IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *DGBK Architects v. CWMM Consulting Engineers Ltd.,* 2024 BCSC 1356

Date: 20240605
Docket: S218845
Registry: Vancouver

Between:

DGBK Architects, Greg Dowling Architect Inc., Sebastian Butler Architect Inc., Ralf Janus Architect Incorporated, Robert Lange Architect Inc., and Sebastian Butler

Plaintiffs

And:

CWMM Consulting Engineers Ltd., Nemetz (S/A) & Associates Ltd., Gage Babcock & Associates Limited, Jensen Hughes Consulting Canada Ltd., Eckford Tyacke + Associates, Eckford & Associates Landscape Architects, Eckford + Associates Landscape Architecture Inc., SRC Engineering Consultants Ltd., Vector Engineering Services Ltd., AquaCoast Engineering Ltd., Aqua-Coast Building Envelope Consulting Inc., Aqua-Coast Engineering (2009) Ltd., and AquaCoast Restoration Consulting Inc.

Defendants

Before: The Honourable Justice Tammen

Oral Reasons for Judgment

In Chambers

Counsel for the Defendant, Nemetz (S/A) & Associates Ltd.:	C.B.P. Elder E. Colins, Articled Student
Counsel for the Defendant, SRC Engineering Consultants Ltd.:	N. Steinman
No other appearances.	
Place and Date of Hearing:	Vancouver, B.C. May 1, 2024
Place and Date of Judgment:	Vancouver, B.C. June 5, 2024

[1] **THE COURT:** This is an appeal from the order of Master Harper, now Associate Judge Harper. The order appealed from permitted the respondent SRC Engineering Consultants Ltd. (“SRC”), to file a third-party notice against multiple parties, including the appellant, Nemetz (S/A) & Associates Ltd. (“Nemetz”).

[2] The application was heard by Harper A.J. on April 24, 2023, and on August 14, 2023, she issued comprehensive reasons for judgment (indexed at 2023 BCSC 1410 [*Harper Reasons*]). The essential factual background, with which no issue is taken, is succinctly set out at paras. 1–6 of *the Harper Reasons*:

> The defendant, SRC Engineering Consultants Ltd. ("SRC"), seeks leave to file a third party notice against the defendant, Nemetz (S/A) & Associates Ltd. ("Nemetz"), pursuant to Rule 3-5(4)(a) of the *Supreme Court Civil Rules* [*Rules*]. The application is in the context of a multi-party dispute arising from the design and construction of a retirement living building in Surrey, British Columbia (the "project").
>
> The owner of the project, Prime Time (Abbey Lane) Inc., commenced an action in the Vancouver Registry under action no. S1710261 (the "Prime Time action") against multiple defendants, including a group of architects (the "DGBK parties"), SRC, and Nemetz.
>
> The DGBK parties were the project architects. SRC is a firm of mechanical engineers that provided services related to the installation of mechanical services including water and sewage. Nemetz is a firm of electrical engineers that did work on the project.
>
> A defendant seeking contribution or indemnity is entitled to bring a separate action which is what the DGBK Parties have done in this action (the "DGBK action"). (For brevity, I will shorten "contribution or indemnity" to "contribution".) The DGBK parties seek contribution in respect of the Prime Time action from parties who are also defendants or third parties in the Prime Time action. The DGBK parties do not allege any losses separate and apart from those suffered by Prime Time in the Prime Time action.
>
> The application in the present case is unusual. SRC’s proposed third party notice is a contingent claim on top of the DGBK parties' contingent claim. I am told by counsel that this application is a case of first instance.
>
> SRC could have filed a third party notice against Nemetz in the Prime Time action, but it missed the limitation period for doing so. SRC seeks to overcome the limitation period problem by obtaining leave of the court to file a third party notice against Nemetz in the DGBK action.

[3] Thereafter, Harper A.J. noted at para. 14 of the *Harper Reasons* the ambiguity in the third-party notice, which she observed mimicked how a third-party

notice in the Prime Time action would be drafted. About the ambiguity, she then said this:

> For instance, under paragraph 1 of Part 2 - Relief Sought, SRC claims: "[a] declaration that the Plaintiffs' loss was caused in whole or in part by the negligence of the other Defendants". It is not clear whether SRC means the plaintiffs in the DGBK action or the plaintiffs in the Prime Time action. If "Plaintiffs" means the plaintiffs in the Prime Time Action, then that is the action in which the declaration, if any, will be made. If "Plaintiffs" means the DGBK parties in this action, such a declaration would not be possible since the DGBK action is an action for contribution only.

[4] Next, Harper A.J. set out the governing legal principles and noted that the legal test to be applied was the same as for an application to strike pleadings. The appellant's position was that the third-party notice failed to disclose a cause of action and should not be permitted. Thus, the over-arching issue was, “is it plain and obvious that the proposed third-party notice discloses no reasonable cause of action?”: *Harper Reasons*, para. 19.

[5] Associate Judge Harper then set out the positions of the parties and proceeded to analyze the issues for determination. At para. 34, she distilled the nub of the position of the appellant, which was based on the unusual fact that SRC's claim was a contingent claim overlaid on another contingent claim, namely that brought by DGBK Architects (“DGBK”). By application of the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333, specifically s. 4-2(b), DGBK's claim against SRC could only be for the proportion of fault ascribed to SRC in the main, or Prime Time, action. Thus, SRC could never be required to pay more than its proportionate share in the DGBK action and consequently would not need to look to other defendants for contribution.

[6] Associate Judge Harper noted at para. 37 that SRC did not tackle that argument head on, but simply asserted that its claim against Nemetz was not bound to fail. Then, at para. 39, she observed that SRC "elides the distinction between a third-party notice filed in the Prime Time action with the proposed third party notice it seeks to file in the within action." At para. 42, she made the following findings:

> Despite Nemetz’s compelling argument that there are no possible facts that could be found to exist by the trial judge to result in success on the third party

> notice that SRC seeks to file, I am not entirely convinced that SRC's third party notice is bound to fail. I have reached the unsatisfactory conclusion that, based on the written and oral submissions of both parties, I am unable to definitively rule on the merits of the application.

[7] Associate Judge Harper then found that she could not conclude that SRC's claim for contribution against Nemetz was bound to fail, and thus permitted the third-party notice to be filed. She also found that Nemetz had raised significant legal arguments that deserve to be revisited and granted leave to Nemetz to bring a further application to strike the third-party notice.

[8] Nemetz has not done so, but rather took this appeal. When this appeal was first scheduled for hearing in January 2024, the parties had filed materials based on a common understanding that the test to be applied on appeal was whether Harper A.J.'s decision was clearly wrong. On appeal, the appellant wished to argue that the appropriate standard of review was correctness, based on the recently decided case of *Situmorang v. Google, LLC*, 2024 BCCA 9. The appeal was adjourned. The parties filed additional submissions on the standard of review, and I heard the appeal on May 1, 2024.

[9] With respect to standard of review, the appellant relies on para. 52 of *Situmorang*, which is crystal clear that whether a notice of civil claim discloses a cause of action is a pure question of law, reviewable for correctness. If all that was at issue on this appeal was the ability of SRC to claim against Nemetz within the DGBK action, the appellant would succeed. If the sole question decided by the Harper A.J. was whether the third-party notice disclosed a cause of action in that context, I would likely find that the decision was incorrect. The appellant's argument on that score is unassailable, and there is only one answer to that question. Within the DGBK action, SRC could never be required to pay more than its proportionate share as determined by the liability findings in the Prime Time action, and thus could have no claim over against Nemetz.

[10] However, as noted by Harper A.J., SRC does not restrict its claim solely to the DGBK action. SRC also seeks a declaration that it is entitled to contribution or indemnity from other defendants, including Nemetz, in the main, or Prime Time,

action. That is expressly pleaded at para. 2 of the “Relief Sought” in the third-party notice. That claim engages a consideration of the *Limitation Act*, S.B.C. 2012, c. 13. There are facts pleaded capable of sustaining the essential claim.

[11] Equally clearly, the claim appears to be statute barred. Nonetheless, I am not persuaded that the findings of Harper A.J., and in turn her overall finding that the claim is not certain to fail, is reviewable on a standard of correctness. The standard of review is whether Harper A.J.'s decision was clearly wrong. I cannot say that the decision to permit the filing of the third-party notice was clearly wrong. In my view, SRC's claim is extremely weak, and its arguments in favour of non-application of the two-year limitation period are unlikely to succeed. However, I cannot conclude, nor did Harper A.J. conclude, that the third-party claim is bound to fail.

[12] In *Rooney v. Galloway*, 2024 BCCA 8, at para. 166, the court, albeit in obiter, noted that:

> ... limitations defences will rarely be decided on an application to strike brought under R. 9-5(1)(a) of the *Rules* (*Aubichon*, at para. 41 and the authorities referred to therein; *Toussaint*, at para. 11 (addressing a similar provision in Ontario)).

[13] I share the view of the associate judge in this case that both parties should be permitted to develop their arguments in the context of a broader evidentiary record, mostly likely at a trial, whether summary or conventional. On that narrow basis, the appeal is dismissed.

[14] Due to the unusual nature of the claim and the issues noted by Harper A.J. regarding lack of head-on engagement by SRC to the position of Nemetz, I am exercising my discretion on costs by departing from the ordinary rule of costs to the successful party. In my view, costs of this appeal should be in the cause, and I make that order.

[15] That concludes my ruling.

“Tammen J.”