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CORRIGENDA: 20051014

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Georgian Glen Developments Limited v. The Corporation of the City of Barrie

BEFORE: The Hon. Mr. Justice P.H. Howden

COUNSEL: M. Green and T. Tsakopoulos, for the plaintiff

J. Cowan and B. Engel, for the defendant

REVISED ENDORSEMENT

The text of the original endorsement has been corrected with text of corrigendum (released October 14, 2005) appended.

[1] The defendant City of Barrie moves for an order that the plaintiff's claims be dismissed pursuant to rule 20.01(3). It reads:

A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

[2] The chain of events which culminated in the plaintiff's suit against the defendant City began in 1988. The plaintiff, whose president is a veteran of six decades in the development/building business in Ontario, purchased land in Barrie designated for future development. The company president, Mr. Scharf, began to meet municipal officials before the purchase closed in 1988. He states in the affidavit material filed by the plaintiff, that the City's Director of Planning and the Mayor assured him at these early meetings that the City would fully co-operate; the mood and attitude then were very enthusiastic. The Georgian Glen land was strategically located to be of importance to the servicing of the new hospital to be built imminently on a neighbouring lot and which was urgently needed. The necessary planning applications to amend the official plan and zoning were filed by the plaintiff in 1989. Despite the plaintiff's expectation for the final subdivision plan to be approved by 1992, final approval did not occur until 1998. Given the urban context and no unusual problems presented by development of the land in question which was located close to municipal services, this is an unusual length of time for subdivision approval.

[3] On April 30, 2003, the plaintiff commenced this action. It claims general damages for "abuse of public authority" including return of monies paid under protest and carrying costs due

to delay totalling \$2,411,800. The plaintiff also claims punitive damages related to continued repeated breaches of statutory authority in the sum of \$100,000.

[4] The defendant City moves for dismissal of the plaintiff's action on the ground that the claims are either statute-barred due to expiry of the relevant limitation period, or because they do not raise a genuine issue for trial. Counsel for the City submitted that the statement of claim alleges 14 instances of abuse of public office and one claim of negligent misrepresentation, of which seven are barred by limitation expiry and the balance raise no genuine issue for trial. In oral argument, he also submitted that the entire evidential position of the plaintiff on this motion is unsatisfactory in that Mr. Scharf, the plaintiff's principal and affiant in both affidavits filed by the plaintiff, displays nothing more than his opinion of the City's motive; therefore, defendant's counsel suggests that there is no evidence of deliberate targeting of the plaintiff to cause it harm and so no tortious conduct is shown.

[5] Counsel for the plaintiff submitted that the plaintiff's evidence shows repeated deliberate acts by City officials over some 12 years in furtherance of a City policy to obtain benefits for the local community college, the new hospital and the City which are not authorized in law, to the detriment of the plaintiff who has had to pay for such benefits as well as its own carrying costs over the many years necessitated by the City's tactics. It is further submitted that, as the evidence in the motion record indicates, the City's demands were made incrementally throughout the planning process; failure to satisfy the defendant at any given time meant lack of City co-operation, delay, and added cost to the plaintiff, prejudice well known to City officials and professionals experienced in the planning and development process. One example is the letter of February 15, 1994 from the Chairman, of the City Development Committee speaking of continued City support of the secondary plan as a quid pro quo for servicing benefit to the hospital paid for fully by the plaintiff. (Sisson affidavit, exhibit N). He submitted that the evidence indicates knowledge by officials that their conduct went beyond their authority in law, and that they knew, or recklessly ignored, the likelihood of harm occasioned to the plaintiff throughout the process. He submitted that the alleged tortious conduct continued for several years up to and including 2004 when the City's allowance of development on the college's and hospital's portion of their land zoned for environmental protection drove the final nail into the City's rationale for its earlier acquisition without payment of the plaintiff's portion of a contiguous portion of similar land. He submitted that the issues of continuous tort and application of limitation law in these circumstances should be left to the trial judge.

[6] There has been a marked change in recent years in the accepted approach in law to what makes a genuine issue for trial and the corresponding degree of discretion of motion judges to make the call as to whether a genuine issue for trial has been shown. In the years following introduction of the revised Rules of Practice in 1985, this court arrived at the "hard look" approach described by Henry J. in *Pizza Pizza Ltd. v. Gillespie* (1990) 75 O.R. (2d) 225. On that approach, the objective was to screen out claims that could not survive scrutiny. It was expected that both sides would put forward the extent of their evidence and the motion judge would look at the issues, including differences in evidence on material facts in light of all the evidence, and decide whether in all the circumstances there really existed a genuine issue

requiring trial. In the more recent appellate approach *Aguonie v. Galion Solid Waste Material Inc.* (1998) 38 O.R. (3d) 161 (Ont.C.A.), the Court of Appeal held:

In reasons for judgment delivered prior to the decision of this court in *Ungerman*, ... Doherty J. considered the role of a motions judge hearing a summary judgment motion in *Masciangelo v. Spensieri* (1990), 1 C.P.C. (3d) 124 (Ont.H.C.J.). Doherty J.'s helpful analysis on this subject can be found at p. 129 et seq. See, also, *Filion v. 689543 Ontario Ltd.* (1994), 68 O.A.C. 389 at p. 394 (Div.Ct.), where White J. made the observation that the principles in respect to the role of a motions judge hearing a motion for summary judgment enunciated by Henry J. in *Pizza Pizza Ltd. v. Gillespie* ... have been modified considerably by the decision in *Ungerman* ... an observation with which I agree.

In reviewing the evolution of Rule 20, Doherty J. made this significant observation at p. 129: "The case law which has developed under Rule 20 promotes an expansive use of the rule as a means of avoiding expensive litigation where it is possible to safely predict the result without a trial." Morden A.C.J.O. made a similar observation in the passage which I have quoted from his reasons in *Ungerman* ... "It must be clear that a trial is unnecessary." As I read these observations, it must be clear to the motions judge, where the motion is brought by the defendant, as in this appeal, that it is proper to deprive the plaintiffs of their right to a trial. Summary judgment, valuable as it is for striking through sham claims and defences which stand in the way to a direct approach to the truth of a case, was not intended to, nor can it, deprive a litigant of his or her right to a trial unless there is a clear demonstration that no genuine issue exists, material to the claim or defence, which is within the traditional province of a trial judge to resolve.

[7] The motion judge's present role under rule 20, though it includes determination of questions of law, was described in *Aguonie* as "narrowly limited to assessing the threshold issue of whether a genuine issue exists on the material facts requiring a trial." Assessment of credibility, weighing of evidence and finding the facts are not issues for the motion judge; they are for the trial judge only. Despite the onus on the parties to put forth their best cases and reliable sources for material evidence, the motion judge is not to assess credibility issues involving any material fact.

[8] What is a genuine issue for trial comes down to whether there are conflicts in the evidence on material issues of fact and that issue is in turn dependant on there being present evidence to prove the essential ingredients of the cause of action. Not all facts are material to the cause of action being pursued, and not all conflicts involve material facts. I must look at the necessary elements of the alleged cause of action in this case and determine whether there is evidence relating to those elements which is in dispute and requires a trial to resolve. I have now had an opportunity to read all of the affidavits and exhibits filed.

[9] The tort in this case is variously referred to as abuse of public authority, abuse of public office, and misfeasance in public office. The Supreme Court of Canada resolved the nomenclature difficulty by referring to this tort as misfeasance in public office. The Court also defined the required elements, the essential ingredients, of the tort in the same case, *Odhavji Estate v Woodhouse* (2003) 3 S.C.R. 263. The Court stated that there are two categories of this tort. Common to both categories are the following elements:

- (1) the public official must have engaged in deliberate unlawful conduct as a public official;
- (2) the public officer must have been aware that the conduct was unlawful and that it was likely to harm the plaintiff.

The remaining elements are common to all torts,

- (3) the tortious conduct was the legal cause of the plaintiff's injuries;
- (4) the injuries suffered are compensable in tort law.

Neither (3) nor (4) are in issue on this motion.

[10] The two categories of misfeasance in public office come into play when one considers how it is proven. Category A is described by the Court in *Odhavji* as conduct that is specifically intended to injure a person or class of persons. Proof of this kind of targeting by a public officer satisfies both of the first two elements. Category B comprises cases of a public officer acting with knowledge that she/he has no power to do the act complained of and that the act is likely to injure the plaintiff. In category B, both elements (1) and (2) must be proven independently. (paras 22-29, and 32). It is category B in which this case resides.

[11] The plaintiff in this case has sued the municipality, a municipal corporation, rather than an individual officer or officers. The caselaw demonstrates that courts have not maintained any distinction between officer holders and the office itself. The tort of misfeasance in public office has been sustained against a wide variety of defendants including individual officer holders, municipalities and government ministries and bodies.¹ The seminal case of *Three Rivers District Council v. Bank of England* (2002) W.L.R. 1220 (H.L.) noted that the term "public office" has a wide meaning. *Three Rivers* and the other cases implicitly suggest that proceedings can be maintained against an individual office holder as well as against an entire entity as in this case.

¹ See *Roncarelli v. Duplessis*, [1959] S.C.R. 121; see *Namusa Enterprises Ltd. v. Etobicoke (City)*, [1990] O.J. No. 3156 (Ont.Gen.Div); and *First National Properties Ltd. v. Highlands (District)*, [1999] B.C.J. No. 2246 (S.C.), rev'd (2001), 88 B.C.L.R. (3d) 125 (C.A.), leave to appeal to the Supreme Court of Canada refused, [2001] S.C.C.A. No. 365; see *Cheticamp Fisheries Co-Operative Ltd. v. Canada* (1995), 139 N.S.R. (2d) 224 (C.A.), leave to appeal to the Supreme Court of Canada refused, [1995] S.C.C.A. No. 202; *Longley v. Minister of National Revenue*, [1999] B.C.J. No. 1705 (S.C.), aff'd (2000), 73 B.C.L.R. (3d) 222 (C.A.), leave to appeal to the Supreme Court of Canada refused, [2000] S.C.C.A. No. 256; *Simpson v. Chiropractors' Assn. (Saskatchewan)* (1999), 185 Sask. R.7 (Q.B.), rev'd on other grounds (2001), 203 Sask. R. 231 (C.A.); *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (1999), 70 Alta.L.R. (3d) 267, aff'd (2002), 8 Alta. L.R. (4th) 85 (C.A.), leave to appeal to the Supreme Court of Canada refused, [2003] S.C.C.A. No. 35; and *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14 C.A.).

[12] While the Supreme Court of Canada in *Odhavji* appeared to require actual knowledge of likely harm to the plaintiff, it cited *Three Rivers* with approval which envisaged a wider approach to the knowledge issue. Speaking for the court, Iacobucci J. clarified the requirement of subjective knowledge to include cases of recklessness or willful blindness in stating

... misfeasance in a public office is an intentional tort that requires subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct. At the very least, according to a number of cases, the defendant must have been subjectively reckless or willfully blind as to the possibility that harm was a likely consequence of the alleged misconduct; see for example *Three Rivers*, supra; *Powder Mountain Resorts*, supra; and *Alberta (Minister of Public Works, Supply and Services) (CA)*, supra.

[13] In this case, the plaintiff sets out 15 instances of alleged misfeasant conduct knowingly acted out by officials of the defendant. They include the following:

July 1989	City required replacement of planning consultants at plaintiff's expense	\$18,000 plus costs of delay
February 1990	City required stormwater study by a consultant different from the one hired by the plaintiff and then denied opportunity for input	\$37,500 plus costs of delay
February 1990	City required plaintiff to provide land and stormwater management facility to resolve problems caused by College development and City roads	Costs were incurred to purchase land in the neighbouring township, engineering and construction costs of a larger facility than that required for the plaintiff's land and costs of delay.
September 1991	City required plaintiff to pay stormwater report extras	\$20,000 – it is not clear if the City still claims these funds as owing and under what authority they were claimed
March 1989, 1998 and 2004	City required wet area of plaintiff's lands to be designated as environmental protection and dedicated to the City at no charge, later permitted College and Hospital to develop contiguous portions of the	Plaintiff lost the value of this portion of its land for development.

	environmental protection lands, despite lack of rationale for their designation and the cause being College failure to handle its own storm water	
1993 to August 1995 (signing of Municipal Benefits Agreement)	City required offsite municipal benefits or improvements as conditions for favourable subdivision review and support for the required Official Plan designation	
September 1995 to July 1996	City demands of municipal benefits from other developers as well as the plaintiff resulted in appeals of Official Plan amendment and rezoning of plaintiff's lands; City failed to use best efforts to resolve the appeal and used its support to lever from plaintiff offsite municipal benefits	Costs were incurred for delay as a result.
July 11, 1996	City required further study of Duckworth/400 interchange despite lack of any change to the conditions of draft subdivision approval by Council	Plaintiff incurred costs of \$8,500
September 1998	City prevented plaintiff from collecting from College and Hospital pro-rata share of service costs benefiting their lands and any subdivision agreement, this despite the assurance on August 26, 1988 that the City would look upon the institutions when proposing development as owner/developers (exhibit #3, Scharf affidavit)	Plaintiff incurred costs of \$150,000
September 1998	City required payment of legal fees beyond scope of the subdivision agreement	Cost incurred by plaintiff of approximately \$50,000 plus costs of delay
	City required plaintiff to pay for the subdivision-related	Plaintiff incurred \$8,200

	park design which the plaintiff alleges is covered by the City's development charge	
1992 to subdivision approval in 1998	Lost opportunity costs claimed by plaintiff	\$3,755,000 (exhibit #6, supplementary Scharf affidavit)

[14] The defendant attacks the evidence produced by the plaintiff as indicating no more than Mr. Scharf's opinion of the motive and purpose of the City and its officials. He relies on *Cole v Hamilton (City)* (2002), 58 O.R. (3d) 156 and *Ontario Society for the Prevention of Cruelty to Animals v. Ontario Veterinary Association* (1985), 51 O.R. (2d) 183. *Cole* is not this case. In *Cole*, the claimant's attack on a municipal "monster home" by-law was mounted against the city as a case of misfeasance in public office and conspiracy; in fact, despite voluminous evidence, the basis for the attack was only the claimant's opinion that the by-law targeted student housing. The by-law was actually directed at homes too large and dense for their lots and surroundings, some of which could be used for student housing, but there was no evidence to support the view that the by-law targeted student housing or the claimants as students. In the case before me, there is direct evidence and documentary evidence, at times from the City's own records of meetings, indicating that the City repeatedly required of the plaintiff matters not authorized by statute. At a meeting in 1994, during a discussion between councilors and the plaintiff's lawyer about a list of municipal benefits being required by the City and of a requested quid-pro-quo of development credits, the Committee Chair put to the plaintiff's lawyer that he must refrain from use of the word "legal" during the discussion. There is evidence of deliberate actions by the City and requests by the City, said to be beyond its authority as an approval authority, and no action to distribute equitably the cost of non-site-produced expenses benefiting neighbouring uses. The evidence of Mr. Scharf is that options of appealing to the court or to the Ontario Municipal Board would have only produced added prejudicial delay and cost by lengthy proceedings and long wait-times, conditions which were all well known to the City officials dealing with planning and land-use issues.

[15] It is significant that the defendant City's submissions at no time took issue with the description of the various items of conduct as lacking, or in excess of, the City's authority in law as alleged by the plaintiff. This case is far from the *Cole* situation. The passage cited by counsel for the defendant by Callaghan J. (as he then was) in the *OSPCA* case is apt to this case:

In this case the question of the motive, which prompted the council to act as it did, is a question of fact and is one, which should be decided at trial. There is a developing tort consisting of the infliction of damage by the deliberate abuse of public office or authority (*ibid.*) which by necessary implication permits a plaintiff such as that in this case, if it sustains damage as a result of such an abuse, to come to a common law court for its remedy and not necessarily rely on the remedies afforded through judicial review of such action.

[16] Though the Scharf affidavits at times do contain opinion, they and the defendant's motion record provide sufficient evidence to indicate a prima facie case of deliberate conduct amounting to various ultimatums by the approval authority, which, in the increasingly lengthening scenario, leveraged the plaintiff repeatedly to pay and move on. There may well be evidence to contest these allegations, which will be heard at a trial and considered; the affiant for the defendant on the motion had no personal knowledge of the circumstances in this case. It is not a case lacking any genuine issue for trial. Furthermore, I do not see that the context of the planning process is a bar to this action being considered by the court. Like private corporations, local authorities come within the general law, including tort law that requires individuals to be compensated for wrongs done to them. They may be sued for torts committed by them and be liable for damages resulting therefrom. Such damages may include punitive damages where the conduct of the officials of the municipality has been high-handed or arrogant. Municipalities acting through their officers and servants are liable for the tortious performance of their duties. One difference from other cases is that the determination of the liability of a municipal corporation is partly one of statutory interpretation and partly a question of the extent of application of the common-law rules of tortious liability. *Law of Canadian Municipal Corporation*, by I. MacF, Rogers (2d edition), volume 2 para. 252.1.

[17] In regard to the limitation argument, counsel agreed that the applicable limitation period is six years. [*Limitations Act*, R.S.O. 1990 Ch.L.15, s.45 (g)]. The defendant's submission is that each instance pleaded is a complete tort and the conduct was known at the time; therefore the first seven causes of action are statute-barred as arising beyond the limitation period. Six years prior to commencement of this action produces a date of April 30, 1997 as the outside limit for conduct founding a cause of action.

[18] I do not accept the defendant's characterization of the plaintiff's case as simply a list of individual independent torts. It is arguable that the defendant and its officials acted in a continuous coherent and repeated manner to the deliberate end of acquiring extras beyond municipal legislative authorization at substantial cost to the plaintiff, while being reckless or willfully blind to the likely harm to the plaintiff. For example, it has been held that municipalities may not require financial terms in regard to approval or support for an amendment to the Official Plan. *First City Development Corp. Ltd. et al v. Durham (Regional Municipality)* [1989] O.J. No. 87 (Ont.H.C.J). Yet there is evidence that the defendant did so.

[19] Several authorities indicate that in the case of deliberate torts of a continuing nature where the issues are contested, the trial judge should rule on the limitation issue. One, a case in this court, held that the limitation period should be calculated from the end of the continuing conduct. *Starline Entertainment Centre Inc. v. Ciccarrelli* [1995] O.J. No. 2494 (Gen.Div.) In that case Epstein J. held that a continuing tort can be explained as the continuance of the act which caused the damage. See *Ihnat v Jenkins* (1972) 3 O.R. (629) (Ont.C.A.); *Carey v Bermondsey Borough Council* (1903), 67 J.P. 447 (C.A.). Epstein J. went on to say:

What then is a "continuing cause of action"? It was described in *Hole v. Chard Union* [1984] 1 Ch. 293 at p. 296 ... (C.A.) as:

a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.

In that case, the defendants had polluted a stream by pouring in sewage and refuse. It was held that this was nuisance, and a continuing cause of action. At p. 296, A.L. Smith L.J. stated:

[The series of acts] were repeated in succession, and became a continuing cause of action. They were an assertion of the same claim – namely, a claim to pour sewage into the stream, and a continuance of the same alleged right.

Do the plaintiffs' claims stand up to this test? They allege that a continuing cause of action exists here because of Mrs. Palmer's chronic injuries. However, the actions of Mr. Major against them regarding the bingo licence ended around the end of October. On October 28, 1993 the Ministry informed Starline that its licence had already ceased to be valid. The moratorium had been lifted the day before. These were the last acts taken by the defendants, so the six-month period therefore ended in late April 1994.

[20] In *Genge v Canada* (1995) F.C.J. No. 1086, Jerome A.C.J. dealt with the case of repeated yearly rejections of a plaintiff's applications for a licence to fish between 1977 and 1989 which was alleged to constitute a continuing tort with the concomitant result that the plaintiff had from 1989 until 1995 to commence the action. The court in that case held that, though the wording of the general rule seems simple, its application is more difficult and calls upon the court to make a determination as to what facts are the material ones to start the clock ticking in respect of the commencement of the appropriate limitation period. It therefore left it to the trial judge to determine all of the facts following full argument on the law.

[21] In the circumstances of this case, it will be for the trial judge to determine the facts including whether the plaintiff proves the factual elements required to prove misfeasance in public office. The defendant certainly does not concede the necessary knowledge of likely harm to the plaintiff and lack of authority, though it did not contest lack of, or excess of, authority on this motion. It should be left to the trial judge to deal with the limitation issues in all the circumstances and on the conduct as he or she finds it. It should be added that nothing in these reasons is to be taken as a comment on the likelihood of success at trial. In my view there are genuine issues for trial in this case and therefore the action cannot be summarily dismissed. The application of the law of misfeasance in public office in the planning process appears to be a somewhat novel one requiring a complete record to determine the issues including the limitation issues and the characterization of continuing tort.

[22] I understand that the statement of claim will be amended by the plaintiff to clarify that negligent misrepresentation is not being claimed in respect of the College's future plans and any reference to them by the City. The plaintiff's position is that it was compelled by the City to

provide the stormwater pond for off-site lands at its sole expense in order for it to get approval from the defendant.

[23] For the reasons given, the motion for judgment under rule 20.01(3) is dismissed. Counsel may file written submissions as to costs directed to me at my chambers in Barrie within 30 days of the release of this Endorsement.

HOWDEN, J.

DATE: October 14, 2005

CORRIGENDA

1. Page 3, first paragraph now reads: Pizza Pizza Ltd. v. Gillespie
2. Page 4, para 10, line 7: (paras) 22-29, and 32).
3. Page 7, para 16, line 6: It is not a case lacking any genuine issue for trial.