"FIRST CAPITAL REALTY INC. V. IMPERIAL OIL LIMITED" CASE COMMENT

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Eyes Wide Open: Cost Recovery Action when Plaintiff Purchases a Contaminated Site with Knowledge of Contamination

The issue of fair allocation between a plaintiff and a defendant of the costs incurred by the plaintiff in remediating a contaminated site was recently considered by our Supreme Court in *First Capital Realty Inc. v. Imperial Oil Limited*. The June 2012 decision (as yet unreported) is of importance to those contemplating or already involved in a cost recovery action and to those in the business of purchasing and selling contaminated sites in British Columbia.

The facts of the case were as follows: The defendant, Imperial Oil Limited, and its predecessor companies owned a commercial property in Nanaimo, BC from about 1958 until about 1993. The defendant sold the property in 1993 to a third party, a numbered company. In August 2007, the plaintiff, First Capital Realty Inc., purchased the property from the numbered company.

During its ownership of the property, the defendant had operated a gasoline service station on the property. The numbered company, which bought the property from the defendant, held the property but did not operate any business on it. The plaintiff bought the property from the numbered company for the purposes of redevelopment and paid more than fair market value for it. Prior to completing the purchase of the property, the plaintiff undertook an environmental investigation of the property which confirmed that the property was contaminated with hydrocarbons. The plaintiff proceeded with the purchase without any adjustment of the purchase price in recognition of the contamination. On becoming owner, the plaintiff remediated the property and obtained a certificate of compliance from the Ministry of Environment. The costs of remediation and certificate of compliance application totaled approximately $234,000. The plaintiff sued the defendant pursuant to section 47 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (“EMA”) to recover these costs.

At trial, the parties both agreed that the property was a “contaminated site” pursuant to the EMA prior to its remediation by the plaintiff.

The parties also agreed that both the plaintiff and the defendant were “responsible persons” pursuant to section 45 of the EMA as the current and former owner of the property, respectively.

Thus, the primary issue for the court was whether any of the remediation costs incurred by the plaintiff ought to be allocated to the defendant and, if so, in what amount.

The defendant took the position that no costs of remediation should be attributed to it because at the time of the purchase of the property the plaintiff was fully aware of the contamination and accepted the risk without seeking a discount in the purchase price.

The court held that where a purchaser acquires a contaminated site with a reduction in price to reflect the contamination, the court would be inclined to discount the amount of the costs of remediation which the purchaser could recover from other responsible persons to prevent the purchaser from being compensated twice for the costs incurred (i.e., by obtaining a discount in the purchase price and by obtaining judgment in a cost recovery action). However, that was not the case here. The plaintiff had not obtained any discount in the purchase price and the court disagreed with the defendant's contention that the plaintiff ought not to recover any costs of remediation from the defendant on the basis that it knew of the contamination prior to purchasing the property.

Turning then to the appropriate amount to be allocated to the defendant, the court reviewed the considerable expert evidence led by the parties respecting the source of the contamination at the property.

There were two zones of hydrocarbon contamination at the property which the plaintiff had remediated by way of an excavation. The first was the shallow contamination which both the plaintiff's and the defendant's expert agreed had been caused by the defendant's gas station operation. The second area was the deeper contamination that contained traces of benzene. The plaintiff's expert also attributed this deeper contamination to the defendant's activities. The defendant's expert, on the other hand, was of the view that this deeper contamination was unrelated to the defendant's activities but was rather caused by coal waste fill which had historically been deposited on the property by non-parties to the action. The court preferred the defendant's expert's opinion concluding that only the shallow contamination was caused by the defendant.

Although the plaintiff did not cause any of the contamination (shallow or deep), the court allocated to the defendant only those costs attributable to excavating and disposing of the shallow contamination (approximately $30,000), which were attributable to the defendant's activities. Further, since the property was excavated as part of the plaintiff's redevelopment plans, the court applied a discount to account for the excavation costs that would have been incurred in any event (i.e., even in the absence of the shallow contamination). Applying that discount, the ultimate amount awarded was $28,200.

This decision serves as a reminder to those in the business of purchasing contaminated sites for the purposes of redevelopment that they may be prevented from or limited in their ability to recover the costs incurred in remediating the property they purchase if the primary target did not cause all of the contamination and/or if a discount in the purchase price was obtained from the seller to account for the contamination. However, the case also clarifies that knowledge of contamination prior to purchasing the property is not necessarily a bar to recovery of the costs of remediation against the polluter where no discount in the purchase price on account of contamination is obtained.