

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bradley v. British Columbia (Public
Guardian and Trustee)*,
2023 BCSC 1674

Date: 20230925
Docket: S133658
Registry: Kelowna

Between:

Sheleah Joy Bradley

Plaintiff

And

**The Public Guardian and Trustee of British Columbia and
Phillip Campeau**

Defendants

And

**Bonnie Baravalle also known as Bonnie Havilah,
Jordan Ninkovich, Chris Landry and
Verico Paragon Mortgage Inc.**

Third Parties

Before: The Honourable Justice Walkem

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

P. Spinks

Counsel for the Defendants:

R.E. McLarty

The Third Party, Bonnie Baravalle,
appearing on her own behalf:

B. Baravalle

Counsel for the Third Party, Jordan
Ninkovich:

L.R.E. Taneda

Counsel for the Third Party, Chris Landry:

H.A. Bromley

Counsel for the Third Party, Verico Paragon
Mortgage Inc.:

O. Stoklosa

Place and Date of Trial/Hearing:

Kelowna, B.C.
July 25, 2023

Place and Date of Judgment:

Kelowna, B.C.
September 25, 2023

Table of Contents

INTRODUCTION 4

BACKGROUND..... 4

POSITION OF THE PARTIES 7

 Third Party Notice..... 7

 Application to set aside Third Party Notice 8

LAW..... 9

Adams Rule..... 9

 Test to Strike a Third Party Notice..... 11

 Agency 12

DISCUSSION..... 14

INTRODUCTION

[1] The plaintiff, Sheleah Bradley, commenced the underlying action in March 2022 against the defendants, Public Guardian and Trustee (“PGT”) and its employee, Phillip Campeau (“Campeau”), for damages suffered as a result of the plaintiff making loans to the third party, Jordan Ninkovich (“Ninkovich”), which were financed through mortgages.

[2] Verico Paragon Mortgage Inc. (“Paragon”) has brought this application for an order that the third party notice issued by the defendant, PGT, on July 6, 2022, be struck according to *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [Rules] 3-5(8) and 9-5(1).

BACKGROUND

[3] The plaintiff suffered a traumatic brain injury when she was struck by a motor vehicle as a child, and received settlement funds which were placed in trust for her benefit with the PGT. Campeau was an employee of PGT who oversaw the plaintiff’s file. The plaintiff’s mother was made Committee of her financial affairs.

[4] In 2011, the plaintiff purchased a house which was secured with a mortgage. In 2013, the Committee requested the PGT, through Campeau, pay off the remaining balance on the mortgage out of the plaintiff’s settlement funds, and that the remainder of the funds be invested into a guaranteed investment certificate (“GIC”). Campeau approved the release of the settlement funds, and said PGT would register a caveat against the plaintiff’s house which would require PGT’s consent to change ownership or register a mortgage against the house (the “proposed Caveat”). The proposed Caveat was never registered against the plaintiff’s house.

[5] In 2016, the plaintiff met Ninkovich. Between 2017 and 2018, Ninkovich induced the plaintiff to loan him money with the promise that she would get a substantial return. She took out numerous mortgages against her home which she then loaned to Ninkovich.

[6] Amounts the plaintiff mortgaged and then loaned to Ninkovich included the following:

- a. February 28, 2017: The plaintiff received proceeds of a \$147,784.78 mortgage, and advanced \$150,000.00 to Ninkovich;
- b. March 5, 2017: The plaintiff received proceeds of a \$53,854.71 mortgage, and advanced \$50,000.00 to Ninkovich;
- c. April 7, 2017: The plaintiff received proceeds of a \$152,810.22 mortgage, and advanced \$152,810.22 to Ninkovich;
- d. October 19, 2017: The plaintiff received proceeds of a \$36,023.65 mortgage, and advanced \$36,000 to Ninkovich; and
- e. January 12, 2018: The plaintiff received proceeds of a \$10,000.00 mortgage, and advanced \$10,000.00 to Ninkovich.

The total amount the plaintiff loaned to Ninkovich funded through mortgages registered against her house is \$398,810.22. Ninkovich has not repaid any of these amounts.

[7] The plaintiff entered into refinancing mortgages to avoid defaulting on the original mortgages. She has paid the interest, but not the principal.

[8] In December 2019, Ninkovich declared bankruptcy. The plaintiff was not listed in the proceeding as a creditor, nor were the loans listed as debts. The plaintiff did not receive notice of the bankruptcy.

[9] On March 22, 2022, the plaintiff filed a notice of civil claim (“NOCC”) against the PGT alleging negligence and claiming damages for losses suffered as a result of the PGT’s failure to register the caveat.

[10] In its response to the NOCC, the PGT argues the plaintiff was capable of managing her financial affairs prior to September 25, 2017, when she was formally

declared capable. Further, that the plaintiff was capable of managing her financial affairs from February 28, 2017 until January 12, 2018, the period when she took out the mortgages. In the legal basis of its defence, PGT argues the plaintiff suffered loss as a result of being a victim of fraud, and “not as a result of her suffering from any lack of capacity prior to being formally declared capable of managing her financial affairs.” The PGT’s response to the NOCC further alleges that:

14. If the Plaintiff suffered any loss, damage or expense, either as alleged or at all, which is denied, any such injury, loss, damage or expense was the result of Ninkovich’s fraud, or, alternatively the Plaintiff’s own negligence and that of [the Committee], Landry and [Paragon], and the PGT pleads the provisions of the *Negligence Act*....

...

24. [Paragon] knew, or ought to have known, that Landry was securing mortgage loans for the Plaintiff that were contrary to her interests and in contravention of his duties and obligations as a licensed mortgage broker.

[11] On July 6, 2022, the PGT issued a number of third party notices, including to Paragon; mortgage broker, Chris Landry; the Committee, and Ninkovich. In the event it is held liable, the PGT claims for contribution and indemnity from Paragon and other third parties pursuant to s. 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333. Specific to Paragon, the PGT seeks the following relief:

- a) a declaration that the Plaintiff’s injury, loss, damage or expense, if any, were caused or contributed to, in whole or in part, by the negligence, omissions, fault, breach of duty of care and/or breach of contract of Landry and [Paragon];
- b) a declaration the PGT is entitled to contribution and indemnity from Landry and Paragon pursuant to section 4 of the *Negligence Act*, RSBC 1996, c. 333, as amended, to the degree to which Landry and [Paragon] are found by the Court to have been at fault in respect of the Plaintiffs claim;
- c) judgment against Landry and [Paragon] for any amount that may be found payable from PGT to the Plaintiff, including interest to the *Court Order Interest Act*, RSBC 1996, c. 79 and amendments thereto;
- d) judgment against Landry and [Paragon] for costs PGT may be judged liable to pay to the Plaintiff, and for PGT’s own costs and disbursements in proceeding against the Third Parties; ... The allegation is that Landry owed a duty of care to act in the Plaintiff’s best interests. Further, that [Paragon] is vicariously liable for the actions of Landry, who was an employee or agent of [Paragon].

POSITION OF THE PARTIES

Third Party Notice

[12] In its third party notice, the PGT alleges that Landry, acting as an agent for Paragon, knew or ought to have known the plaintiff had no experience with mortgages making her vulnerable to improvident transactions, and that the refinancing mortgages were required to fund further loans as a result of her not being repaid by Ninkovich; that Landry owed a duty of care to the plaintiff to act in her best interests; and that Landry breached that duty by acting negligently in several ways, including by securing mortgage loans that were contrary to her financial interests.

[13] With respect to Paragon, the PGT alleges that Paragon knew, or ought to have known, Landry was securing mortgages for the plaintiff which were contrary to her interests and in contravention of his duties as mortgage broker.

[14] Adopting its arguments in the response to civil claim, the PGT also argues Paragon is wholly or partially liable for the plaintiff's losses and that:

- a) Paragon is vicariously liable for the actions of Landry, who at all material times was an agent of Paragon; and
- b) Landry (as an agent of Paragon) and Paragon owed a duty of care to the plaintiff, and that Paragon had a duty to adequately supervise Landry and to have compliance procedures in place.

[15] In its response to the third party notice, Paragon argues at all times Landry was acting as an independent contractor of Paragon and, therefore, Paragon cannot be vicariously liable for any acts or omissions of Landry. Paragon says, in the alternative, if Landry is found to have been an employee or agent of Paragon, then it met its duty to properly supervise Landry and any negligence on his part was unauthorized by Paragon.

Application to set aside Third Party Notice

[16] Paragon argues the third party notice against it should be set aside on the basis the pleadings disclose no cause of action, as they are based on allegations of a duty of care owed by Paragon and Landry to the plaintiff and does not make any allegations of a duty owed to the PGT. Paragon says the PGT cannot claim contribution or indemnity against a third party where the substance of the claim can be raised against the plaintiff by way of defence and cites *Adams v. Thompson*, (1987), 15 B.C.L.R. (2d) 51 (C.A.) (the “Adams Rule”).

[17] Paragon further argues the *Negligence Act* does not support a third party claim of contribution where the only cause of action claimed against the third party is the breach of a duty owed to the plaintiff.

[18] Paragon submits that mortgage brokers act as agents to their clients, and are under an obligation to their borrower clients to act in good faith and to make timely disclosures of matters which may impact their clients’ ability to make informed decisions. They further say, absent any contractual terms to the contrary, they owe a duty to their principal to act in accordance with the instructions contained in their express authority and to act for the benefit of their client.

[19] Paragon says at all times it, and Landry, were acting in an agency relationship with the plaintiff and, therefore, that a third party claim cannot lie against it. In their application to dismiss, Paragon acknowledges that they were the brokerage that Landry operated out of.

[20] In response, the PGT argues the application to strike should fail as Paragon was not an agent to the plaintiff and the pleadings do not disclose or establish an agency relationship between the plaintiff and Paragon. The PGT further notes that Paragon’s response to the third party notice initially denies Landry was acting as its agent, yet it now bases its application to strike on an agency relationship with the plaintiff.

[21] In the alternative, the PGT argues if Paragon did act as an agent for the plaintiff then it falls within the second branch exception of the *Adams* Rule (discussed below).

LAW

***Adams* Rule**

[22] The two-stage “*Adams* Rule” was described by McLachlin J.A. (as she then was) in *Adams* at paras. 16-17, and affirmed in *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2012 BCCA 22 [*Laidar Holdings*] at para. 1, as follows:

It thus may be stated with confidence, in my view, that a third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defence. Where the only negligence alleged against the third party is attributable to the plaintiff, there is no need for third party proceedings since the defendant has his full remedy against the plaintiff.

(I will refer to this as the first branch of the *Adams* rule.) The Court continued:

On the other hand, where the pleadings and the alleged facts raise the possibility of a claim against the third party for which the plaintiff may not be responsible, the third party claim should be allowed to stand. [At 55.]

(I will refer to this as the second branch of the rule, although it might also be considered an exception to the first branch.)

[23] How this may be viewed under the *Rules* and the *Negligence Act* was discussed at para. 17 of *Adams*:

[17] The same result arises if one views the matter on the basis of the *Negligence Act* and the *Supreme Court Rules*. Where the third party claim can be raised by way of defence, the substance of the matter is that the plaintiff is at fault. That being the case, s. 1 of the *Negligence Act*, which deals with the situation where fault is alleged against the plaintiff, is applicable. Section 1 makes no provision for contribution or indemnity between co-defendants. By contrast, s. 4 of the *Negligence Act*, which deals with cases where the plaintiff is not at fault, provides for contribution and indemnity between those found at fault in causing the plaintiff's loss.

[24] If fault were found to be attributable to an agent of the plaintiff, s. 4 would not apply and third party notice concerning those allegations should be struck because

under the *Adams Rule* the plaintiff is responsible for the actions of their agent. This was described by McLachlin J.A. in *Adams* at paras. 20-21:

[20] Generally speaking, all acts falling within the scope of an agency between the proposed third party and the plaintiff fall into the category of acts for which the plaintiff is responsible and hence are not the proper subject to third party claims. At the same time, it must be recognized that a person acting as agent to the plaintiff may undertake duties toward co-contractors and others outside the scope of his agency. To put it another way, the plaintiff's agent may, as a consequence of his relations with other contractors on the project, assume duties toward persons other than the plaintiff, for breach of which the plaintiff would not be vicariously liable...

[21] Another situation where a third party claim cannot be raised because the obligation is essentially that of the plaintiff is where the claim is one that the proposed third party should have advised or assisted the plaintiff to mitigate his damages. In that situation, like the situation of agency, third party proceedings are redundant because the defendant can obtain any relief to which he may be entitled by reduction of the plaintiff's claim if he makes out the defence of failure to mitigate.

[25] If the primary allegation against the third party is a failure to advise the plaintiff of their duty to mitigate, there is no need for a third party claim as the defendant would have a complete remedy by way of a reduction of damages: *Adams* at para. 25. As stated by Justice Walker in *0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.*, 2022 BCSC 1095:

[47] In summary, if a proposed third-party claim falls under the first branch of the *Adams Rule*, which encompasses the two broad categories in which the breach of duty or negligence alleged against the proposed third party is attributable to the plaintiff, then the third-party claim should not be allowed to stand under R. 3-5(1)(a), unless the second branch of the *Adams Rule* applies (e.g., where the proposed third-party is alleged to also owe a duty to someone other than the plaintiff).

[26] However, if it cannot be said all allegations against a third party are “necessarily related to acts committed as agents” for the plaintiff, then there is a possible third party claim and it should be permitted as per the exception under the second branch of the *Adams Rule*: *Laidar Holdings* at paras. 15-17. If the third party claim raises a claim for which the plaintiff may not be responsible, the claim should be allowed to stand: *Iannello v MacCallum*, 2021 BCSC 2235 [*Iannello*] at para. 34.

Test to Strike a Third Party Notice

[27] The test to strike out a third party notice was set out in *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17, 1988 CanLII 3036 (C.A.). A third party notice may be struck where it discloses no reasonable cause of action or where it is plain and obvious that the claim cannot succeed: *McNaughton* at paras. 17-18.

[28] In assessing the matter, the court should proceed on the assumption that all facts as pled in the third party notice are true unless they are “manifestly incapable of being proven”: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 22, citing *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, 1985 CanLII 74 (SCC) at p. 455. See also: *Iannello* at para. 27. The framework set out in *McNaughton* has been carried through into the *Rules*, specifically Rules 3-5(1), 3-5(8) and 9-5(1).

[29] Rule 3-5(1) provides that:

(1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that

(a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action...

[30] Rule 3-5(8) provides that a court can set aside a third party notice at any time.

[31] Rule 9-5(1)(a) provides that:

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be...

[32] In *Steveston Seafood Auction Inc. v. Bahi*, 2013 BCSC 1072, the court summarized the test for striking a third party claim at para. 19 as including the following:

(a) The test on this application is the same as under Rule 9–5. The proposed third party must establish beyond doubt that the pleadings discloses no cause of action. The court is permitted to reject proposed

claims only if the action is “bound to lose” or there is no bona fide triable issue.

Drummond v. Moore, 2012 BCSC 496 at para. 25.

(b) In exercising its discretion as to whether leave ought to be granted, the court can consider factors such as prejudice to the parties, the expiration of a limitation period, the merits of the proposed claim, any delay in the proceedings and the timeliness of the application.

Clayton Systems 2001 Ltd. v. Quizno’s Canada Corporation, 2003 BCSC 1573 at para. 9.

(c) The court is required to assume that all pleaded facts are true.

Hunt v. Carey Canada Inc., 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959 at 980.

Dhillon v. Coape and Hockaday, 2004 BCSC 1208 at paras. 17-18.

(d) An important consideration is whether it is “just and convenient” in all the circumstances of the case to grant leave to file the third party notice.

Symes v. Knooihuizen, 1998 CanLII 2231 (BC SC), 1998 B.C.J. No. 611 at paras. 38-39.

Clayton Systems 2001 Ltd. at para. 9.

(e) A third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defense.

Adams v. Thompson et al. (1987), 1987 CanLII 2590 (BC CA), 15 B.C.L.R. (2d) 51 at para. 20.

Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc., 2012 BCCA 22 at para. 1.

[33] It is primarily the final ground listed above that Paragon focussed on in its submissions. Paragon argues it was acting as the plaintiff’s agent; and therefore, the third party notice should be struck because the defendant can raise allegations directly against the plaintiff by way of defence.

Agency

[34] What constitutes an agency relationship was recently summarized by the Court of Appeal in *0848052 B.C. Ltd. v. 0782484 B.C. Ltd.*, 2023 BCCA 95:

[42] ... In G.H.L. Fridman, *Canadian Agency Law*, 3rd ed. (Toronto, Ontario: LexisNexis Canada Inc., 2017) the author explains at p.5:

Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property.

[43] An agency relationship has three essential elements:

- i) The consent (express or implied) of both the principal and the agent;
- ii) Authority given to the agent by the principal; and
- iii) The principal's control of the agent's actions.

(Halsbury's Laws of Canada, Commercial Law/(Agency), "The Agency Relationship" at HAY-2 "Essential Elements of Agency" [Halsbury's]).

[44] An agency relationship can arise by agreement, implication, subsequent ratification, *estoppel* or operation of law: see P. Watts and F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 22nd ed. (London: Thompson Reuters, 2021) at 45; Halsbury's at HAY-11 "Creation of Agency".

[35] The agency relationship was summarized further by Justice Hughes in *Yang v. Li*, 2022 BCSC 1648:

[98] An agency relationship typically manifest in two ways: actual agency or apparent agency. In actual agency, the agent's authority to act on behalf of the principal results from a "manifestation of consent": *De Cotiis CA* at para. 23. The actual authority of the agent may be impliedly or expressly provided, but it must come from the principal to the agent. Conversely, apparent authority is manifested through representations made by the principal to third parties (e.g., the principal holding someone out as their agent, despite that person not having actual authority to bind the principal).

[36] In some cases, courts have found an agency relationship to exist between mortgage brokers and their clients. *Iannello* concerned a mortgage investment where the plaintiff loaned money as a mortgage, but was unaware the mortgage was registered as a second priority. The defendant filed a third party notice against Mortgage Central, alleging if there were any losses suffered by the plaintiff, they were partially attributable to Mortgage Central.

[37] Mortgage Central argued that the response to civil claim had referred repeatedly to it as an agent of the plaintiff; and therefore, the third party notice should be struck. Mortgage Central further argued that the defendants had not alleged any additional duty was owed to the defendants bringing it within the second branch of the *Adams Rule*:

[35] Mortgage Central argues it is not appropriate or necessary for the MacCallum defendants to make a third party claim against it because a central feature of their response is that Mortgage Central was the plaintiff's agent at all material times. They say they took instructions from, advised and reported to Mortgage Central as the plaintiff's agent. They do not set out particulars of the relevant instructions, advice and reports.

[36] If Mortgage Central was the plaintiff's agent at all material times and was carrying out tasks for which the plaintiff is ultimately responsible, then the MacCallum Defendants can raise Mortgage Central's acts and omissions in their defence to plaintiff's claim. The MacCallum defendants do not allege Mortgage Central acted outside the scope of that agency and such cannot be implied from any of the facts pled in the third party notice.

[37] The MacCallum defendants counter that the second branch of the Adams test is engaged because the plaintiff effectively alleges that Mortgage Central's actions fall outside the agency relationship and gave rise to the initial loss. They say they dispute this, as apparently does Mortgage Central on this application. However, if the plaintiff were to succeed in establishing the pleaded allegation, the plaintiff would not be responsible for Mortgage Central's conduct.

...

[39] I do not agree that the allegations the plaintiff originally made against Mortgage Central must be interpreted as falling outside an agency relationship. The plaintiff does not expressly address the issue of "agency" in her notice of civil claim. She also does not plead anything inconsistent with an agency relationship between her and Mortgage Central. The plaintiff originally alleged that Mortgage Central owed her a fiduciary duty and duty of care, and that it breached those duties in various ways. An agent can owe their principal these types of duties within the agency relationship. If an agent is found to have breached such duties, that does not mean that what they did automatically falls outside the scope of the agency; it may just mean they did not perform their duties appropriately.

[38] Master Bilawich found the third party notice fell within the first branch of the Adams Rule, and did not fall within the exception under the second branch, and thus should be struck.

DISCUSSION

[39] Paragon argues that because there is no cause of action pled alleging that Paragon is liable to the PGT, there is no basis for the third party claim. Paragon's position on this point misunderstands the nature of a claim for contribution and indemnity, which is a claim for contribution from joint tortfeasors. A claim for

contribution and indemnity rests not on a claim of independent duty to a joint tortfeasor, but under s. 4 of the *Negligence Act*.

[40] It is not necessary for the PGT to show that Paragon owed it (PGT) a duty. Rather, it is sufficient for the PGT to allege Paragon owed a duty to the plaintiff that, if proven, would make them wholly or partially liable for the damage the plaintiff alleges the PGT is responsible for. That is what is allowed under s. 4 of the *Negligence Act* and encompassed by a claim for contribution and indemnity. Third party notices can be defeated where it is established that the third party had an agency relationship with the plaintiff.

[41] As noted above, the PGT argues there was no relationship of agency between the plaintiff and Paragon, and in the alternative, if Paragon is found to have acted in an agency relationship with the plaintiff, then it falls within the exclusion at the second branch of the *Adams* Rule. Paragon points to the fact that if it is alleged by PGT that the plaintiff is at fault, then s. 1 of the *Negligence Act* applies, and under that section there is “no provision for contribution or indemnity against co-defendants”. Paragon argues s. 4 of the *Negligence Act*, which allows for claims of contribution and indemnity where there is no claim that the plaintiff is responsible. Paragon argues that it stands in an agency relationship with the plaintiff, per *Adams*, and so the third party notice should be struck.

[42] A preliminary question to be addressed is whether Paragon did, in fact, act as an agent for the plaintiff. Paragon argues *Iannello* establishes a mortgage broker acts as an agent for a party that they help secure a mortgage for.

[43] Paragon, in their response to the third-party notice filed by the PGT, denies that Landry is an employee or agent of Paragon, and argues that he was an independent contractor. They plead, in the alternative, that if Landry is found an employee or agent of Paragon, that any negligence was unauthorized by Paragon.

[44] I am mindful that a court should approach the *Adams* rule regarding striking out a third party notice assuming the pleadings are true. Therefore, assuming that Paragon and Landry were not in an employment or agency relationship, and Landry

was solely an independent contractor for Paragon, any agency relationship that might be asserted due to a mortgage brokerage and mortgage lender relationship would likely be between Landry and Bradley.

[45] Paragon relies on *Iannello* to argue that the third party notice should be struck because they are in an agency relationship with Bradley as the mortgage brokerage company that Bradley used. In *Iannello*, the mortgage brokerage did not claim to be in an independent contract with their mortgage broker. There was no distinction between the broker and the brokerage in that decision when the court found an agency relationship between the mortgage broker and the mortgage lender. Ultimately, in *Iannello*, Mortgage Central, the brokerage, claimed it was the plaintiff's agent. There was no separation of the employer/employee or agent/principal in relation to the mortgage broker and brokerage.

[46] In *Iannello*, the question of agency was not in issue. Master Bilawich found the third party claim must be struck pursuant to the first branch of the *Adams* rule. In addition, as PGT submits, in *Iannello*, the subject party was the mortgage broker themselves (*i.e.*, that Mortgage Central stood in the role of Landry and not Paragon).

[47] As outlined above, the initial position of Paragon in the response to third party notice is that Landry was not acting as its agent but rather as an independent contractor, and therefore it cannot be held vicariously liable for his actions or inactions if any negligence is found. The PGT says there are no facts pled in the underlying action, or in the third party claim against Paragon, that there was an agency relationship between the plaintiff and Paragon.

[48] I find the facts pled do not allow me to determine whether the relationship between Paragon and the plaintiff falls within the scope of an agency relationship. While I agree there is support for the proposition mortgage brokers act as agents for their clients, in this case it is not clear from the pleadings whether the agency relationship would extend from Landry to Paragon based upon the distinct relationship Landry and Paragon had.

[49] If I am wrong, I find this would fall within the exception at the second branch of the *Adams* Rule as the pleadings do disclose the possibility that the plaintiff may not be responsible for her losses based upon her legal capacity.

[50] I find it is not plain and obvious the third party claim against Paragon is bound to fail; and therefore, must be allowed to stand.

[51] The PGT is entitled to its costs.

“A. Walkem J.”