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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SYLVIA SCOTT and ROBERT SCOTT

)
)
) **Paul Gemmink, for the Plaintiffs**
)
)
)

Plaintiffs

- and -

IAIN PIKE and MARION PIKE

)
)
) **Paul S. Lenardon, for the Defendants**
)
)
)

Defendants

) **HEARD: February 26, 2008**

RULING ON MOTION

Graham J.:

Issue

[1] On the basis of a claim for private nuisance, the plaintiffs seek an interlocutory injunction preventing the defendants from operating the outdoor wood-fired boiler (OWB) located on the defendants' residential property.

Background

[2] The plaintiffs, the Scotts, and the defendants, the Pikes, have been next-door neighbours since the plaintiffs moved into their home in 2004. They live in a predominantly rural area south of the town of Uxbridge.

- 2 -

[3] The defendants state that until the fall of 2006 they heated their home using an interior wood-burning fireplace insert and, rarely, an oil furnace. They state that they also used a wood-burning stove and a kerosene heater to heat their garage. They state that their annual heating costs were about \$900 per year compared to \$3,500 per year paid by the previous owners of their house who used the oil furnace and did not heat the garage.

[4] The defendant, Mr. Pike, operates a tree cutting and trimming business. He uses wood cut in the course of his business for heating purposes. This benefits him twice because he does not have to pay for the wood and he does not have to pay to dispose of it.

[5] The defendants state that they received some complaints from the plaintiffs about smoke from the fireplace insert although they did not receive any complaints about smoke from the previous owners of the plaintiffs' house.

[6] The defendants state that after the winter of 2005/06 they were worried about chimney fires and felt that they would have to install a stainless steel liner in the chimney in order to continue to use the fireplace insert. They also state that the wood stove had then fulfilled its life expectancy and had to be replaced.

[7] The defendants approached their next-door neighbours, on either side, and asked if they would be interested in buying an OWB together.

[8] An OWB is a wood-fired furnace that is usually housed within a small insulated shed located some distance from a house. Inside an OWB is an oversized firebox that can accommodate large loads. Surrounding the firebox is a water jacket that can be heated. The OWB cycles water through the jacket and delivers hot water to the house by water pipes that run underground to deliver hot water for both space heating and domestic use.

[9] The plaintiffs were not interested. They state that they told the defendants that they were concerned about smoke. The defendants deny that the plaintiffs mentioned smoke. In any event, the neighbours on the other side of the defendants, the Kerrigans, agreed to participate.

[10] In the fall of 2006, an OWB was installed in the defendants' backyard. The defendants state that the cost of the OWB was about \$13,400 including installation.

[11] The plaintiffs state that they complained to the defendants about smoke from the OWB the first day it was used and that they have suffered as a result of smoke from the OWB many times since.

[12] The plaintiffs submitted copies from a daytimer which they say contains references to some of the occasions that the OWB emitted smoke onto their property.

[13] The entry for October 10, 2006, the day the OWB was first fired up, indicates that Ms. Scott spoke with Mr. Pike as the plaintiffs' house was full of smoke because their windows were open.

- 3 -

[14] The daytimer contains five entries for November of 2006. They are: "smoke in bedrooms" (November 4), "Great can't get to sleep smoke in bedrooms" (November 5), "Phoned Pike bedrooms stink Clark on sofa again" (November 9), "house stinks" (November 21), and "house stinks of smoke Clark on sofa again" (November 29).

[15] There are seven entries for December of 2006. They are: "house stinks of smoke" (December 3), "house once again smells of wood smoke I'm really getting ticked" (December 13), "tired stinks of smoke" (December 14), "stinks of smoke (am)" (December 15), "house stinks of smoke" (December 24), "house stinks of smoke...getting really tired of this stench" (December 25), and "house stinks of smoke Great Xmas" (December 27).

[16] In January of 2007 there are five entries: "smokey and smells at 3 am Happy New Year" (January 1), "stinks Clark on sofa" (January 3), "stinks Getting...woken up AGAIN ridiculous" (January 4), "stinks" (January 5), and "spoke to Pike asked to switch off furnace, would only switch off fan for a couple of hours We warned we would have to take action" (January 26).

[17] In January of 2007, the defendants had the OWB moved a short distance within their backyard. They state that they paid \$1,400 to have the OWB moved further from the plaintiffs' house because of the plaintiffs' complaints. As a result of the move, the OWB is now about 90 to 100 feet from the plaintiffs' house.

[18] The plaintiffs' daytimer contains two entries for February of 2007. They are: "stinks" (February 19) and "stinks" (February 21).

[19] The defendants state that they used the OWB until the end of March of 2007 and did not use it again until the fall of 2007. In the interim, they increased the height of the OWB's smokestack, at a cost of about \$800, in an effort to address the plaintiffs' concerns. Mr. Pike states that he also installed a variable fan which he uses to reduce the amount of smoke when the wind is blowing towards the plaintiffs' property. He states that, for the same reason, he does not open the damper when the wind is blowing towards the plaintiffs' house. Mr. Pike also states that he built a device which passes smoke through a curtain of water, thereby removing most of the particulate matter from the smoke, but he found that the device is not practical for use during the winter.

[20] The plaintiffs' daytimer has five entries for November of 2007: "wood furnace ignited" (November 9), "stinks of smoke" (November 11), "stinks of smoke" (November 12), "stinks of smoke" (November 23) and "woken at 4:45 am stinks of smoke unable to get to sleep" (November 24).

[21] There are seven entries for December of 2007: "smoke in bedroom Rob woken up...went outside in afternoon garden stinks but not of normal wood suspect green wood" (December 17), "House and front of property smells of smoke" (December 21), "smells bad in and out the house" (December 22), "stinks of smoke in and out" (December 23), "stinks of smoke in and out" (December 24), "Went to get dogs out back stench took my breath away" (December 25) and "took dogs out stinks out back and smell of smoke in bedroom 06:30...cleaning ice stinks out front - afternoon" (December 30).

- 4 -

[22] No further daytimer entries were provided.

[23] The plaintiffs state that their property is affected when the wind blows anywhere from 70 degrees to 240 degrees on the compass and that they are affected most when the wind blows from 190 degrees to 240 degrees because of the location of their house. They state that because their home is 5 to 6 feet lower than their backyard, any emissions blowing into the back garden tend to roll down the bank and hang around the back of their house.

[24] The plaintiffs state that they are unable to exercise their dogs for a suitable time when the wind blows smoke onto their property because the smell of the smoke clings to the dogs' coats and is particularly obnoxious.

[25] The plaintiffs state that when the smoke is blowing towards their house they are not able to open their windows or spend much time outside. They state that the smell prevents them from getting to sleep or wakes them up during the night at times. They state that as a result they are tired at work. They state that their son has to leave his bedroom and sleep in on the sofa in the living room at times because of the smell of smoke. They state that none of them had problems sleeping before the OWB was installed.

[26] The plaintiffs state that since the OWB was installed they have experienced an increased frequency of headaches and eye, sinus, and throat irritations. They state that the stress of living with the emissions of the OWB is affecting them. Ms. Scott states that she enjoys exercise and running but she is unable to complete her routines because of shortness of breath caused by the inhalation of smoke particles. She states that she has recently been prescribed Ventolin by her physician and has been referred to the Stouffville Hospital for testing as a result of her symptoms.

[27] The plaintiffs submitted material, authored recently by the Northeast States for Coordinated Air Use Management (NESCAUM) and the Environmental Protection Bureau under the auspices of the Attorney General of New York State, indicating that OWB's are environmentally unfriendly.

[28] The NESCAUM report, for example, indicates that wood smoke contains a complex mixture of particles and gases, many of which have been shown to produce acute and chronic biological effects, as well as deleterious physiologic responses in exposed humans. The report indicates that the abundance of fine particulates in wood smoke presents a serious health risk to exposed populations. The report indicates that fine particulate matter can be delivered into the deep lung by wood smoke and that exposure to airborne fine particulate matter is associated with cardiopulmonary effects, aggravated asthma, decreased lung function, and chronic bronchitis. The report indicates findings that the emissions from a single OWB are equivalent to emissions from 4 non-certified wood stoves or 10 to 22 EPA certified wood stoves or 205 oil furnaces or 3,000 to 8,000 natural gas furnaces and that 1 OWB can emit as much fine particulate matter as 4 heavy duty diesel trucks. The report also indicates that the gases emitted from OWB's are associated with serious health effects.

[29] Mr. Scott states that he is a licensed industrial instrument mechanic. He states that he carried out a measurement of fine particulate matter on the nights of February 14/15 and 16/17,

2008 in the rear extension of his home. He states that readings exceeded 100 parts per million for significant periods of time. The plaintiffs submitted excerpts from the Ontario Ministry of the Environment website indicating that readings over 100 parts per million are considered to indicate very poor air quality that can cause severe respiratory effects.

[30] The defendants state that they burn only seasoned wood that has been cut, split and stacked for at least 6 months. They state that they and their two young children have not experienced any ill effects from smoke, smoke smell, or particulate emissions from the OWB and that none of their house, garage, vehicles, or dog, smell of smoke. They state that they rarely smell smoke in their yard and have not smelled smoke in their house since installing the OWB. They state that none of their friends or family who visit has complained about the smell of smoke. They state that the Kerrigans, next door, have no smoke concerns.

[31] Mr. Pike states that he drove along the road that is several hundred feet behind his home and counted 8 houses that were using wood-burning fireplaces or stoves based on his observations and the smell of the smoke. He states that he believes that wood-burning households are common in the Uxbridge area. He did not, however, indicate whether anyone else in the area has an OWB.

[32] The defendants state that there are other sources of smoke near the plaintiffs' home including diesel-powered gravel trucks that pass by on the highway nearby. They suggest that the plaintiffs may smell smoke because their home is under renovation and might not be well-sealed. They also suggest that Ms. Scott's breathing difficulties may be due to the presence of dust, dog hair, or mould in her home. They also suggest that the plaintiffs are overly sensitive and are unreasonably attempting to exert control over their environment.

[33] The defendants submitted letters from friends, acquaintances and relatives to the effect that they have never noticed excessive smoke at the defendants' home.

[34] Mr. Pike states that the defendants and the Kerrigans intend to use their interior wood-burning fireplace and/or stoves for heat if the OWB must be shut down. He states that he believes that the use of the interior fireplace and/or stoves will cause the plaintiffs to have the same complaints that they have now.

[35] The defendants provided a study which suggests that the NESCAUM report unfairly compares the particulate matter output of an OWB over time with the particulate matter output of other types of wood stoves over time. The report suggests that because OWB's heat larger areas, a fairer comparison would be relative particulate matter output per unit of heat generated or per unit of fuel burned. Based on that approach, the study indicates that OWB particulate matter output averages only about 22 to 25 percent higher than EPA certified wood stoves.

[36] In reply to some of the defendants' statements, Ms. Scott states that she has owned dogs all her life and they have never caused her difficulty breathing. She admits that there is some mould in her house but states that the mould existed before the OWB was installed and she did not have breathing difficulties then. She also admits that trucks use the road in front of her house but states that although there are far more trucks in the summer than in the winter, her breathing problems occur only in the winter and only since the installation of the OWB. Ms. Scott further

- 6 -

admits that their house is under renovation but states that the renovations are properly sealed. She adds that, in any event, the house is not new and is not completely airtight. Ms. Scott states that she was never bothered by the Pike's use of their interior fireplace.

The Law - Interlocutory Injunction

[37] The test for an interlocutory injunction has recently been reviewed by MacPherson J.A. in the context of a stay application pending an appeal in *Ontario v. Shehrazad Non Profit Housing Inc.* (2007 ONCA 267) wherein he related that Weiler J.A., in *Longley v. Canada (Attorney General)*, [2007] O.J. No. 929 at para. 14 (C.A.) had recently reaffirmed the test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, as follows:

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be determined on appeal. Second, the court must determine if the appellant would suffer irreparable harm if the application were refused. Finally, the balance of convenience must be determined by assessing which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[38] The court must also bear in mind that, "a pre-trial injunction is a drastic and extraordinary remedy. Thus it should be granted only in those circumstances which warrant taking such a drastic and extraordinary step." (see *Kanda Tsushin Kogyo Co. v. Coveley*, [1997] O.J. No. 56 (Ont. Div. Ct.)).

[39] In addition, Rule 40.03 of the *Ontario Rules of Civil Procedure* requires the moving party for an interlocutory injunction to undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party, unless the court orders otherwise.

Serious Issue to be Tried

[40] The test for a serious issue to be tried was reviewed by MacPherson J.A. in *Shehrazad Housing* wherein he cited Laskin J.A. in *Circuit World Corp. v. Lesperance et al.* (1997), 33 O.R. (3d) 674 (C.A.) at 676-7 as authority that, "the court should not extensively review the merits" but must, nevertheless, determine that the issues raised are not frivolous or vexatious.

[41] In this case, that determination requires a review of the law of private nuisance.

[42] Linden, in *Canadian Tort Law (Seventh Edition)* (2001) (Butterworths), at pages 525-536, says:

Private nuisance may be defined as an unreasonable interference with the use and enjoyment of land....it is an environmental tort. The use of the term "unreasonable" indicates that the interference must be such as would not be tolerated by the ordinary occupier. The court need not,

therefore, be concerned with the effect of the defendant's conduct on any other members of the community, other than the occupier.... The onus of proof that the defendant caused an unreasonable interference with the use and enjoyment of the plaintiffs' land rests on the plaintiff, but once that is shown, the onus is on the defendant to establish that the use of the land was reasonable.... In determining whether there has been an unreasonable interference with the use and enjoyment of the plaintiffs' land, the court balances the gravity of the harm caused against the utility of the defendant's conduct in all of the circumstances. As for the harm element, the court examines the type and severity of the interference, its duration, the character of the neighbourhood and the sensitivity of the plaintiff's use. As for the conduct of the defendant, the court looks at the object of the activity undertaken and the attitude of the actor towards the neighbours.... The interference caused to the plaintiff's use of the land must be substantial. No compensation will be awarded for trivial annoyances.... Damages for injury to health may be recovered in an action for nuisance if there is also interference with the use and enjoyment of land.... If the defendant's conduct causes only an inconvenience or a minor discomfort to the plaintiff, it is unlikely that the court will hold it to be a private nuisance."

[43] Linden cites the *Restatement of Torts* (4 Restatement of Torts, Second, Comment "G", p. 112, (1965) (The American Law Institute)) as follows:

Life in an organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities, unless carried on in a wilderness, interfere to some extent with other or involve some risk of interference, and these interferences range from trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience, and interference, and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends on the principle of "give and take, live and let live", so that the law of torts does not attempt to impose liability or shift the loss in every case where one person's conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances.

[44] Linden adds that, "Whether an annoyance is trifling and must be put up with or whether it is serious and actionable is not always easy to determine." He adds, citing Fleming (*The Law of Torts*, 9th ed. (1998)) at p. 467, that, "It is clear that "not all amenities...commonly associated with the beneficial use of land are vindicated by the law of nuisance."

[45] Linden also cites Salmond (*Salmond and Hueston on the Law of Torts*, 19th ed. (1989)) at p. 49, as follows, "The truth is that all wrongful escapes of deleterious things, whether continuous, intermittent or isolated, are equally capable of being classed as nuisances. The type of harm caused by the escape, the gravity of that harm, and the frequency of its occurrence are

- 8 -

each relevant (but not conclusive) factors in determining whether the defendant has maintained on his premises a state of affairs which is a potential nuisance."

[46] Linden cites Fleming (*supra* at p. 467) stating, "a "tolerable balance" must be struck between the competing interests of the landowners "each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other." and adds, "The ultimate question to be asked is whether the defendant is using the property reasonably having regard to the fact that the defendant has a neighbour."

[47] Fleming (*supra*) identifies the ultimate question as follows, "Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, having regard to the prevailing standard of comfort of the time and place. Reasonableness in this context is a two-sided affair. It is viewed not only from the standpoint of the defendant's convenience, but must also take into account the interest of the surrounding occupiers. It is not enough to ask: Is the defendant using his property in what would be a reasonable manner if he has no neighbour? The question is, "Is he using it reasonably, having regard to the fact that he has a neighbour?"

[48] In *340909 Ontario Ltd. v. Huron Steel Products (Windsor) Ltd. And Huron Steel Products* (1992), 9 O.R. 3d 305n, the Ontario Court of Appeal upheld a permanent injunction granted at 73 O.R. (2d) 641 (H.C.J.O.) by Potts J. who cited the passages from Fleming noted above and added that "each case must be considered in light of the particular facts in question", citing Hodgins J.A. in *Oakley v. Webb* (1916), 33 D.L.R. 35, 38 O.L.R. 151 (O.C.A.) who stated that "the rule...adopted by Sutherland J., in *Beamish v. Glenn*, 36 O.L.R. 10... is the proper test to be applied...It is that "an arbitrary standard cannot be set up which is applicable to all localities. There is a local standard applicable in each particular district, but, though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances." Potts J. continued by stating that, "Unreasonableness" in nuisance law is when the interference in question would not be tolerated by the ordinary occupier. What constitutes "unreasonable interference is determined by considering a number of factors:

- (1) the severity of the interference, having regard to its nature and duration and effect;
- (2) the character of the locale;
- (3) the utility of the defendant's conduct;
- (4) the sensitivity of the use interfered with."

[49] In *Beamish v. Glenn*, the Ontario Court of Appeal upheld a permanent injunction granted by Sutherland J. based upon a private nuisance caused by smoke, odours, and noise emanating from a blacksmith's shop during business hours onto its neighbour's adjoining residential property even though the trial judge found that there was a great deal of noise in the locality from factories and considerable other smoke as well (see [1916] O.J. No. 178, 36 O.L.R. 10).

