

In order to decide this ground of appeal, we should again consider the general philosophy of the Act and modern arrangements for protecting the environment. The legislature wanted to allow members of the public to defend not only their private interests, but also the common right of all citizens to a healthy environment. Motions and applications brought by citizens require long and sometimes costly expert evidence. Therefore it would seem that unless the courts are flexible in this regard, they will be taking back with one hand what the Act gave with the other. In this case, in allowing the application for an interlocutory injunction in part, the trial judge based his decision to a great extent on the opinion of one of the experts called by the appellants, Mr. Mazen Victor Eldada. In addition, the other reports are certainly relevant, even if their conclusions are debatable. Therefore, it is just and reasonable in the circumstances not to deprive the applicants of costs incurred in arguing their case. Therefore, I am also of the opinion that the judgment appealed from should be amended and that the applicants should be allowed costs for fees for expert witnesses.

I conclude that:

1. the principal appeal should be allowed in part and the judgment *a quo* should be amended in two ways: first, the amount of security to be provided by the appellants should be reduced to \$500, and the appellants should be allowed costs for fees of expert witnesses;
2. the cross-appeal should be dismissed with costs

Appeal allowed in part; cross-appeal dismissed.

Nippa v. C.H. Lewis (Lucan) Ltd. et al.

[Indexed as: Nippa v. C.H. Lewis (Lucan) Ltd.]

Ontario Court (General Division), Fitts J. May 16 and June 24, 1991.

Appeal — Stay pending appeal — Injunction — Trial judge awarding injunction for deliberate and long-term nuisance — Stay not to be granted.

Civil procedure — Costs — Solicitor and client — Defendants operating landfill site under permit — Court awarding injunction, damages and exemplary damages for nuisance — Not appropriate to award costs on solicitor-and-client basis.

Damages — Nuisance — Defendants operating landfill site under permit in conscious, deliberate and callous disregard of plaintiffs' rights for extended

period — Plaintiffs were organic farmers — Entitled to damages for loss of income, extra work and general damages.

Damages — Exemplary damages — Defendants operating landfill site under permit in conscious, deliberate and callous disregard of plaintiffs' rights for extended period — Operation nuisance — Plaintiffs entitled to exemplary damages.

Injunctions — Adequacy of damages — Defendants operating landfill site under permit in conscious, deliberate and callous disregard of plaintiffs' rights for extended period — Operation nuisance — Damages inadequate — Injunction to issue.

Judgments and orders — Interest — Prejudgment — Entitlement — Court awarding damages to plaintiffs under several heads — Entitled to prejudgment interest in accordance with nature of damages and awards — Not entitled to interest on exemplary damages.

The plaintiffs were organic farmers, who occupied the same farm since 1963. The individual defendant owned adjoining land on which the corporate defendant operated a landfill site since 1972. The landfill operation was carried on under a ministerial permit. The plaintiffs complained for years about the operation of the landfill operation, in particular about the stench and the litter it caused. The Environmental Appeal Board directed that the permit be revoked in 1984, but that decision was overturned on appeal. The plaintiffs brought this action for an injunction and damages.

Held, judgment should be awarded to the plaintiffs, together with costs and prejudgment interest. The motion for a stay should be dismissed.

(1) The plaintiffs' evidence, virtually uncontradicted, showed that the defendants carried on their operation consciously, deliberately and with callous disregard of the plaintiffs' rights over an extended period. The operation amounted to a nuisance and damages would be an inadequate remedy. Hence, an injunction should issue to prevent continued operation of the landfill site.

(2) The plaintiffs were also entitled to damages, namely, damages for loss of income, for extra work in picking up litter from the landfill operation, and for general damages.

(3) The plaintiffs were also entitled to punitive damages, since the defendants acted in a callous and high-handed manner over an extended period, without regard to the plaintiffs' rights, knowing that their actions affected the plaintiffs adversely.

The defendants then brought a motion to stay the injunction pending appeal. **Held**, the motion should be dismissed.

The plaintiffs would suffer continued hardship if the injunction were stayed and no remedy short of an injunction would afford them adequate protection.

In supplementary proceedings the parties appeared again before the trial judge to dispose of the issues of prejudgment interest and costs.

Held, the plaintiffs were entitled to prejudgment interest agreeable to the nature of the several damage awards, and to party-and-party costs.

(1) The award for lost income was based on an identical loss in each of the preceding 10 years. Hence, prejudgment interest should be calculated at the respective rates applicable to each of those years. The award for extra work was based on the preceding three years, with the largest amount allocated to the

immediately preceding year. Prejudgment should be calculated accordingly. The award for general damages was not an annual calculation multiplied by a number of years, but a global assessment of money wrongfully withheld from the plaintiffs. Accordingly, prejudgment interest should be awarded at the rate of 8% on the award from the date when the claim for prejudgment interest was made.

(2) Having regard to the fact that the defendants carried on their operation under permit and that exemplary damages were awarded, this was not a proper case for solicitor-and-client costs. Hence, the plaintiffs were only entitled to party-and-party costs.

Walter v. Pioneer Construction Co. (1967) Ltd. (1975), 56 D.L.R. (3d) 677, 8 O.R. (2d) 36, **fold**

Nantel v. Parisien (1981), 18 C.C.L.T. 79, 22 R.P.R. 1, 10 A.C.W.S. (2d) 332, **apld**

Foulis v. Robinson; Gore Mutual Ins. Co., Third Party (1978), 92 D.L.R. (3d) 134, 21 O.R. (2d) 769, 8 C.P.C. 198, **consd**

Other cases referred to

Plater v. Town of Collingwood (1967), 65 D.L.R. (2d) 492, [1968] 1 O.R. 81; *McKinon Industries Ltd. v. Walker*, [1951] 3 D.L.R. 577, [1951] W.N. 401

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rule 63.02(b)

EDITORIAL NOTE: The defendant moved in the Court of Appeal for a stay of the injunction pending appeal. The motion was dismissed on May 28, 1991, by Doherty J.A. in chambers, whose endorsement appears following the reasons of Flinn J. (p. 431, *post*).

ACTION for an injunction to prohibit the continued operation of a landfill site, for damages and for ancillary relief; **MOTION** for a stay pending appeal.

Charles M. Campbell and *Richard D. Lingren*, for plaintiffs.
Anna M. Hampson, for defendants.

FLINN J.:—This is an action for injunctive relief and damages arising out of the operation of a landfill site or garbage dump. The plaintiffs are farmers residing at Lot 23, Concession 3 in the Township of Biddulph and owning other land adjacent in Concession 2. The defendant, Lorne Arnold Lewis, is the owner of the lands upon which the landfill is being carried on, being part of Lot 24, Concession 3, immediately south of the residence of the plaintiffs. The corporate defendant is the operator of the landfill. The defendant, Lorne Arnold Lewis, has taken no part in the proceedings, has filed no pleadings, and has been noted in default.

The plaintiffs purchased their lands in 1963 and have raised two children there; one, a son, lives and is presently fully employed on the farm. The male plaintiff is 54. He emigrated to Canada in 1957. He is an electrician in the employ of Kellogg's in London where he

has worked for 13 years. The female plaintiff is Peter Nippa's wife. She has had education in agriculture, although she has worked in the past as a nurse's aide, deciding to remain on the farm and look after her children. The plaintiffs carry on what is called organic farming, that is, the pursuit of agriculture without the use of chemical fertilizers, pesticides or herbicides of any sort. This pursuit is reflected in the claim. ^a

This action was commenced in 1984 and includes claims dating back to 1978. The plaintiffs had a fire and their records were destroyed and in addition they were faced with limitations problems but their complaints with respect to the landfill go back to 1972 when the landfill was started. The plaintiffs' complaints are generally litter, odour, noise, dust, fire and smoke, and general interference with their personal lives. ^b

There was virtually no defence. While counsel cross-examined the various witnesses for the plaintiff, the only witness called for the defence was a neighbouring farmer who, in fact, lives some one mile east of the landfill. The defence asked for an amendment to the statement of defence authorizing the defendants to plead statutory authorization for the landfill, and that was granted, but there was no evidence, no evidence of a permit or the extent of any permit. ^c

The plaintiff was a pleasant man who testified without exaggeration albeit with emotion. I must say that at the outset I found it difficult to understand how one could have so many complaints and receive so little assistance from the government authorities. He was not ignorant of the usual farm odours from cattle and swine as he raised these animals himself over the years. Even on cross-examination he was gracious with counsel, giving and conceding where he felt it appropriate and in no way battled with counsel for the defendant corporation. ^d

His evidence was supported by the testimony of his wife and by two neighbours, one Donna Jean Wells who lived one and a half miles north of the plaintiffs' farm but on the same concession road, and Lorella Shaw who lived across the concession road from the plaintiffs' farm. It was also supported by evidence of the son and indeed to a certain extent by evidence from an expert called with respect to the plaintiffs' damage claim, one Peter Stonehouse who had a doctorate in agricultural economics. ^e

The evidence indicated the following: ^f

(a) As to litter, the complaint was generally with respect to plastic bags, pieces of plastic and some paper which was blown by the wind and generally polluted that portion of the plaintiffs' farm lying east of the plaintiffs' house. This field was for a number of ^g

^h

years cropped and was generally in the direction of the prevailing winds from the south. Because of the litter problem it has recently been left in pasture. The plaintiff said that the littering occurred for the most part in the spring and fall when the winds seemed to be at their maximum and during which time it would interfere with land preparation, either before or after crop. It occurred at other times when the wind was up but with lesser effect, to the farming. There was a line fence between the property of the plaintiff and the defendants and much of this plastic would become hung upon the fence, to blow through as time went on. The plaintiff complained that it took time to pick it up and that even after it was picked up, it would be necessary to get down from the farm implements and pick up isolated pieces as tillage of one sort or another was being performed. All of the witnesses including the defence testified with respect to litter. Notwithstanding the fact that some four weeks before the trial some efforts were made by the corporate defendant to clean up the operation, on the last day of the evidence the son brought in what is commonly called a green garbage bag full of plastic refuse which had been picked up that very morning from an area east of his house about 300 ft. by 20 ft. which he said took him 20 minutes.

The videotape which is ex. 8, graphically shows the plastic leaving the landfill, being deposited in the fields and on the fences. The still photographs found in the album marked ex. 7, display the same thing. The plaintiffs' evidence was that this condition was not constant but that it was continuous and that little effort was made by the defendant, except on a few occasions, to pick up the litter.

The plaintiffs' problem was further complicated by the fact that in organic farming litter on the fields is prohibited in that it may well become part of the crop being ground up by machines and it interferes with the crop and field rotation necessary according to the evidence in maintaining a standard sufficient to receive official designation as an organic farmer. As a result of the litter some certification by the Organic Farmers Association was withdrawn.

(b) The second complaint was odour from the landfill arising from the fact that the defendants failed to properly cover the dumped garbage promptly after being moved there by the various garbage trucks. The plaintiffs testified that whenever the wind was from the south, they were recipients of this smell and that in the still summer nights the smell of the garbage hung to the point where they were unable to enjoy the outside and in fact had to retreat to the inside of their home and close the windows. The source of the smell was graphically depicted in the videotape, ex. 10, which showed substantial mounds of garbage uncovered.

The plaintiffs testified that this remained uncovered in some cases for a number of days and then would be lightly covered with some form of silage refuse which on its own would create an offensive odour. a

In addition to the smell from the garbage the plaintiffs complained about the smell of a number of dead animals which the defendant, Arnold Lewis, allowed to lie around his property immediately adjacent to the plaintiffs' residence from time to time. b While there was no direct evidence to this effect, it was more than probable that the number of animals that died, died as a result of eating in the landfill where they wandered regularly. Arnold Lewis, an absent landowner in the sense that he did not reside on his farm, would leave these dead carcasses to rot and cause a stench in the area. c

The plaintiffs also complained a number of occasions when loads of disposed-of turnips would be dumped on the Arnold Lewis lands for feed for the hogs maintained there. They would be dumped in piles, the hogs would not eat them all either because they had already rotted or because the animals had defecated upon some of these turnips while they were feeding and would not eat those turnips upon which waste had been deposited so that these too were permitted to rot and provide a stench which, with the appropriate wind, would waft its way onto the premises of the plaintiffs. d

(c) The third complaint was with respect to noise. The plaintiff says that he fully understands that it takes equipment to operate a landfill, that it is necessary to have trucks come with the garbage and deposit it, that it is necessary to have machines to pack the garbage down and machines to cover the garbage with appropriate cover. However, the plaintiffs' complaint was that nothing was regular about the operation of this landfill, that a machine might come at 7 o'clock in the morning or it might come at 7 o'clock in the evening and continue well into the evening. He said that they would operate on Saturdays and while if done regularly, the machine noise might be of little consequence, when done irregularly the length of time over which the machine worked would be longer and more difficult to accept. e

(d) The plaintiff complained further about the dust emanating from the landfill, particularly the dust arising from the use of the road by the large garbage trucks into the landfill. The road was gravel and apparently little in the way of dust control was done by the defendant corporation so that the number of trucks continually raised dust which, with the appropriate wind, would be deposited on the plaintiffs' farm. f

g

h

(e) The complaint with respect to fire and smoke arose out of the plaintiffs' evidence that brush was burned in the landfill and that in addition garbage was burned. There were graphic pictures of a big garbage fire and of course there is no evidence as to whether or not this was a fire caused by spontaneous combustion and without fault on the part of the defendant corporation, or if, in fact, it was a way to dispose of some of the garbage that was there. It would appear that the brush was deliberately fired and in one of the videotapes it is clear that the smoke is of such a colour as to indicate that something more than brush is being burned. It was the plaintiffs' claim that it was asphalt shingles and there was, as indicated, no denial of this by the defendant corporation.

(f) The last claim is generally an interference with one's person by denying to the plaintiffs the right to enjoy their property free of interference from a thing such as a landfill.

Details with respect to these complaints and the times upon which they occurred are found in ex. 6 which is a catalogue of the plaintiffs' observations, ex. 7 which is the photo album, and in three videotapes which are exs. 8, 9 and 10. The videotapes were used as representative photographs of occurrences in 1988 and supported the plaintiffs' testimony with respect to the occurrences in that year. In fact there were videotapes present in the courtroom, 13 in all, which the plaintiff testified contained like instances of the various complaints above noted through to 1990. The tapes that we saw were compilations of the other tapes. In all, the plaintiff testified that there was some 96 hours of videotaping and as the plaintiffs testified to it being of representative character, we only saw portions of three, and only three were entered in evidence. While defence counsel took some objection to allowing the videotape to be entered because of the editorial comments in the audio part of the tape, she did not investigate any of the other tapes and the plaintiffs' evidence to the effect that these activities continued unabated until early March, 1991, when doubtless for the benefit of the court some efforts were made by the defendants to relieve the plaintiffs of the various heads of nuisance which I have described.

The plaintiff testified that he complained to Lewis once in the late 70s with respect to these difficulties but was met with the universal epithet 'and thereafter he complained regularly to the Department of the Environment, both locally and in Toronto. He testified that in some years he must have complained at least 100 times. Again this evidence was not challenged. One would have thought that the defence would have called somebody from the

Department of the Environment with respect to this matter if, in fact, the situation was not as bad as the plaintiff described.

Plaintiff's counsel filed with the court a book of authorities at the outset. In that book of authorities was an appeal by the corporate defendant from action by the Director of the Ministry of the Environment with respect to a licence issued to the defendant. Counsel for the plaintiff chose not to refer to this decision presumably as a result of the lack of evidence coming from the defendant with respect to authorization for operating this landfill. There can be no doubt that this appeal had to do with this landfill as it is so described in the style of cause. The decision is that of the Environmental Appeal Board and is dated April 4, 1984. I quote from that decision:

Had the parties to this hearing been the Appellant and the Respondent only, we might simply have affirmed the Condition which is the subject of this appeal. However, much of the evidence and argument has come from third parties, including very full submissions by Mr. Shrybman on behalf of the Nippas, as well as the representations made by Mrs. Donna Wells, who lives in the immediate area and Mrs. Caroline Taylor, who also lives in the area and who spoke on behalf of certain concerned citizens, also of the area.

The general tenor of the evidence given by all these parties was that the site had very frequently been operated in such a callous and haphazard manner as to constitute a public nuisance and had also, on occasion, been operated without due regard to public health and safety.

On the issues of public health and safety, the expert evidence before the Board was principally that submitted by the Ministry and it was the opinion of the Ministry, that the site, though not without problems, did not constitute a hazard to public health and safety. None of the monitoring and testing conducted by the Ministry disclosed leachate or toxin problems of significant proportion, and in lieu of definite evidence to the contrary, the Board concludes that the site as presently constituted is potentially safe.

We can only say "potentially safe" because there was an abundance of lay evidence that this landfill site has recently been so ill-supervised as to be open to grazing, both by pigs and sheep. Hogs, presumably, go to market when they are fattened and in our view, the finishing of hogs on such sundry municipal garbage cannot be tolerated. Regulation 824, Section 10 (Revised Regulations of Ontario, 1970 and amended by Ontario Regulations 217/73, 382/73, and 75/74) specifically sets forth standards for waste disposal sites. These standards are again stated in Regulation 309, Section 8 (August 1982).

This Board takes the view that these regulations are to be enforced.

The aforementioned evidence leaves this Board puzzled as to why these regulations are ignored.

Much evidence was given by Mr. Nippa, deposing as to a virtual plague of blowing refuse, plastic and paper, which had escaped from the site and then been visited upon his family and his farm in years past. The Board sees no reason to doubt the validity of Mr. Nippa's assertions as they seem consistent with the generally unconcerned management of this company. Mr. C.H. Lewis himself, gave credence to a general impression of carelessness in the

a Company's management by his lack of familiarity with problems on the site and the day-to-day conduct of the company's business. At times it was possible to wonder whether authority within the Company had not been delegated to the point where there was no effective control. Evidence was given that large quantities of rubble — ostensibly contracted for delivery to the site — missed the target entirely and that other truck drivers arrived on site without any direction as to where they should dump. The Board is left to wonder whether management did not at times, deliberately turn its head to spare itself the embarrassment of viewing its own performance.

b In any event, it is the opinion of the Board, that the public interest to date has been most indifferently served by the Respondent and that the operation of this site has very frequently created a nuisance. These are additional reasons for immediate restriction of the Appellant's operation and the reasons also for this Board's decision to revoke the Appellant's Certificate of Approval altogether.

c The Board does recognize that the Appellant may quite recently — especially with the present appeal in the offing — have made more strenuous efforts to manage its site effectively and the Ministry has also indicated that it has no serious outstanding complaints at this particular time. Nonetheless, the Board is of the view that years of indifference and positive neglect cannot be adequately compensated by sporadic last-minute measures.

d Déja-vu. We have heard it all again — the same music with the same words. Even Haskett, the only witness for the defendant, testified to the litter and the animals in the landfill but rather shrugged it off as inconsequential.

e In view of the history of this matter it would be easy to be critical of the Ministry of the Environment. However, I did not hear from any representative of the ministry.

f I am satisfied from all of the evidence, that by reason of the operation of the landfill the plaintiffs suffered the conditions about which they complain, all of which interfered with the enjoyment of their property and its use in a real and substantial manner. The complaints are not exaggerated nor are they trivial.

g The law of nuisance was reviewed by Morden J. in *Walker v. Pioneer Construction Co. (1967) Ltd.* (1975), 56 D.L.R. (3d) 677 at p. 680, 8 O.R. (2d) 35. At p. 690 he quotes with approval [from *Clerk and Lindsell on Torts*, 11th ed. (1954) at p. 564] the following as to when a nuisance is actionable:

h "... must be such as to be real interference with the comfort or convenience of living according to the standards of the average man. ... Moreover, the discomfort must be substantial and not merely with reference to the plaintiff; it must be of such a degree that it would be substantial to any person occupying the plaintiff's premises, irrespective of his position in life, age or state of health; it must be 'an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English [Canadian] people ...'

The plaintiffs here come within these parameters.

Without question the plaintiffs are entitled to relief. They are entitled to injunctive relief because damages alone are not adequate and they are entitled to damages: *Plater v. Town of Collingwood* (1967), 65 D.L.R. (2d) 492, [1968] 1 O.R. 81 (H.C.J.); *McKinnon Industries Ltd. v. Walker*, [1951] 3 D.L.R. 577, [1951] W.N. 401 (J.C.P.C.).

As to injunctive relief, I would have granted the same at the conclusion of the trial but plaintiff's counsel requested that if I consider injunctive relief, I also take into account that the two weeks following the trial are those weeks commonly known as "clean up" in the community when people are entitled to either put out for pick-up or deliver to landfill, items not otherwise included in the general garbage and that if the landfill is closed much of this stuff might be strewn around the township. I have therefore let this period of time go by.

The injunctive relief should be against both defendants, the corporate defendant and Arnold Lewis. There was no evidence as to the legal relationship between the two in so far as the landfill size is concerned other than the acknowledgement that the landfill is operated by the corporation and the evidence that the land was owned and farmed by Arnold Lewis.

Counsel for the defendant corporation suggested that the injunction, if any, be limited to those items which form guidelines in the operation of the landfill established by the Ministry of the Environment. In my view the corporation has shown such a callous disregard for the environment and for the rights of people like the plaintiffs and because the landfill is operated in such a mismanaged, haphazard, offending fashion, injunctive relief should be such so as to prevent the operation of this landfill. Accordingly, an injunction will issue in the following terms: to restrain the defendants and both of them from operating a waste disposal site upon the property located on Lot 24, Concession 3 in the Township of Biddulph in the County of Middlesex and Province of Ontario.

As to damages, the plaintiff claimed damages under a number of headings.

The first was a calculation of damages as a result of a reduced crop and income brought about by an interruption of the rotation of the various crops through the various fields in the farm. The evidence was quite clear that to be a serious organic farmer one was required to pay particular attention to a rotation of crops as this had much to do with weed control, fertilization, and soil productivity. The evidence with respect to this claim came from various records which had been prepared over the years by the

a plaintiffs, particularly the female plaintiff, and discussions with the
plaintiffs by Peter Stonehouse, the agricultural economist. Using
the documents attached to ex. 11 which contained information
given to him by the plaintiffs and extracted from their records, he
was able to calculate with some precision from the land-use
patterns, the crop-yield profiles, the crop gross margins, machin-
ery- and truck-operating time, and the machinery and truck-
operating costs, a loss of productivity and therefore a loss of crops
b which he calculated to be of a value of \$125,000. The evidence had
a "what if" quality to it and while the calculations of Stonehouse
were quite well done, I questioned whether they were based on
reality. The plaintiffs did their best in reconstruction of what had
taken place over the previous years in order to allow him to make
his calculations but the evidence in total did not satisfy me beyond
c an appreciation that there was a loss of crop and therefore income,
and doing the best I can, I would allow the plaintiffs under this
head the sum of \$35,000.

d The second head of damages was for extra work in picking up
the litter which was calculated by Stonehouse for the years 1987 to
1989 in an amount of \$2,075.04. Again there were no records kept
with respect to this matter and they are estimates in hindsight
given to Stonehouse and not under oath, difficult to value that time
because of its sporadic nature. Something should be allowed as
there is no question but what this labour was performed in my view
e and I would allow under this heading the sum of \$3,500.

f The third head was the loss of revenue from sales of crop
directly from the farm. I did not see how this would not find itself
in one way or the other under the first head and therefore would
make no specific allowance with respect to this matter.

g The fourth head was general damages. This is really general
damages for having been disturbed and having the rural way of
life disturbed for a period of 13 years for many hours each year. As
indicated before, this was a serious interference with the plaintiffs'
enjoyment of their farm let alone an interference with its produc-
tivity. Counsel for the plaintiff suggested that anything less than
\$5,000 per annum would be unconscionable but that notwithstanding,
h I think the appropriate award would be to each of the
plaintiffs, the sum of \$20,000.

Finally, the plaintiffs claim punitive damages against the defen-
dants. As noted, this matter was before the Environmental Review
Board in 1983. In fact the Environmental Review Board purported
to withdraw the licence and order the landfill closed. This was
appealed to the Divisional Court and the Divisional Court found
that there was no jurisdiction in the board to do what it did for the

reasons peculiar to the situation there involved. One would have thought that the defendants would have been chastened by this experience. Not so. The actions constituting nuisance in this case were performed by the defendants intentionally in that they were done with apparent indifference to the outcome. In fact, the purpose of punitive damages is to punish the wrongdoer for his high-handed conduct against the rights of the plaintiff. The cases indicate that they should be awarded where the evidence indicates that the defendants consciously and deliberately had a callous disregard for another's rights. In *Nantel v. Parisien* (1981), 18 C.C.L.T. 79 at p. 89, 22 R.P.R. 1, 10 A.C.W.S. (2d) 382 (Ont. H.C.J.), Galligan J. said as follows:

In this country we live by the rule of law; that woman, in my opinion, had the right to occupy those premises until August 31, 1980. Not only must the law not sanction the deliberate and callous disregard by the powerful of the weaker person's rights, the law must do what it can to ensure, by whatever means are at its disposal to ensure that the legal rights of a citizen are protected from the tyranny of another. Many cases have said that exemplary damages must not merely amount to a licence fee or to a reasonable cost or expense of doing business.

It is my opinion that in proper cases damages should act as a deterrent to deter the powerful from subjugating the weaker to their business interests.

Here the defendants were carrying on a business; they were operating for profit. They operated in complete disregard of others' rights. They carried this along for in excess of 13 years and when brought to the court they have no answer. There is therefore no defence. I think the proper award in this case is the sum of \$25,000. Judgment for the plaintiffs accordingly and against both defendants. I may be spoken to as to costs.

Judgment for plaintiffs.

SUPPLEMENTARY REASONS

June 24, 1991.

Subsequent to release of reasons herein I have been attended by counsel for the plaintiffs and the defendants in connection with prejudgment interest and costs in particular.

With respect to the matter of prejudgment interest as a result of argument and in some cases by agreement I make the following findings.

As to the claim for loss of income allowed at \$35,000 it seems to be convenient to follow the suggestion of counsel for the defendants accepted by counsel for the plaintiff that it be considered in increments of \$3,500 for each of the 10 years, 1980-1990. That

item will bear interest therefore at the respective rates of interest applicable in each of the years.

The second head of damages was for extra work in picking up the litter during the years 1987 to 1989 inclusive. Under that head I allowed the sum of \$3,500 and prejudgment interest should run at the rate of \$1,000 for 1987, \$1,000 for 1988 and \$1,500 for 1989 at the respective rate on those amounts for those years.

With respect to general damages awarded to each of the plaintiffs the matter is somewhat more difficult. It is said that interest is not to be used either as a reward or a penalty but is meant to reflect the value of money wrongfully withheld, in this case money for compensating the plaintiffs. Those matters were more particularly described in my reasons for judgment. The sum was not intended to be an annual calculation multiplied by a number of years but a global assessment of what I felt would be appropriate as a result of the disturbance over a number of years weighted perhaps more significantly in the later years rather than the earlier. Therefore, some rate of interest ought to be used which approximates a percentage of the average rate over the years 1984 (the date when the claim for prejudgment interest was made) and the date of the judgment. On this basis I think the Rules of Civil Procedure with respect to prejudgment interest and the plaintiffs' entitlement would be satisfied if I awarded interest at the rate of 8% per annum on the total amount of \$20,000 to each plaintiff from November 9, 1984.

Finally, the rules preclude the grant of interest on punitive or exemplary damages. Therefore, the judgment will reflect prejudgment interest as calculated in accordance with these reasons.

As to costs, counsel for the plaintiffs asks that I award all of the costs on a solicitor-and-client basis and obviously under the rules I have authority so to do. The matter of solicitor-and-client costs was extensively canvassed in the Court of Appeal in *Foulis v. Robinson; Gore Mutual Ins. Co., Third Party* (1978), 92 D.L.R. (3d) 134, 21 O.R. (2d) 769, 8 C.P.C. 198.

In *Foulis* the court considered that the statement of defence really did not disclose any defence to the action, that the defendant was present throughout and did not give evidence, that the defendant's ability to drive a motor vehicle was impaired by alcohol, there was no evidence called by counsel for the defendant and there was an attempt at the opening of trial to amend the statement of defence. After reviewing much of the law with respect to the matter Dubin J.A. said, at pp. 141-2:

With respect, I think the learned trial Judge erred in this case in awarding costs on the higher scale, and in the light of the tests to which I have referred, the error was an error in principle. An award of costs on a party-and-party scale does not result in the defendant and third party litigating "with total immunity". Under our system defendants are entitled to put the plaintiff to the proof, and there is no obligation to settle an action. Where the costs follow the event, the length of the trial will be reflected in the bill of costs taxed. The fact that the issue of liability was not seriously contested at trial, that the defendant did not give evidence, that he pleaded guilty to criminal negligence, and that no evidence was called by the defendant and third party on the issues of liability and damages are not factors which, by themselves, merit punitive action in the award of costs.

It is further to be observed that although liability was not admitted, very little time at trial was taken on that issue.

There is a great danger, in my respectful opinion, in a trial Judge second-guessing, after the event, how a trial should be conducted, even where the trial is presided over, as was the case here, by a trial Judge who has had great trial experience at the bar.

Indeed, the issue there was between the third party and the defendant and as the learned appeal judge pointed out, not much time was taken on the question of liability, while in the case at bar the entire case in one way or another brought liability into focus.

As well, it is now quite obvious that while no evidence was called with respect to this fact the operation was being carried on under the authority of a permit issued by the Province of Ontario. This had to provide some comfort to the defendants and perhaps even confidence in at least approaching the trial and I take that into consideration.

I have awarded punitive damages against the defendants. In all the circumstances I conclude that in the peculiarities of this case solicitor-and-client costs should not follow. Costs should be awarded to the plaintiffs on a party-and-party basis throughout subject to any other orders with respect to costs and security therefor and giving credit for any costs already paid pursuant to any other court order.

As to specific items with respect to costs, I direct the assessment officer to allow the full costs of the Stonehouse report if otherwise proper and the attendance of Professor Stonehouse in assessing the costs.

As to junior counsel fee, in my view the case was not particularly complex. Indeed, there were a lot of facts and because of the period of time involved the presentation of the plaintiffs' case was not particularly easy. The legal points raised by the issue were not of any extraordinary difficulty and while the plaintiffs had to anticipate the public authority defence and be ready for it, it never

did arise. On that basis therefore I do not think the assessment officer ought to allow a junior counsel fee.

^a I apologize for the delay in preparing this addendum. However, I got little help on the law from either counsel and had to devil on my own.

^b *Judgment accordingly.*
DOHERTY J.A.:—The respondents sued the appellant alleging that the appellant's operation of a waste disposal site adjoining the respondents' property constituted a nuisance. On May 16, 1991, the trial judge gave judgment in favour of the respondents, awarded substantial damages, and issued an injunction enjoining the appellant from operating the waste disposal site.

^c The appellant seeks a stay of the injunction under Civil Procedure rule 63.02(b) pending the hearing of the appeal.

The authorities require that I consider:

^d — The merits of the appeal.

^e — The balance of convenience and the respective hardship to the parties by the granting or refusal of the stay requested.

I am not impressed with the force of any grounds of appeal put forward on the motion but would not go so far as to say that the appeal clearly has no merit.

^f The appellant alleges some interference with its business if the injunction is granted, and the reeves of certain local municipalities suggest the injunction will add to the costs of their garbage disposal. The appellant's affidavit does not suggest that its overall business will suffer, nor does it suggest that it cannot find a suitable alternate dump site for the garbage in question. It goes no further than to say that this particular site will be unavailable to the appellant if the injunction issues.

^g The trial judge found, on the virtually uncontradicted evidence before him, that the respondents had suffered long and hard because of the indifference and incompetence of the appellant. If I order a stay that hardship will continue. There is also some evidence of economic hardship to the respondents should a stay be issued.

^h I am also not satisfied that any measure short of the injunctive relief granted by the trial judge can reasonably be expected to afford the respondents adequate protection against the nuisance found by the trial judge.

In my view, the balance of convenience favours the respondents.

The motion is dismissed. Costs of the motion to the respondents in any event of the cause.

Re Sutherland

[Indexed as: Sutherland Estate v. Dyer]

Ontario Court (General Division), Killeen J. July 11, 1991.

Real property — Covenantants — Repurchase — Purchaser giving vendor first opportunity to repurchase at fixed price if wishing to sell — Not option but covenant conferring right of pre-emption or first refusal — Not subject to perpetuities rule — Listing agreement by purchaser's estate fell outside agreement — Perpetuities Act, R.S.O. 1980, c. 374, ss. 1(c), 13(3).

Real property — Perpetuities — Contractual rights — Right of repurchase not option but right of first refusal — No limitation creating interest in land — Not subject to perpetuities rule — Not converted into option when property listed by estate of covenantor — Perpetuities Act, R.S.O. 1980, c. 374, ss. 1(c), 13(3).

The deceased purchased certain property from the first respondent in 1968 and covenanted to resell to the vendor at a fixed price when she wished to dispose of the property. The purchaser died in 1985. Her executors, the applicants, discovered the agreement for resale and contacted the vendor, who submitted an offer to purchase at the stated price. The executors rejected the offer and listed the property for sale at its current value. They brought this application for advice and directions.

Held, the agreement did not create an interest in land and expired with the death of the purchaser.

(1) The agreement did not create an option, since it did not give the vendor a right to purchase the land. The vendor would only have that right if the purchaser should decide to sell. Rather, the agreement created a covenant in the nature of a right of pre-emption or first refusal. While an option creates an interest in land and is, thus, subject to the rule against perpetuities, a right of first refusal does not create an interest in land. Hence, the agreement did not offend s. 13(3) of the *Perpetuities Act*, R.S.O. 1980, c. 374, which imposes a 21-year period for the exercise of options. Further, s. 1(c), which defines "limitation" broadly, does not, having regard to the context of the statute, extend to rights of first refusal.

(2) The listing of the property by the executors did not convert the right of first refusal into an option, since the agreement was, by its terms, restricted to the purchaser's life time.

Cases referred to

Pritchard v. Briggs, [1980] 1 All E.R. 294; *Mackay v. Wilson* (1947), 47 S.R. (N.S.W.) 315; *Canadian Long Island Petroleum Ltd. v. Irving Industries (Irving Wire Products Division) Ltd.* (1974), 50 D.L.R. (3d) 265, [1975] 2 S.C.R. 715, [1974] 6 W.W.R. 385, 3 N.R. 430

Statutes referred to

Perpetuities Act, R.S.O. 1980, c. 374, ss. 1(c), 2, 4, 13, 14
Perpetuities Act, 1966, S.O. 1966, c. 113