statement of claim first describes the nuisance in paras. 87-90, where nuisance is alleged against the Sunrise defendants (not the Teskey defendants). Paragraph 87 states as follows:

> The *escape of propane* and the explosions and fire from the Property and the Facility *substantially and unreasonably interfered with the plaintiffs' and class members' use and enjoyment of their lands and properties*. Alternatively, the escape of contaminants and subsequent contamination of the plaintiffs' and other class members' properties substantially and unreasonably interfered with the plaintiffs' and class members' use and enjoyment of their lands and properties. The Sunrise Companies are therefore liable to the plaintiffs and other class members in nuisance. They are strictly liable for the nuisance. [Emphasis added.]

[100] It is also alleged in para. 89 that the "escape of propane and other contaminants and the explosions and fire constitute a public nuisance causing harm to the environment under the *Environmental Bill of Rights*, S.O. 1993, C. 28."

[101] It is alleged that the Sunrise defendants are liable in nuisance because they operated the land and facility from which the nuisance emanated and they managed and controlled the Sunrise propane facility (para. 88). In essence this is a nuisance that the Sunrise defendants created.

[102] The nuisance cause of action against the Sunrise defendants correctly focuses on the escape of propane and contaminants from the Murray Road properties that substantially and unreasonably interfered with the plaintiffs' use and enjoyment of their lands and properties. This description of a nuisance is consistent with the law set out above.

[103] The nuisance cause of action against the Teskey defendants is set out in paras. 235-74 of the proposed statement of claim. Here the plaintiffs describe the nuisance differently and in a way that does not conform to the legal definition of a nuisance.

[104] Paragraph 241 states that the "dangerous propane condition" was a nuisance. Para. 240 defines this dangerous propane condition as "unlawful truck to truck transfers of propane and other unlawful and unsafe practices". These unlawful practices are described in paras. 44-53 of the proposed statement of claim (tank-to-tank transfers contrary to the TSSA order, smoking at the Sunrise propane facility and moving propane tanks without a permit from the TSSA).

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The Nuisance Cause of Action against the Teskey Defendants Will Fail

[105] The premise of the nuisance pleading against the Teskey defendants can be summarized as follows:

- A nuisance was occurring (the dangerous propane condition).
- The Teskey defendants knew that the dangerous propane condition constituted a nuisance.
- They knew that it would probably or possibly result in an escape of gases and contaminants from the property.
- As owners, landlords, sub-landlords or agents for the owners and/or tenants (of 54 or 48 Murray Road), they had powers and obligations under the Sunrise lease to stop the dangerous propane condition.
- They failed to intervene and are therefore liable in nuisance.

[106] The pleading is flawed and cannot succeed. The dangerous propane condition per se is not a nuisance. As the Supreme Court of Canada stated in *St. Pierre*, a nuisance is the act of "indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable". According to the pleading, the dangerous propane condition (truck-to-truck transfers) was an activity that led to an unreasonable and substantial interference with the neighbours' land. Without interference there can be no nuisance. This is an essential element of the nuisance cause of action. The interference in this case did not happen until the explosions occurred. Only then did the propane and contaminants escape and unreasonably interfere with the neighbours' enjoyment of their land. Only then did a nuisance exist.

[107] Significant interference with the plaintiffs land is an essential element of this cause of action. It is clear from the proposed statement of claim, read as a whole, that there was no interference with the plaintiffs' lands until the explosions occurred and the propane and contaminants escaped onto the neighboring property. It is plain and obvious that this pleading will fail. Therefore the nuisance cause of action as pleaded must be struck.

[108] I appreciate that the pleading must be read generously to allow for inadequacies due to drafting frailties. For this reason, I will consider whether a nuisance cause of action against any of the Teskey defendants can survive if the nuisance is as described in para. 87 (i.e. the escape of propane and contaminants from the Murray Road properties that substantially interfered with the neighbours' use of their land). This requires me to consider when an owner/landlord can be held liable for a nuisance created by its tenant.

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Is an Owner/Landlord liable for the Nuisance of the Tenant?

The Legal Framework

[109] The general rule on this specific legal issue is set out in Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Markham, Ont.: LexisNexis Canada, 2011) at p. 594 as follows:

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

[110] G.H.L. Fridman, in *The Law of Torts in Canada* at p. 172 also discusses this issue. The author explains that an owner may be liable for the nuisance a lessee or licensee creates, if the nuisance "arises from acts which it is contemplated the lessee or licensee will engage in when the agreement between the owner, or landlord, and the tenant or licensee, is made."

[111] There are two key decisions in Ontario that consider when an owner/landlord will be held liable for a tenant's nuisance: *Banfai v. Formula Fun Centre Inc.* (1984), 51 O.R. (2d) 361 (H.C.J.) ("*Banfai*") and *Aldridge v. Van Patter, Martin and Western Fair Association*, [1952] O.R. 595 (S.C.) ("*Aldridge*"). Both provide considerable guidance in determining if a nuisance cause of action against the Teskey defendants can survive the s. 5(1)(a) test, assuming the nuisance is properly described.

[112] In *Banfai* at p. 375, the court confirmed the general rule as follows:

> 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.

[113] A review of the facts in *Banfai* is helpful. The defendant Formula Fun Centre ("Formula") operated an automobile amusement racing ride directly across the street from the

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plaintiffs' motel. The plaintiffs commenced an action alleging that the noise created by the racing cars on the track was a nuisance.

[114] The court found that the worst noise was caused by the engines of one or two cars as they were revving and as they accelerated and pulled away from the starting line. This produced a noise similar to the noise from a chainsaw, trail bike or snowmobile. It was a high pitched noise not in keeping with other noises in the area. It was considerably louder than other surrounding noises and was pervasive, intrusive and annoying. The court found that the noise created by one or two cars was a nuisance. An injunction was issued against Formula. The court went on to consider if Ontario Hydro, as the owner and landlord of the property, could be found liable.

[115] Hydro owned the land where the amusement racing ride was built and operated. Before a lease was signed, Hydro knew that Formula was going to use the land to operate an automobile-racing amusement ride. It knew and approved the layout of the track that was being built and knew the size, power and make of the cars to be raced and the hours of operation. Hydro understood that two cars might be racing on the track at any one time.

[116] Before signing a lease, the *Environmental Assessment Act* required Hydro to classify the environmental acceptability of Formula's intended use of the land. Hydro was concerned that the track might cause noise that was unacceptable to the neighbours. Hydro "categorized the intended use as one which would have potential adverse impact of an "intermediate" degree on land use and environmental elements" (p. 373). Hydro needed the approval of the Ministry of the Environment before it could lease the land to Formula.

[117] Formula submitted a noise study report that the Ministry found to be inadequate. Nevertheless, the Ministry issued a conditional certificate allowing Formula to operate the track. The Ministry decided to allow the project to go ahead and wait until it was in operation to see if it was making a noise that was unacceptable to the neighbourhood.

[118] The court found that Hydro had full knowledge of Formula's intended use of the land. It also knew that the Ministry had decided to approve the project without a proper noise study and was prepared to wait until the project was in operation to determine if it was making too much noise. With this knowledge Hydro leased its land to Formula. In particular, the court found at p. 374 that "Hydro did nothing to prevent a use being made of its land that it had already decided would have a 'potentially significant noise impact' on neighbouring properties".

[119] As noted, the court found that one or two cars racing on the track at one time was a nuisance. The following excerpts at pp. 376-77 explain the basis for the court's decision to hold Hydro liable in nuisance:

> Hydro understood two cars might be racing on the track at any one time, and as I indicated earlier, Formula had frequently three and four cars on the track at once. Nevertheless, I am satisfied on the evidence that one or two cars racing on the track at one time are a nuisance. *Therefore, the nuisance resulted from Formula*

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> *operating the track, that is to say, using the land exactly as Hydro knew it intended to use it*. By entering into the lease, *Hydro authorized Formula to use the land in the manner that caused a nuisance*. It follows that the nuisance was "the natural and necessary result of what the landlord authorized the tenant to do". Hydro was aware and concerned long before the lease was entered into that the track might cause noise unacceptable to its neighbours and several clauses in the lease purported to deal with how excessive noise was to be dealt with. Therefore, "the nuisance was plainly contemplated by the lease" and the possibility of the track causing a noise nuisance "was in the immediate contemplation of the owner". Subsequent events have shown that there was not only "a very high degree of probability that a nuisance would result from the purpose for which the property was let" but there was "a certainty" that such would occur.
>
> ….
>
> *The "certainty" that a nuisance would be created existed before Hydro leased the property* and Hydro would have been aware of that "certainty" if it had insisted on the noise study that the contemplated project cried out for. Even without the noise study, and just on the information provided to Hydro by Ungaro, I am satisfied *Hydro must have been aware that there was "a very high degree of probability" that Formula's intended use of the property would create the nuisance* which it actually did. Hydro is then responsible for the nuisance.
>
> [Emphasis added.]

[120] In *Aldridge*, the owner of land with a grandstand and race track granted a licence to Mr. Martin to operate a stock car race on the track. Western Fair Association had operated the grandstand and race track for many years. Cars raced around the track at 60 mph. The track was not banked in any way and was surrounded by a "frail fence". Immediately adjacent to the fence was a city park and sidewalk.

[121] The written agreement between the Association and Mr. Martin granting the licence to use the track required Mr. Martin "[t]o provide adequate watchman service at all times." Mr. Martin intended to comply by providing the services of eight off duty police officers who would be placed around the track at strategic points. The purpose of having these officers "was to avoid injury to the many persons who attempted to view these stock-car races by standing against the outside edge of the fence, thereby obtaining an excellent view without having to pay admission to the grounds."

[122] On the day in question, one car had already struck the fence. Later, a second car left the track, crashed through the fence and struck and injured the plaintiffs who were standing outside the fair grounds. This was the very risk that the Association contemplated when it agreed to grant Mr. Martin a licence to use the race track.

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[123] Mr. Martin and the Association were found liable in nuisance. The court explained the basis for this finding at pp. 611-13:

> The evidence in the present case shows conclusively that the defendant the Western Fair Association, through its officers, particularly Jackson, the general manager, and Saunders, the grounds superintendent, and also the defendant Martin, *knew that there was grave and constant danger of competing drivers going through the fence into this public park* and in fact on that very afternoon one competitor already had struck and torn down the fence near which the accident occurred, although by chance the vehicle did not proceed beyond the fence.
>
> …
>
> I find as a fact and, indeed, no other finding is possible in view of [the lease], that the defendant Martin was licensed to conduct automobile racing in Queen's Park, and I further find as a fact that the *possibility of an automobile, during the course of a race, plunging though the fence at the north end was in the immediate contemplation of both defendants when the agreement was executed*.
>
> [Emphasis added.]

The Nuisance Cause of Action will Fail

[124] The plaintiffs allege that the "possibility or probability of an explosion of propane and a discharge of pollutants was in the immediate or reasonable contemplation of the parties to the [Sunrise lease]". Specific facts are pleaded to support this statement. This pleading repeats the words used in *Aldridge* where the court found that the nuisance (the risk of the car plunging through the fence) was in the "immediate contemplation" of the Association and Mr. Martin when they signed the licence agreement. The nuisance pleading cannot survive the s. 5(1)(a) test simply because the plaintiffs use words that appear in a case that defines when an owner/landlord will be held responsible for a nuisance.

[125] Following *Banfai* and *Aldridge*, for a nuisance claim to survive, the following must have been within the immediate contemplation of the parties to the lease: that Sunrise would allow unlawful truck-to-truck transfers of propane contrary to a TSSA order, 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. It is absurd to say that this was within the immediate contemplation of any of the Teskey defendants and yet they agreed to lease the Murray Road properties.

[126] The plaintiffs state that the "possibility or probability of an explosion of propane and a discharge of pollutants was in the immediate or reasonable contemplation of the parties to the [Sunrise lease]" and provide seven facts in support:

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(a) the Tenant's intended use of the Property and Facility was highly dangerous, namely, to store propane and carry out a business of selling and transferring for the purpose known as a transfer station;

(b) Article 3.01 of the Lease contemplated a "business of distribution of industrial gasses and propane" from the Property and Facility;

(c) Article 3.02(a) of the Lease contemplated expressly "a nuisance or menace to the landlord" and, inferentially, "a nuisance or menace" to the neighbours who are Class Members;

(d) Article 2.17 of the Lease contemplated "Compliance with Fire and Other Regulations";

(e) Articles 2.15 of the Lease contemplated an inspection by the landlord;

(f) Article 6.09 of the Lease imposed upon the Tenant a warranty of compliance with the *Environmental Protection Act* and a warranty of not to "be deemed as a nuisance"; and

(g) Articles 11.01 of the Lease granted to the landlord the right to remedy any default by the Tenant.

[127] None of these facts assist the plaintiffs as I will now explain.

[128] Subparagraphs (a) and (b) simply describe the propane business. The fact that storing selling and transferring propane is "highly dangerous" does not assist in explaining why the nuisance was in the "immediate or reasonable contemplation of the parties". It is not the propane business itself that is the nuisance. Furthermore, the parties expected that Sunrise would operate the propane business and *comply* with "Fire and Other Regulations" (Subparagraph (d)). There is no allegation that the parties contemplated that Sunrise would ignore the TSSA orders.

[129] Subparagraph (c) does not assist. It states that Article 3.02(a) of the Sunrise lease expressly contemplated "a nuisance". This is not what this section of the lease states. The lease states that "in the conduct of the Tenant's business" it will "not perform any acts or carry on any practices which may injure the Buildings or improvements forming the Buildings or be a nuisance or menace to the Landlord". In other words, the parties to the lease contemplated that Sunrise would *not* create a nuisance.

[130] Subparagraph (f) relies on Article 6.09 of the lease and the tenant's covenant not to carry on any business or permit anything to be done on the leased premises that "may be deemed as a nuisance". This does not support the allegation that the nuisance was in the immediate or reasonable contemplation of the parties. Like the facts pleaded in the other subparagraphs, this shows that the lease and therefore the parties contemplated that Sunrise would *not* create a nuisance.

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[131] Subparagraphs (e) and (g) address articles 2.15 and 11.01 of the lease. Article 2.15 gives the landlord the right to enter the leased premises to inspect the condition and where an inspection reveals that repairs are required, the landlord must give the tenant notice and time to repair. Article 11.01 gives the landlord the right to perform the tenant's obligations under the lease in the event of the tenant's default. These lease provisions are irrelevant to the question of whether the nuisance was in the "immediate or reasonable contemplation of the parties".

[132] Paras. 237-39 and 243-44 generally allege that the Teskey defendants had the right, obligation and duty to inspect, monitor and control the dangerous propane operations and prevent the escape of the contaminants from the leased property, that they failed to do so, and that if they had done so the "explosions would not have occurred". Such facts, if true, are not relevant to the nuisance cause of action. They do not address the requirement that the nuisance be in the immediate contemplation of the parties when the land is leased.

[133] 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).

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

[134] There is a reason why the proposed statement of claim does not make any of the above allegations that are essential to the survival this nuisance cause of action. Such allegations would be patently ridiculous and would be struck. The plaintiffs have not satisfied the s. 5(1)(a) criterion for the nuisance cause of action.

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THE NEGLIGENCE CAUSE OF ACTION

Occupiers' Liability Act

[135] The proposed statement of claim alleges that the Teskey defendants are liable in negligence. Plaintiffs' counsel confirmed during the hearing that they rely primarily on the *Occupiers' Liability Act* but if that Act does not apply, they rely on the common law to establish negligence.

[136] S. 3(1) of the *Occupiers' Liability Act* describes the duty that an occupier owes as follows:

> 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*. [Emphasis added.]

[137] S. 8(1) provides that a landlord owes the same duty of care as follows:

> 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.

[138] The *Occupiers' Liability Act* has no application to the facts as pleaded in the proposed statement of claim. An occupier owes a duty to "persons entering on the premises". The duty in the Act does not extend to those who are not on the premises. There is no allegation in the proposed statement of claim that the plaintiffs or anyone in the class entered the Murray Road premises. The pleading is crystal clear and it is obvious that the *Occupiers' Liability Act* is not engaged.

[139] There is virtually no case law that discusses whether the *Occupiers' Liability Act* imposes a duty of care on the owner for losses that occur off the owner's property. This reflects the fact that the wording of the Act is clear. *Axa Insurance (Canada) v. Brunetti*, [1998] O.J. No. 2009 at paras. 58-60 is one example of a decision that supports the clear and plain wording of the statute.

[140] The plaintiffs rely on *Oyagi v. Grossman*, [2007] O.J. No. 1087. This was a motion for summary judgment where the court refused to dismiss the action. The defendant argued that there was no genuine issue for trial. The defendant Geoff Grossman had a party at his parents' home while his parents were away. He did so against his parents' strict instructions. The party quickly grew out of control. The plaintiff was leaving the party and was out on the street in front of the Grossman home when she and others noticed a person running away from the home with a sack over his shoulder. They concluded that he was a thief running from the Grossman home. The thief got into a car while the plaintiff and a group of friends surrounded the car. The plaintiff was standing directly in front of the car as it accelerated into her. She was seriously injured. The plaintiff alleged that the Grossmans owed her a duty of care under the *Occupiers' Liability Act*. The defendants argued that it did not apply because the injury occurred off the Grossman property.

[141] 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.

[142] The plaintiffs also rely on cases where the owner of a tavern/bar is held liable when a patron leaves the bar and is injured in an accident. Once again these types of cases can be distinguished because the patron was on the property and so there is a factual basis that triggers the *Occupiers' Liability Act*.

[143] The plaintiffs argue that there is no justification for limiting the Act to persons on the occupier's property, that the Act is remedial and I should therefore read it generously to achieve a just and reasonable result. They rely on s. 64(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, that states as follows: "An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."

[144] The court should not embark on the interpretation of a statute when the wording of the statute is clear, as it is in this case. This is the direction of the Supreme Court of Canada in *R. v. McIntosh*, [1995] 1 S.C.R. 686 at para. 18:

> [W]here no ambiguity arises on the face of a statutory provision, then its 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).

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[145] Further in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 the court stated:

> Although much has been written about the interpretation of legislation…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.

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[146] There is no ambiguity in the *Occupiers' Liability Act*. The words are clear. The occupier only owes a duty to "persons entering on the premises". The duty does not extend to those who are not on the premises. As a result the negligence cause of action that depends on this Act will fail.

Common Law Negligence

[147] The next question is whether a common law negligence cause of action can survive the s. 5(1)(a) test. Ordinary negligence principles of law apply. The plaintiffs must allege that the Teskey defendants owed them a duty of care, that the duty was breached and that damage resulted from the breach. A negligent defendant will not be held liable unless it owed the injured person a duty of care.

[148] The Teskey defendants' position is summarized as follows. They say that on the facts as pleaded it is clear in law that no duty is owed. Only the tenant, as the party in physical possession of the premises, was engaged in activities that resulted in the injuries and losses. They recognize that a landlord may retain a degree of control over the property, or over the tenant's activities on the property. However, Teskey Construction, through the Sunrise lease, is the only Teskey defendant that had "a relevant landlord and tenant relationship that would give rise to any possible legal connection to the explosion caused by [Sunrise]." There is no landlord and tenant relationship between Sunrise and Teskey Concrete, Teskey 209 or HGT.

[149] The Teskey defendants say that "only where the landlord *exercises such control* is a duty of care owed", and only then can liability be imposed "if the landlord's acts or omissions demonstrate a lack of reasonable care." The fact that Teskey Construction and Sunrise had a landlord and tenant relationship is not enough for the cause of action to survive. If "control is exercised exclusively by the tenant, the landlord owes no duty and incurs no liability for loss-causing acts or omissions on the property". The Teskey defendants say that the proposed statement of claim does not plead this requisite degree of control. Instead they point out that the pleading repeatedly states that there was a right to control but that it was not exercised.

[150] I will review the negligence pleading against Teskey Construction and explain why it satisfies the s. 5(1)(a) criterion. I will then explain why the negligence pleadings against Teskey Concrete, Teskey 209 and HGT also satisfy this criterion.

Teskey Construction

[151] The plaintiffs have properly pleaded a cause of action in negligence against Teskey Construction. It is not plain and obvious that this cause of action will fail. The plaintiffs have satisfied the s. 5(1)(a) criterion. My reasons follow.

[152] The plaintiffs plead that Teskey Construction owed a duty of care to the plaintiffs because Sunrise "operated a dangerous propane business" on the leased property (para. 275).

[153] It is alleged in para. 276 that there was a sufficient degree of proximity between Teskey Construction and the plaintiffs to establish a duty of care because of the following:

(a) Teskey Construction was an owner and landlord and directly leased the Property and Facility to the Tenant for a highly dangerous propane business;

(b) the Class Members are neighbours to the Property and Facility;

(c) the Class Members are owners and occupiers who worked and resided in close proximity to the Property and Facility;

(d) Teskey Construction knew that a residential neighbourhood was in close proximity to the dangerous propane business;

(e) the circumstances of the Property and Facility used for a dangerous propane business, located in close proximity to a residential neighbourhood are such that 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 Lease;

(f) Teskey Construction knew that if any of the propane gases escaped from the Property and Facility, it could cause an explosion and fire and would likely result in some Class Members suffering property damage, some Class Members suffering personal injuries and some Class Members being evacuated;

(g) Teskey Construction *exercised control over the Tenant by virtue of the rights granted under the Lease*;

(h) the Class Members were vulnerable to any failure on the part of Teskey Construction to ensure the Tenant complied with the Lease; and

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(i) the Class Members had no way of ensuring that the safety measures required under the Lease were taken and no way of protecting themselves if insufficient measures were taken by Teskey Construction.

[Emphasis added.]

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[154] Teskey Construction breached the standard of care it owed to the plaintiffs and was negligent. In paras. 277(a)-(s), particulars of the negligence are listed. These particulars are summarized below.

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

[156] 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.

[157] 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."

Exercise of Control is not Required

[158] I do not accept the position of the Teskey defendants. They argue that the negligence cause of action will fail because it is premised on a pleading that the Teskey defendants failed to act. I reject the cases that they rely on for this principle (*O'Leary v. Smith*, [1925] M.J. No. 19 (C.A.); *Earl v. Reid*, [1911] O.J. No. 145 (C.A.); *Ward v. Caledon*, [1892] O.J. No. 18 (C.A.)). These decisions do not make it plain and obvious that the negligence cause of action will fail. The decisions did not involve facts where the landlord/owner exercised control by virtue of rights granted under a written lease. Further, more current cases do not support the Teskey defendants' argument. For example, in *Fenn v. City of Peterborough* (1979), 25 O.R. (2d) 399 (C.A.), the liability of Consumers Gas was premised on its failure to act.

[159] 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.

There is no Landlord Immunity

[160] The Teskey defendants also argue that at common law, a landlord is immune from the negligence of the tenant. The cases that the Teskey defendants rely on all predate the *Occupiers' Liability Act* and discuss the concept of landlord immunity for losses that arise *on* the leased premises (*Cavalier v. Pope*, [1906] A.C. 428; *MacDonald v. Town of Goderich*, [1949] O.R. 619 (C.A.); *Muma v. Moore* (1975), 1 O.R. (2d) 346 (H.C.)). These cases do not assist the Teskey defendants. They deal with losses that occur on the landlord's property and not off the property, as in this case. There is no authority that extends the landlord's immunity to damage that occurs off the property. Therefore, this is not a settled area of law and the common law negligence cause of action against Teskey Construction should not be struck on a s. 5(1)(a) motion.

The Other Teskey Defendants

[161] The pleading against the other Teskey defendants is the same with some variations to account for the following facts that are pleaded:

- When Teskey Construction signed the lease with Sunrise it did not own 48 Murray Road. Teskey Concrete owned 48 Murray Road.

- Teskey Construction sold 54 Murray Road to Teskey 209 in 2007 and Teskey 209 then leased the property back to Teskey Construction.

- Teskey Concrete sold 48 Murray Road to HGT in 2007 and HGT then leased the property back to Teskey Concrete.

[162] I begin by reviewing the negligence pleading against Teskey Concrete.

The Negligence Claim against Teskey Concrete

[163] The defendants rely on the legal maxim of nemo dat quod non habet ("nemo dat"), which means that you cannot give what you do not have. Teskey Construction did not own 48 Murray Road when the Sunrise lease was signed. Applying nemo dat, the defendants say that Teskey Construction could not grant a valid lease of 48 Murray Road. Therefore, to the extent that the Sunrise lease purports to lease this property, it is not valid. As a result, the Teskey defendants argue that there is no basis in law for alleging that Teskey Concrete was a landlord.

[164] The plaintiffs plead that Teskey Concrete was a landlord under the Sunrise lease. They rely on the following:

- the wording of the lease;

- the reasonable expectations of the parties (Sunrise, Teskey Construction and Teskey Concrete);

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- inadvertence, oversight and mistake;
- the *Commercial Tenancies Act*; and
- the law of agency.

[165] In argument, the plaintiffs also raised tenancy by estoppel. The plaintiffs argue that any one of these points is a viable argument against nemo dat and as a result, it is not plain and obvious that the negligence cause of action fails against Teskey Concrete. I agree and my reasons follow.

The Sunrise Lease

[166] There are several provisions in the lease that support the pleading that Teskey Concrete was a landlord. Teskey Concrete is named as a landlord in the Sunrise lease with Teskey Construction because Article 13.01 of this lease states that "[t]he term 'Landlord' as used in this lease…shall be limited to mean and include only the owner or owners at the time in question of the Leased Premises". The Article goes on to state that if a transfer of the premises occurs, the previous landlord is freed from liability for future breaches. As a whole, Article 13.01 is meant to limit liability to the current owner or owners of the premises, but the first clause of the Article nevertheless says that the term landlord includes the owner or owners of the property. At the very least it is arguable that this Article defines "landlord' to include Teskey Concrete. The term "Leased Premises" includes 54 Murray Road and part of 48 Murray Road. This is clear from the definition of Leased Premises and the Schedule attached to the lease. It is pleaded that Teskey Concrete owned 48 Murray Road when the lease was signed; this brings Teskey Concrete under the definition in Article 13.01.

[167] As well, Article 8.03 states that the "[l]andlord has…full power and absolute authority to let the Demised Premises". Finally, pursuant to Article 13.06 of the Lease, all notices Sunrise intended to provide to the landlord were to be delivered to Teskey Concrete. Therefore, based on the wording of the Sunrise lease, it is not plain and obvious that Teskey Concrete was not a landlord under the lease.

Reasonable Expectations, Mutual Mistake and Rectification

[168] Alternatively, the plaintiffs allege that the "Tenant, Teskey Concrete and Teskey Construction intended and reasonably expected that Teskey Concrete would be named as a landlord together with Teskey Construction" (para. 140), and that "[d]ue to inadvertence, oversight or mistake, the Tenant, Teskey Concrete and Teskey Construction failed to formally name Teskey Concrete as a landlord on page 1 of the Lease" (para. 141). Facts are alleged to support this pleading:

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(1) Teskey Concrete was involved in the negotiations of the Sunrise lease, or at least was aware of the negotiations, and could have prevented 48 Murray Road from being leased to Sunrise, but did not. For example:

- Mark Teskey and Roy Teskey ("the Teskeys") managed and wholly owned both Teskey Construction and Teskey Concrete (para. 135).

- The terms of the Lease were negotiated by the Teskeys acting on behalf of both Teskey Concrete and Teskey Construction (para. 140(c)). Even if the Teskeys were not acting on behalf of Teskey Concrete, Teskey Concrete was aware, through the Teskeys, of all aspects of the negotiations.

- Teskey Concrete was aware that the "Leased Premises" in Article 1.01 included part of 48 Murray Road (para. 137), which was owned by Teskey Concrete, and that Article 3.01 permitted Sunrise to use the Leased Premises as a propane facility (para. 138).

(2) Teskey Concrete permitted Sunrise to occupy part of its land and buildings at 48 Murray Road (para. 140(e)) for nearly four years.

(3) Teskey Concrete and Teskey Construction obtained liability insurance for 48 and 54 Murray Road. Both companies were listed as "named insureds" and the Tenant was identified as a "propane dealer" (para. 140(f)).

(4) In its yearly financial statements, Teskey Concrete recorded a portion of the income from the lease (para. 140(g)).

(5) Sunrise, Teskey Construction and Teskey Concrete treated Teskey Concrete as if it was a named landlord (para. 142) and Teskey Concrete considered itself to be a landlord (para. 143).

[169] These facts that are pleaded show that it is not "patently ridiculous" that through an error, Teskey Concrete was not formally named in the Sunrise lease as a landlord.

[170] The plaintiffs plead that Teskey Concrete could have enforced its rights under the Sunrise lease "by application to court for rectification of the Lease to formally name it as a landlord. The court would have granted rectification of the Lease based on the facts pleaded above." (para. 145). While the proposed statement of claim does not seek rectification of the Sunrise lease, the point was argued during the motion. The plaintiffs and the Teskey defendants disagree on the test for rectification. However, given that the plaintiffs are alleging that there was a common/mutual mistake, not a unilateral mistake, rectification requires the following:

(i) that there be a common intention among the parties to the contract,

(ii) evidenced by outward expression of accord,

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(iii) that the common intention continued until the instrument was executed, and

(iv) that the formal instrument does not conform to this intention due to a mutual mistake (*Wilson Walker LLP v. Royal Bank of Canada*, [2004] O.J. No. 1934 (Sup. Ct.); *John Austin & Sons Ltd. v. Smith* (1982), 35 O.R. (2d) 272 (C.A.)).

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[171] There is conflicting law on whether a third party to a contract (in this case the plaintiffs) can request rectification of the contract. The defendants rely on the following statement in *Gates v. Trainor* (1979), 23 Nfld. & P.E.I.R. 331 (P.E.I.S.C.) at para. 7: "There can be no rectification of a document when the person seeking to rectify was not a party to the original document." More recently, in *Drapeau v. Heald*, [2006] O.J. No. 1147 (Sup. Ct.) at para. 22, the defendant was "not a party to the release or the settlement" and therefore had "no standing to make the claim for rectification."

[172] However, in *Itco Properties Ltd. v. Mohawk Oil Co.*, [1988] A.J. No. 818 (C.A.) at para. 2, the Alberta Court of Appeal noted that neither of the two cases relied on in *Gates v. Trainor* "is authority for the bald proposition" made in that case. The court went on to hold that an assignee of a contract, who was not a party to that contract, can seek rectification. The court in *Rogers v. Knutsen*, [1994] B.C.J. No. 40 (S.C.) at para. 35, cited *Itco* and held that "there is a fair issue to be tried as to whether or not the plaintiffs Rogers, successors in title, would be entitled to rectification of the two easements."

[173] In *Sharom v. Sharom Estate*, [1992] O.J. No. 285 (Ct. J. (Gen. Div.)), the wife of the deceased was the beneficiary of her husband's life insurance policy but due to a mistake, the husband had not signed the document designating her as the sole beneficiary. The court declined to follow *Gates v. Trainor* because in the case of life insurance policies, the person seeking rectification will usually not be a party to the contract. The court noted that rectification had also been granted in similar situations in *Cockell v. Cockell and Mutual Life Assurance Co.*, [1944] 4 D.L.R. 373 (Sask. C.A.) and *Cornwall v. Halifax Banking Co.* (1902), 32 S.C.R. 442.

[174] These decisions show that the law is not settled on whether a third party can seek rectification of an agreement and if so, under what circumstances. I conclude that it is not plain and obvious that rectification is unavailable to the plaintiffs. While this issue was raised and argued, an amendment to the proposed statement of claim is required to advance the argument further.

Commercial Tenancies Act

[175] In para. 146, the plaintiffs plead that Teskey Concrete was a landlord pursuant to s. 1 of the *Commercial Tenancies Act*. This is the definition section of this act and it defines "landlord" as including an owner, or the person giving or permitting the occupation of the premises in question. Teskey Concrete was an owner of part of the demised premises and permitted its occupation by Sunrise. Therefore, the plaintiffs allege that Teskey Concrete is a landlord under s. 1 of the *Commercial Tenancies Act*.

[176] If Teskey Concrete is a landlord under the definition in the *Commercial Tenancies Act* that would make Teskey Concrete a landlord in respect of that specific Act. It does not make Teskey Concrete a landlord for all purposes. Other than relying on this definition, the plaintiffs have not pleaded any particulars to show how the *Commercial Tenancies Act* applies to Teskey Concrete. Pleading the definition alone does not support the general pleading that Teskey Concrete is a landlord. The plaintiffs must also plead the specific sections of the *Commercial Tenancies Act*. An amendment to the proposed statement of claim is required.

Tenancy by Estoppel

[177] The plaintiffs rely on tenancy by estoppel in answer to nemo dat. This doctrine precludes parties from denying the truth of representations they have given to other parties. In the landlord-tenant context, tenancy by estoppel prevents a landlord from denying a tenant's interest in a property he lets and prevents a tenant from denying the landlord's title to the property he occupies. The doctrine is described in the following texts as follows:

> In general, a tenant is estopped from disputing the title, at the time of the lease, of the landlord by whom he or she was let into possession, and the landlord is estopped from repudiating a lease under which he or she has given possession, or any tenancy which he or she has acknowledged. (Canadian Encyclopedic Digest (Ont. 4th), vol. 36, title 93 at §57)
>
> [T]he landlord cannot question the validity of his own grant, nor can the tenant question it once he is in possession. (Robert Megarry & H.W.R. Wade, *The Law of Real Property*, 5th ed. (London, U.K.: Stevens & Sons, 1984) at p. 763)

[178] Tenancy by estoppel was recognized in *Canada Sechelt Golf & Country Club Ltd v. District of Sechelt*, 2012 BCSC 1105, [2012] B.C.J. No. 1559. In this case the petitioner tenant sought a declaration that his lease was still in force and effect. The respondent landlord alleged that strict compliance with the renewal provisions in the lease was necessary for the lease to still be in effect. The court recognized that tenancy by estoppel was applicable in Canada, and stated at para. 128 that there is "equitable jurisdiction to interfere in cases where the assertion of strict legal rights may be unjust or unfair." It was held that the respondent was estopped from exercising its right to strict compliance of the renewal provisions of the lease at issue on the basis that the parties had been automatically renewing the leases for several preceding years as if strict compliance with the lease was adhered to.

[179] The issue is whether the plaintiffs, who are not parties to the lease, can rely on tenancy by estoppel in response to Teskey Concrete's assertion that it did not lease 48 Murray Road. The Teskey defendants say that tenancy by estoppel is only applicable between the parties to the purported tenancy. They rely on *Great West Saddlery Co. v. Griesbach*, [1915] A.J. No. 36 (Dist. Ct.). However, in that case, it was held that a third party's goods were not distrainable under a tenancy by estoppel; the third party was protected from being adversely affected by the tenancy. Here, the plaintiffs rely on the relationship that a tenancy by estoppel would create.

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[180] The text authorities quoted above do not preclude a third party from relying on the doctrine. Given the lack of authority on this issue, it is an undeveloped area of law. Therefore it is open to the plaintiffs to argue this as an answer to nemo dat. I add that while this point was argued by the parties during the motion, the proposed statement of claim does not plead tenancy by estoppel. However, the facts necessary to support the argument have been pled and an amendment to the statement of claim would be appropriate. Alternatively it can be pleaded in a reply.

Agency

[181] The plaintiffs allege that Teskey Construction was acting as Teskey Concrete's agent when it entered into the Sunrise lease that included part of 48 Murray Road. The proposed statement of claim states, at paras. 147-48:

> Alternatively, Teskey Concrete was a landlord with all rights and obligations under the Lease through an express or an implied agency.
>
> On or before September 1, 2004, Teskey Construction was authorized by Teskey Concrete, either expressly or by implication, to enter into the Lease on behalf of Teskey Concrete and on its own behalf, to lease 48 Murray Road and 54 Murray Road to the Tenant.

[182] Material facts are provided to support this alternative theory (paras. 147-61). The agency pleading is an alternative argument in the event that all of the above arguments do not apply.

[183] The Teskey defendants argue that the agency pleading cannot succeed because the agency agreement was not in writing as required by the *Statute of Frauds*. However, in para. 151 the plaintiffs plead that the agency agreement was in writing:

> In entering into the Lease, Teskey Concrete and Teskey Construction were represented by Mark Teskey and Roy Teskey, both directors and officers in the two companies. They agreed, either in writing or orally, that the scope of Teskey Construction's authority extended to all matters pertaining to the Lease, including monitoring of the Tenant's compliance with all terms of the Lease and exercising all rights of the landlord to ensure compliance with the terms of the Lease. The authority of Teskey Construction constituted the power to affect Teskey Concrete's legal relations with the Tenant.

[184] Further, paras. 155-56 of the proposed statement of claim pleads:

> The Sunrise Companies, and in particular the Tenant, knew that Teskey Construction, represented by Mark Teskey and Roy Teskey, in all matters pertaining to the Lease, were acting on behalf of Teskey Construction, as landlord of the demised premises at 54 Murray Road and as agent for Teskey Concrete, as landlord of part of the demised premises at 48 Murray Road.

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> By entering into possession of 48 Murray Road, pursuant to the terms of the Lease, the Tenant agreed to be bound by the terms of the Lease and acknowledged and recognized Teskey Concrete as a landlord under the Lease with respect to 48 Murray Road.

[185] In addition, Article 8.03 of the Sunrise lease, which the Teskeys negotiated, supports the agency pleading because it states that the landlord has "full power and absolute authority" to lease the property.

[186] The defendants submit that the sealed contract rule prevents the plaintiffs from suing Teskey Concrete even if an agency relationship did exist. The sealed contract rule provides that "an undisclosed principal cannot be sued on a contract executed by his or her agent when that contract is executed under seal" (*Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842 at para. 1).

[187] It is agreed that the Sunrise lease was executed under seal by operation of s. 13(1) of the *Land Registration Reform Act*, R.S.O. 1990, c. L.4, which deems all documents transferring an interest in land to be under seal. Therefore, if an agency relationship exists and Teskey Concrete was "undisclosed", the sealed contract rule would prevent Sunrise from being able to sue Teskey Concrete, the undisclosed principal. The question is whether the sealed contract rule operates to prevent a third party to a contract from suing an undisclosed principal.

[188] The plaintiffs rely on *Edelstein Construction Ltd. v. Fire Pit Inc.* (1996), 30 O.R. (3d) 383 (C.A.). They claim that this is an analogous case which stands for the proposition that a plaintiff is entitled to sue an undisclosed principal if she seeks rights against that principal but does not seek to enforce the sealed contract. However, as the Teskey defendants point out, that case involved s. 20(2) of the *Mortgages Act*, R.S.O. 1990, c. M.40, which provides that where mortgaged property is conveyed by a mortgagor to a transferee who assumes the mortgage obligations, the mortgagee may enforce its rights against the transferee, despite the absence of a contractual relationship. *Edelstein* was decided on the basis that the statute took precedence over privity of contract and the sealed contract rule and therefore, is not applicable here.

[189] However, this does not mean that it is plain and obvious that the sealed contract rule will apply. The sealed contract rule is typically applied in cases where one party to the contract is seeking to sue the undisclosed principal of the other party to the contract. This was the situation in *Friedmann*, where the Supreme Court declined to abolish the sealed contract rule.

[190] In this case, the plaintiffs are not seeking to directly enforce the contract between Teskey Concrete (the undisclosed principal) and Sunrise, but are seeking to rely on the tenancy relationship that results from the alleged agency agreement between Teskey Concrete and Teskey Construction. This situation was not dealt with in *Friedmann*.

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[191] Here the plaintiffs seek to rely on the relationship between a party to a contract and an undisclosed principal, rather than enforce the contract directly. Whether the sealed contract rule should prevent them from doing so is a novel issue that should not be decided on this motion.

[192] This is consistent with the direction that the sealed contract rule "should not be given any wider effect than necessary" (*642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.) at para. 30; see also *Ryan v. Kaukab*, 2011 ONSC 6826, [2011] O.J. No. 5151 at para. 159).

[193] If an agency relationship exists and the sealed contract rule does not apply, the plaintiffs will be able to sue Teskey Concrete. If an agency relationship exists and the sealed contract rule *does* apply, there will be 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. The resolution of this issue requires a consideration of the evidence that is beyond the scope of the s. 5(1)(a) criterion.

Teskey 209 and HGT

[194] The plaintiffs plead that Teskey Construction sold 54 Murray Road to Teskey 209 on December 28, 2007. Teskey 209 was the owner of this property when the explosions occurred.

[195] The particulars of the pleading against Teskey 209 are set out in detail above. In summary, the plaintiffs allege that Teskey 209 is a landlord under the Sunrise lease for following reasons. First, Teskey 209 was a landlord under the Sunrise lease pursuant to Article 13.01 of the lease (para. 165). I have reviewed this provision in the lease above. It states that the term landlord "shall" include the owner or owners of the premises. Teskey 209 was an owner. Article 13.01 also states that the lease will be binding on the "Landlord, its successors and assigns" during their "respective successive periods of ownership".

[196] Second, the plaintiffs plead that by operation of ss. 7 and 8 of the *Commercial Tenancies Act*, Teskey 209 assumed the role of landlord under the Sunrise lease when it purchased 54 Murray Road from Teskey Construction (para. 166).

[197] In essence, these sections of the *Commercial Tenancies Act* 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. As I stated in my July reasons, "arguably this is one way to plead that Teskey 209 was a landlord [under the Sunrise lease] after it bought the land and remained a landlord when the explosions occurred." (*Durling v. Sunrise Propane Energy Group Inc.* at para. 81).

[198] The same pleadings are advanced against HGT to support the claim that HGT was a landlord under the Sunrise lease (paras. 189-190).

[199] On the basis of the Article 13.01 and *Commercial Tenancies Act* arguments, there is a proper pleading against Teskey 209 and HGT. It is not plain and obvious that Teskey 209 and HGT were not landlords of 54 Murray Road and 48 Murray Road, respectively.

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The Leasebacks

[200] In my July reasons I discussed the December 2007 and January 2007 leases. In the proposed statement of claim, they are called the Teskey Construction Lease and the Teskey Concrete Lease. For ease of reference I will call them leasebacks.

[201] After Teskey Construction sold 54 Murray Road to Teskey 209, Teskey 209 leased the property back to Teskey Construction. Similarly, after Teskey Concrete sold 48 Murray Road to HGT, HGT leased the property back to Teskey Concrete.

[202] The Teskey defendants say that the leasebacks prevent the plaintiffs from being able to use ss. 7 and 8 of *Commercial Tenancies Act* to plead that Teskey 209 and HGT became landlords under the Sunrise lease. The defendants say that by operation of the leasebacks, Teskey Construction and Teskey Concrete remained in exclusive possession of 54 Murray Road and 48 Murray Road when they sold those properties to Teskey 209 and HGT, respectively.

[203] The fact of the leasebacks is a peculiar twist that the plaintiffs deal with in the proposed statement of claim at paras. 176-186 for 54 Murray Road and paras. 200-211 for 48 Murray Road. The plaintiffs plead that the effect of the 54 Murray Road leaseback was to make Teskey 209 the owner and landlord, Teskey Construction the sub-landlord, and Sunrise the sub-tenant. Similarly, the plaintiffs plead that the effect of the 48 Murray Road leaseback was to make HGT the owner and landlord, Teskey Concrete the sub-landlord, and Sunrise the sub-tenant. In the alternative, the plaintiffs plead that the leasebacks were of no force and effect because both 54 Murray Road and 48 Murray Road were already leased to Sunrise.

[204] It is not plain and obvious that the leasebacks prevent Teskey 209 and HGT from being landlords under the Sunrise lease. It is unclear how, given the nemo dat rule, Teskey 209 and HGT could have leased the properties to Teskey Construction and Teskey Concrete, when those properties were already leased to Sunrise at the time that Teskey 209 and HGT purchased them. It is possible that the leasebacks were of no force and effect and that therefore Teskey 209 and HGT were landlords. Given the uncertain legal and factual situation of this pleading, it is not plain and obvious that the leasebacks defeat the pleading against Teskey 209 and HGT.

CONCLUSION

[205] It is plain and obvious that the nuisance and strict liability causes of action against the Teskey defendants will fail. Similarly the negligence cause of action against the Teskey defendants made under the *Occupiers' Liability Act* will fail. The proposed statement of claim does not satisfy the s. 5(1)(a) criterion for these causes of action. The common law negligence cause of action against the Teskey defendants does meet the s. 5(1)(a) criterion.

[206] Leave is granted to amend the statement of claim to reflect the single cause of action against the Teskey defendants that satisfies the s. 5(1)(a) criterion. As well the plaintiffs may if desired, include further particulars to support the allegation that Teskey Concrete is a landlord

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under s. 1 of the *Commercial Tenancies Act* and a pleading of tenancy by estoppel and rectification.

[207] This action is certified as a class proceeding against the Teskey defendants pursuant to the *Class Proceedings Act* on the basis of the common law negligence cause of action. The common issues involving the Teskey defendants must be limited to this one cause of action. The parties shall prepare an order that incorporates my conclusions and complies with s. 8 of the *Class Proceedings Act*.

[208] If the parties cannot agree on costs, they must deliver written submissions to the court by January 7, 2013 in accordance with a schedule to be agreed upon by counsel. This schedule must allow for a brief reply from the plaintiffs.

C. Horkins J.

Released: November 20, 2012

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CITATION: Durling v. Sunrise Propane Energy Group Inc., 2012 ONSC 6570
COURT FILE NO.: CV-08-363271-00CP
DATE: 20121120

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ONTARIO

SUPERIOR COURT OF JUSTICE

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. and TESKEY CONCRETE CO. LTD., THE TECHNICAL STANDARDS AND SAFETY AUTHORITY, FELIPE DE LEON, ONTARIO HOSE SPECIALTIES LIMITED, PERAFLEX HOSE INC., PERAFLEX HOSE INDUSTRIES INC., BLACKMER OPERATING AS A DIVISION OF DOVER ENERGY INC., WELDEX COMPANY LIMITED, KEDDCO MFG. LTD., ROBERT PARSONS EQUIPMENT TRADING INC. and PRO-PAR (1978) INC.

Defendants

REASONS FOR JUDGMENT

C. Horkins J.

Released: November 20, 2012

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