Final Ruling
April 27, 1988

Court ordered

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY
INDICTMENT NO. C-4474-75

CITY OF PERTH AMBOY,

Plaintiff,

vs.

COURT'S DECISION

MADISON INDUSTRIES, et al.,

Defendants.

Middlesex County Courthouse
New Brunswick, New Jersey
January 27, 1988

BEFORE: JOHN E. KEEFE, J.S.C.

APPEARANCES:

Albert W. Seaman, Esq.,
-and-
David Tykulsker, Esq.,
Attorneys for the Plaintiff

Ronald P. Heksch, Esq.,
Deputy Attorney General,
Attorney for the DEP

Schwartz, Tobia & Stanziale, Esqs.,
By: Theodore A. Schwartz, Esq.,
Attorneys for CPS

Sterns, Herbert & Weinroth, Esqs.,
By: William J. Bigham, Esq.,
Attorneys for Madison Industries

Stanley Grabon, C.S.R.
Official Court Reporter

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COMPUTER AIDED TRANSCRIPT

1 January 27, 1988.)

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3 THE COURT: The motion by Mr.
4 Tykulsker to be relieved of counsel will be
5 granted. I think clearly at this point in the
6 litigation the conflict of interest between Mr.
7 Tykulsker and his client is apparent.
8 I think that I should state for
9 the record why it was that I felt that Mr.
10 Tykulsker should initially be permitted to
11 participate. I agree that Mr. Schwartz is
12 correct in the final analysis. He's the one
13 who complained most strenously about Mr.
14 Tykulsker's intervention. But perhaps he's
15 right for the wrong reason. As I understood
16 the way this case was presented to the court,
17 we were dealing with the question of whether
18 Judge Furman's initial order of remediation
19 could be implemented. I think that it is now
20 abundantly clear from Judge Furman's bench
21 opinion, which I've read into the record today,
22 from his written opinion, which is on file, and
23 everyone has a copy of, and from the Appellate
24 Division opinion, that the remediation plan was
25 a plan that was keyed into a bentonite wall

1 with the South Amboy fire-clay. And that Judge
2 Furman was aware of the fact that there might
3 be problems concerning it, and those problems
4 might require further applications to the
5 court.
6 I can only assume that the
7 Appellate Division was also aware of those
8 contingencies and, as a matter of fact,
9 recognized additional contingencies in terms of
10 costs, and for that reason they lifted the
11 ceiling on costs for remediation when they
12 remanded the case to Judge Cohen for the entry
13 of a judgment.
14 I am satisfied that D.E.P. in the
15 trial before Judge Furman, from the record that
16 I have read, took the position that Dames &
17 Moore option number one was satisfactory to
18 them, and it is that option which Judge Furman
19 alluded to in deciding the case both orally and
20 in writing. When it became obvious to D.E.P.
21 at least, and perhaps the defendants, by reason
22 of their involvement, that there may be some
23 problems with the continuity of the South Amboy
24 fire-clay, they embarked upon another
25 remediation plan, without notifying Perth Amboy

1 and without notifying the court. In my view
2 that was a bad mistake. I have already stated
3 that on the record, stated my reasons for it,
4 and I think that I have to go no further with
5 it.
6 But at that juncture, when D.E.P.
7 came into this court to vacate Judge Furman and
8 Judge Cohen's prior order of remediation, the
9 essential issue was whether the South Amboy
10 fire-clay was continuous so that the wall could
11 be tied into it. There's no question that it's
12 on the record, and Mr. Seaman has conceded
13 that. And it was my view that further borings
14 would conclusively prove whether that was the
15 case or not.
16 I guess that I am scientifically
17 naive. I thought that although lawyers
18 disagree about almost everything that happens
19 in life, that scientists would not and,
20 therefore, they would agree upon what the
21 borings showed. And I thought that would end
22 the litigation. And there was no objection to
23 that by Perth Amboy, other than the fact that
24 the City of Perth Amboy has always taken the
25 position that Judge Furman's and Judge Cohen's

1 order should remain inviolate, and there should
2 be no attack on it, and it should be enforced
3 as written.
4 But getting beyond that point,
5 when it became clear that I was taking the
6 position that I would not order a remedial plan
7 that was environmentally unsound, Perth Amboy
8 never took the position that if the South Amboy
9 fire-clay was discontinuous, the Woodbridge
10 clay was and, therefore, the wall should be
11 tied into the Woodbridge clay. So when I
12 ordered the borings, it was for the sole
13 purpose of determining whether the South Amboy
14 fire-clay was continuous.
15 It turned out that my inexperience
16 in scientific matters showed that scientists
17 could disagree on what borings revealed. And,
18 therefore, I could not conclude the case, I
19 guess it was March of '86, at that time when I
20 thought it might be concluded, and I felt it
21 best to engage what I believed to be an
22 independent expert, a person with impeccable
23 credentials in terms of geology, to interpret
24 those borings and to advise the court and
25 counsel of his views as to whether the South

1 Amboy fire-clay was present or not present and
2 whether it was continuous or not.
3 I think Dr. Olson acted rather
4 promptly, considering the magnitude of the
5 undertaking. And thereafter, when his report
6 was furnished, I gave to it all counsel and
7 asked for their comments. The City of Perth
8 Amboy took the position that Dr. Olson's report
9 was erroneous; the South Amboy fire-clay was in
10 fact present and continuous. Therefore, as the
11 case shaped up for trial, it appeared to me
12 that if the South Amboy fire-clay was
13 discontinuous, the only question after that was
14 going to be a question of remedy. And I gave
15 the City of Perth Amboy the opportunity to
16 present experts on both issues. That was
17 memorialized in my letter of October 14, 1987.
18 That letter, by the way, resulted from a prior
19 conference between the court and counsel.
20 Mr. Seaman advised all of us that
21 his expert, Petruzzelli, would testify on the
22 question of South Amboy clay, and at one point
23 in time he had no expert on the remedy aspect
24 of the case. Therefore, I addressed that
25 question in paragraph two of my letter of

1 October 14, and I advised Mr. Seaman that if he
2 wished to submit an expert on the second issue,
3 namely the remedy issue, that he may do so.
4 And I set forth a date when he was to do so,
5 and I indicated that reasonable extensions of
6 time would be granted to the city.
7 The December trial day was
8 December 10th, and Mr. Seaman asked for an
9 adjournment for personal reasons, and I granted
10 it to him. We had a discussion on the record
11 that day in which he indicated that he had no
12 expert, other than Petruzzelli, and then
13 indicated at a later time point in time through
14 the entrance of Mr. Tykulsker that he had
15 engaged co-counsel on the issue of remedy; that
16 the City of Perth Amboy's remedy position was
17 essentially the same as that of Old Bridge
18 Township's. So I thought there would be no
19 conflict of interest, since Perth Amboy's
20 interest only was in the presence or absence of
21 the South Amboy fire-clay, and as far as the
22 remedy issue was concerned, their interest was
23 the same as the Township of Old Bridge. So I
24 thought Mr. Tykulsker could enter the case
25 without conflict.

1 It seems clear to me that Mr.
2 Seaman's interest shifted somewhat during the
3 trial of this case through perhaps something he
4 heard from Dr. Olson concerning the Woodbridge
5 clay and its continuity, and he recalled
6 obviously option two of the Dames & Moore
7 report, which I had not been aware of before
8 that time because I had not been the trial
9 judge, and decided to take the tact that if the
10 Woodbridge clay was present, but the South
11 Amboy clay was not, that the court might want
12 to order option two of the Dames & Moore report
13 as the remedy.
14 Well, that would have been a
15 satisfactory approach to the case had we all
16 been advised of it, if not two years ago, at
17 least six weeks ago, because that issue
18 concerning the Woodbridge clay is a remedy
19 issue, essentially. We were not advised of it.
20 That created the conflict for Mr. Tykulsker.
21 It's obviously something that had not been
22 contemplated by anyone before this trial began
23 and, I think, Mr. Tykulsker could not be blamed
24 ethical for entering this case, nor do I think
25 that I was wrong for permitting his entry at

1 that moment in time. It appears at this time,
2 however, that there is an irreconcilable
3 conflict, and he must be relieved of obligation
4 to represent Perth Amboy in this case.
5 Old Bridge's motion to intervene
6 is denied. I don't want to beat a dead horse.
7 I have said on the record many, many times why
8 I think Old Bridge's entry into this case is
9 too late and why it's Perth Amboy, D.E.P., and
10 the defendants who have the interest in the
11 prior judgment of this court and why it is that
12 I think the D.E.P., as the state agency charged
13 with the responsibility for environmental
14 cleanups, has the interests of Old Bridge,
15 Perth Amboy, and everyone else in the state
16 hopefully in mind when it embarks upon a
17 remediation plan.
18 The motion to continue the trial
19 of this case is denied. I have already gone
20 through the history of this case. We all know
21 how long it has been since this pollution has
22 affected the ground water in this area, how
23 long the implementation of a remedy has been
24 delayed by endless legal battles, and I suspect
25 that these proceedings point out, if no other

1 proceeding in the state has, why the trial
2 setting is inappropriate for the resolution of
3 remediation plans in environmental cases. It
4 may be very appropriate for damage remedies.
5 It may be very appropriate for enforcement
6 remedies. It is inappropriate in terms of
7 deciding what remedy should be adopted.
8 The fact of the matter is in terms
9 of due process, speaking like a lawyer and a
10 judge, we have given every opportunity to the
11 City of Perth Amboy to be heard on the question
12 of remedy. Option two of the Dames & Moore
13 report was clearly better known to Perth Amboy
14 than it was to this court in terms of the
15 alternative remedy, if the original court
16 ordered remedy could not be imposed. No
17 mention was made of it until yesterday. I
18 think everyone, including Mr. Tykulsker,
19 co-counsel for the City of Perth Amboy,
20 yesterday was shocked by the approach taken by
21 the city concerning the Woodbridge clay.
22 I think the remedy issue has been
23 delayed long enough. I have no idea, no idea,
24 except from the testimony of Dr. Olson, that
25 the Woodbridge clay is present and continuous,

1 whether it is otherwise suitable as the bottom
2 of a bathtub to prevent the pollutants from
3 leaching further into the soil or into the
4 ground water. I have no idea whether it
5 presently is acceptable state of the art in
6 terms of remediation. I don't know how long a
7 continuation would take to get that type of
8 information before the court. But what I do
9 know is that the expert that Perth Amboy two
10 weeks ago claimed was going to be their expert
11 on remediation, Dr. Uhl, has taken the position
12 that the bathtub containment theory is not an
13 appropriate remediation theory.
14 The time has come when I think
15 that we have to make a decision once and for
16 all on the issue of remedy. This trial was
17 established for December 10th to do that. It
18 was adjourned until this week. I see no point
19 in putting it off further. Therefore, Mr.
20 Seaman, I direct that you will have to either
21 present your case on remedy or the court will
22 order the remedy which is set forth in the
23 state's application to the court in September
24 of 1985. You may proceed, sir.
25 MR. SEAMAN: I do not choose to

1 proceed. I do not choose to proceed.

2 THE COURT: Mr. Heksch?

3 MR. HEKSCH: I have nothing

4 further at this time, your Honor. There has

5 been some discussion about the order that was

6 presently submitted in court two years ago.

7 Because of the time lapse since the submission,

8 there may be some staleness in some of the

9 dates in that order, and we would like to be

10 given an opportunity to review it, and if

11 appropriate, revise it and submit it under the

12 five day rule.

13 THE COURT: I want to make sure,

14 and I thought that I brought it out with me --

15 yes, I do have it here. Okay. You forwarded

16 to this court on November 25, 1986 a notice of

17 motion for approval of consent order amending

18 judgment of June 14, 1983, along with a

19 certification of Daniel Toter in support

20 thereof. Except for the possible staleness of

21 dates set forth in that consent order, I want

22 to make sure that the state's position on the

23 record today is that the remedy plan is going

24 to be essentially that as set forth in the

25 proposed consent order.

1 MR. HEKSCH: Correct.

2 THE COURT: Okay. Then it will be

3 the court's order that that plan will be

4 adopted as the order of this court. I want to

5 also state for the record, because I know that

6 this case may not end here, that the testimony

7 today in court and the prior expert reports

8 filed in this matter I think conclusively

9 establish if this court had ordered the

10 so-called court ordered plan of Judge Furman

11 and Judge Cohen which required these defendants

12 to tie into the South Amboy fire-clay, that the

13 pollution of the ground water in this area

14 would have continued, and that clearly I think

15 has been established by the testimony in this

16 case that the court ordered plan was

17 environmentally unsound because of insufficient

18 data available to the court at that time.

19 You may submit the order, Mr.

20 Heksch.

21 MR. HEKSCH: Thank you, your

22 Honor:

23 THE COURT: I would like to state

24 on the record that the court is returning all

25 exhibits marked into evidence to the parties

1 who offered the exhibits, so that it is clear
2 as to who has the responsibility for retaining
3 exhibits. I also want to indicate for the
4 record that the court will not stay any
5 judgment entered by it based upon this trial.
6 So no application for a stay should be made.
7 The record should reveal that all applications
8 for stay will be denied. I order that the
9 remedy be implemented as soon as the order is
10 executed by the court. Any stay will have to
11 be granted by the Appellate Division
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6 C_E_R_T_I_F_I_C_A_T_E
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8 I, STANLEY GRABON, C.S.R. #XI00377,
9 an Official Court Reporter of the State of
10 New Jersey do hereby acknowledge that the
11 foregoing is a true and accurate transcript
12 of my stenographic notes of the within
13 proceedings to the best of my ability.
14
15 STANLEY GRABON, C.S.R.
16 OFFICIAL COURT REPORTER
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