IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ridley Terminals Inc. v. Sandvik Canada Inc.,* 2023 BCSC 420

Date: 20230320
Docket: S207703
Registry: Vancouver

Between:

Ridley Terminals Inc.

Plaintiff

And

Sandvik Canada Inc., Sandvik Mining and Construction Canada, Ausenco Engineering Canada Inc., Stasuk Testing & Inspection Ltd., and WB Melback Corporation

Defendants

Before: Master Robertson

Reasons for Judgment

Counsel for the plaintiff:	M.R. Milne
Counsel for Sandvik Canada Inc.:	D. Winterton
Counsel for Stasuk Testing & Inspection Ltd.	S.H. Haakonson
Counsel for Ausenco Engineering Canada	J. Hutchinson
No other appearances	
Place and Date of Hearing:	Vancouver, B.C. February 1, 2023
Place and Date of Judgment:	Vancouver, B.C. March 20, 2023

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[1] There are two applications before the court today, one by the defendant Sandvik Canada Inc. (“Sandvik”) and one by the defendant, Stasuk Testing & Inspection Ltd. (“Stasuk”), for each to have leave to file third party notices as against the defendant, Ausenco Engineering Canada Inc. (“Ausenco”) for declaratory relief. Sandvik, also seeks to file third party notices as against WB Melback Corporation (“WB Melback”) and Stasuk, against whom contribution and indemnity are also being sought, which are not opposed.

[2] The applications with respect to Ausenco engage the court’s consideration of the effect of a settlement pursuant to *British Columbia Ferry Corp. v. T&N,* 1995 CanLII 1810 (BCCA) (“*BC Ferry*”) on the right of a party to seek apportionment of liability by way of third party proceedings as against a settling co-defendant when no claims of contribution or indemnity are being sought. In most other Canadian jurisdictions, partial settlements in multi-party proceedings are referred to as Pierringer agreements, named after the decision in *Pierringer v. Hoger* (1963), 124 N.W. (2d) 106 (U.S. Wis. S.C.). For the purpose of these reasons I will refer to this as a BC Ferries settlement.

Background

[3] By way of background, the plaintiff owns and operates a bulk handling, marine terminal close to Prince Rupert.

[4] The plaintiff sought to upgrade its facilities including those portions relating to three rail mounted stackers and reclaimers (collectively, the “Stackers/Reclaimers”) which are used to both stack bulk materials to prepare them for storage, or to reclaim them for transport. To that end, the plaintiff retained Sandvik to investigate and provide advice as to the design concepts that would accomplish these upgrade goals.

[5] Sandvik authored a report with its findings and recommendations in 2011, following which the plaintiff and Sandvik entered into a term sheet in December 2011, and thereafter, a written agreement for the upgrades on or about June 16, 2014 (the “Upgrade Agreement”). The scope of work in the Upgrade Agreement

included refurbishment and modernization of the Stackers/Reclaimers (the “Upgrade Project”)

[6] Sandvik then subcontracted with the defendant, WB Melback for the mechanical and structural construction of the Upgrade Project.

[7] In addition, by agreement dated October 16, 2014 (the “Inspection Agreement”) the plaintiff retained Ausenco to carry out annual structural inspections at the terminal, the scope of which included inspections of the Stackers/Reclaimers. Ausenco then subcontracted those services to Stasuk by agreement dated April 14, 2015, as amended on June 7, 2016 and August 28, 2017 (collectively, the Inspection Subcontract”)

[8] Under the initial terms of the Inspection Subcontract, Stasuk was to provide the following services:

a) Visual structural inspections;

b) Pin and Trunnion inspections;

c) Ultrasonic and magnetic particle testing of critical areas; and

d) Other inspections as needed on modifications, repairs and upgrades to the terminal facilities.

[9] The amendments broadened the scope slightly, specifically with respect to the ultrasonic magnetic particle testing, to be as oriented by Ausenco’s team.

[10] Work on the Upgrade Project commenced in or about early June 2014. Inspections were carried out from 2015 to 2018, with annual inspection reports being delivered in each of the years 2015 to 2017.

[11] In the 2015 annual inspection, certain shifts in the upper knuckle in the receiving clevis were detected, and noted to be causing friction.

[12] It is alleged in these proceedings that the friction was not accounted for in Sandvik's design and ultimately caused fatigue resistance. Upon learning of this friction, the plaintiff requested that Sandvik inspect, assess the cause and provide a repair and remediation strategy. Sandvik inspected the unit on August 15, 2016 and, is alleged to have said that it was not a critical issue.

[13] On or about August 8, 2018 during routine reclamation operations, there was a catastrophic failure of the left main tension rod of one of the Stackers/Reclaimers, specifically SR 300/301, which caused the entire boom to collapse onto an adjacent coal stockpile which, the plaintiff claims, caused significant damages and losses.

[14] It is alleged that neither Sandvik nor Ausenco had identified fatigue cracks that had developed, allegedly due to the knuckle shift, during their inspections.

[15] On August 4, 2020, the plaintiff commenced this action against Sandvik and its sub contractors, WB Melback, and Ausenco, and Ausenco's subcontractor Stasuk. The notice of civil claim was amended on June 22, 2021 and again on July 19, 2022.

[16] The amended notice of civil claim includes various allegations as to the obligations of Ausenco and Stasuk, including that they both represented to the plaintiff that Stasuk had requisition experience to carry out its mandate and, with respect to the SR 300/301 "Ausenco relied on Stasuk to perform specifically, inspection scope in accordance with the standards and procedures" as set out in the Structural Inspection Program (a defined term). The claim further includes an allegation that Ausenco is responsible for the acts and omissions of its subcontractors.

[17] The amended notice of civil claim was served on:

a) the applicant Sandvik on July 19, 2021, who filed a response on November 18, 2021, in which Sandvik alleges that the failure is due to insufficient lubrication and a failure by Ausenco to properly and regularly inspect the Stackers/Reclaimers, and specifically SR 300/301.

b) the applicant, Stasuk on July 28, 2021, who filed a response on January 26, 2022, denying all liability. The response pleads the specific terms of the Inspection Subcontract, and alleges that Stasuk had not been advised of any particular risk or location of alleged failure that had been identified prior to the inspections and that they were not asked to inspect the specific fault area by Ausenco, or any other party. Further, they allege that they were provided with the equipment for the inspection by Ausenco, and the fault area was at a location that was not accessible to visual inspection.

[18] On June 27, 2022, counsel for the plaintiff wrote to counsel for the defendants and advised that an agreement had been reached to resolve the plaintiff's claims against Auseco, with a notice of discontinuance being filed that same day.

[19] On July 19, 2022, the further amended notice of civil claim was filed to remove the claim against Ausenco and insert a clause (the "BC Ferries Clause") containing what is typical in such settlements to confirm that the plaintiff waives its right to recover any portion of its loss that may be attributable to Ausenco.

[20] On that same day, Stasuk requested a copy of the settlement agreement. The settlement agreement has not been disclosed, on the basis of a claim of settlement privilege, and is not before the court.

[21] Prior to the claims against it being discontinued by the plaintiff, Ausenco did not file a response or provide any lists of documents to its co-defendants.

[22] As of the current date, document discovery has commenced in accordance with the terms of a case plan order, but has not been completed, and no examinations for discovery or trial have been set.

[23] Stasuk initially sought leave to file third party proceedings against Ausenco, seeking contribution and indemnity. However, while Stasuk takes issue with the specific wording of the BC Ferries Clause, assuming it is interpreted as Stasuk says it ought to be, Stasuk accepts that the claim for contribution or indemnity is not

necessary. Thus, at the commencement of the hearing, Stasuk advised that they were not seeking contribution or indemnity, but rather only a declaration as to Ausenco's liability, and provided the court with an amended third party notice in that regard. No party took an objection to this amendment being made at the hearing. Although, Ausenco did reserve the right to address that in terms of costs, as they did prepare for the application on the basis of there being a claim for contribution being made.

[24] The plaintiff and Ausenco both oppose the applications in respect of the third party claims against Ausenco. WB Melback and Stasuk take no position on the third party proceedings being taken against them.

[25] As there was no opposition to the third party claims as against WB Melback and Stasuk, these reasons address only the third party claim against Ausenco.

[26] Ausenco argues that, given the plaintiff's waiver of right to recover any portion of its loss attributable to Ausenco, that Ausenco is no longer a necessary party to these proceedings as the court can still apportion liability against it and compel their involvement as a non-party to the extent it is necessary for documents disclosure or to give evidence as a witness, despite that the claims have been dismissed against it.

Legal Framework and Analysis

[27] The applications are brought pursuant to R. 3-5(1), which provides that a party against whom relief is being sought may pursue a third party claim against any person if it is alleged 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,
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> (b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
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> (c) a question or issue between the party and the person
>
> (i) is substantially the same as a question or issue that relates to or is connected with
>
> (A) relief claimed in the action, or

(B) the subject matter of the action, and

(ii) should properly be determined in the action.

[28] The applicants note that the items in the list above are disjunctive and not conjunctive, the effect of which is that as long as the third party pleadings raise a question or issue between the parties that is substantially the same as the relief and subject matter of the existing action, and should be determined in the action, then leave ought to be granted.

[29] In this respect, third party proceedings provide a recognized function to allow a single procedure to be used for the resolution of related questions, issues and remedies in order to avoid multiplicity of proceedings and inconsistent results, which is fundamental to our civil procedure: *McNaughton v. Baker,* 1988 CanLII 3036 (BCCA) ("*McNaughton*"), at para 14.

[30] Leave of the court is required in order to file a third party notice more than 42 days after filing a response, as is the case here.

[31] In determining whether leave is to be granted, the Court of Appeal set out the following factors for consideration at para. 16 of *Tyson Creek Hydro Corp. v. Kerr Wood Leidal Associates Ltd.,* 2014 BCCA 17, citing *Clayton Systems 2001 Ltd. v. Quizno's Canada Corp.,* 2003 BCSC 1573, at para 9:

a) prejudice to the parties;

b) expiration of limitation period;

c) the merits of the proposed claim;

d) any delay in proceedings; and

e) the timeliness of the application.

[32] The opposing parties do not oppose leave being granted on the basis of an expiration of the limitation period (although there was some question as to the appropriate limitation period for declaratory relief), timeliness of the application

(although the plaintiff did point out that it took close to a year for these applications to be brought, some of which was the result of the usual issues with obtaining court time), or that there would be any delay in the proceedings if leave was granted.

[33] Rather, the parties agreed that for the purpose of this application, the determination is to be based upon the merits of the proposed third party claim where the claims for contribution and indemnity have been settled and only declaratory relief is being claimed, and the prejudice to the parties.

Merit of the Proposed Third Party Claim

[34] In considering the merits of the proposed claims, the court is to assume that the facts alleged can be established: *McNaughton* at para. 33.

[35] In addition, the applicants argue that the inclusion of Ausenco as a third party is "necessary to achieve justice" between the parties, notwithstanding that there is, as a result of the settlement, no direct *lis* between the parties, given that they have no right to claim contribution or indemnity due to the BC Ferries Clause. However, they argue, the court has broad discretion to allow claims for declaratory relief, even where there is no such *lis.*

[36] For example, in *Cheslatta Carrier Nation v. British Columbia,* 2000 BCCA 539 ("*Cheslatta*") the court of appeal summarized the basis for such actions for declaratory relief as follows:

> [13] Generally, modern courts have continued to adhere to the principle that declaratory actions should not be entertained where the declaration will serve little or no practical purpose or raises a matter of only hypothetical interest. Conversely, where the pleadings disclose a "real difficulty," present or threatened, the action will lie. The first edition of Zamir, *The Declaratory Judgment* (1962), summarized the law this way:
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> > Generally, when a person puts himself to the trouble and expense of litigation, he does it to serve some practical purpose of considerable importance for him. It is true that the mere interest of the plaintiff is not sufficient to warrant a declaration of his rights. Declaratory proceedings, though useful enough in the opinion of the plaintiff, have often been dismissed as being hypothetical . . . . Thus, where a declaration may only satisfy the plaintiff's curiosity, or give him an extra assurance against a possible challenge or infringement of his rights in the future, it will (if

> there is no real ground for such a doubt or anxiety) be refused as being hypothetical. But where the court holds that it has jurisdiction and that the plaintiff has established his standing, it will be slow to find that the declaration claimed may not be useful enough to justify its intervention. Accordingly, where a real doubt is cast on the plaintiff's rights, ensuing from a dispute between the parties, the court will generally regard the mere removal of that doubt as of sufficient utility.
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> The requirement of utility does not mean that the plaintiff should, in consequence of the declaration, be enriched by material assets or benefited in a tangible way. Utility only means that the declaration of the court should solve a real difficulty which confronts the plaintiff in the conduct of his business affairs or his private life. [at 192-3; emphasis added.]

[14] Canadian courts have adopted similar reasoning. The leading case is *Operation Dismantle Inc. v. Canada* 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, where Dickson J. for the majority of the Supreme Court of Canada stated that "Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief." His Lordship continued:

> None of this is to deny the preventative role of the declaratory judgment. As Madam Justice Wilson points out in her judgment, Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, states that,
>
> > ...no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty....
>
> Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. [paras. 31-3; emphasis added.]

(See also *Borowski*, *supra*, at paras. 15-42, and Lazar Sarna, *The Law of Declaratory Judgments* (2nd ed., 1988) at 22-5.)

[37] The applicants argue that the present action is not hypothetical, in that it will serve a real and substantial practical purpose, namely the determination as to apportionment of liability as between the defendants and Ausenco.

[38] In *Chief Joe Hall v. Canada Lands Company Limited,* 2014 BCSC 2361 the court specifically noted that only seeking declaratory relief is not a bar to a proposed third party claim:

> [39] The fact that Canada seeks only declaratory relief against British Columbia is not a bar to the proposed third party claim. The court has discretion to permit a third party proceeding where declaratory relief is sought, even without the necessity of a *lis*, provided the claim falls within one of the categories set out in Rule 3-5(1): *Rurka v. JALG Industries Inc.* (1999), 36 C.P.C. (4th) 34 (B.C.S.C.) at para. 31; *British Columbia Ferry Corp. v. T & N plc* (1995), 1995 CanLII 1810 (BC CA), 16 B.C.L.R. (3d) 115 (C.A.) at paras. 29, 31. I will return later in these reasons to the question of whether the court should exercise its discretion to permit the filing of the proposed third party notice in this action.

[39] Assuming the facts as alleged in the proposed third party claims can be proven, there is a *prima facie* case that liability may be apportioned to Ausenco, the effect of which could reduce or eliminate the liability of the applicants. The merit to that claim is not displaced by virtue of the fact that the relief being sought is only declaratory in nature.

Balance of Prejudice

[40] Even where there is merit to the allegations advanced in the third party pleadings, if the balance of the prejudice of the parties does not favour doing so, the court may refuse to exercise its discretion to grant leave. In *The Owners, Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192 the court framed the issue as follows:

> [90] The fundamental question on the applications should have been whether greater injustice and inconvenience would arise from allowing the contribution claim to continue as a third party proceeding, or from striking it and leaving it to be pursued in a separate future action. The chambers judge erred in failing to address that question. Had he done so, in my view he would have been compelled to exercise his discretion in favour of the former course, as the better of two unpalatable options.

[41] In this case, the applicants argue that there will be significant prejudice to them if Ausenco is not included as a party in the proceedings as they will lose the procedural benefits available under the *Supreme Court Civil Rules* which are not available to the same extent in respect of non-parties as they are for parties, and

that they will have significant limitations as a result. Most notably, the applicants point to the differences in the ability to obtain document disclosure and to examine representatives of Ausenco which may result in the discovery of evidence and information from Ausenco being incomplete.

[42] Specifically:

a) Under R. 7-1(1), if a party, Ausenco would be required to produce all documents in their possession or control that could be used by any party to prove or disprove a material fact, whereas an order for production by a non-party under R. 7-1(18) would require the applicants to identify and enumerate in advance the specific documents that may be in Ausenco's possession. Sandvik noted that while a large portion of documents (over 6,500 thus far) have been produced there are likely still thousands that remain undisclosed as they are in the possession and control of Ausenco; and

b) Under R. 7-2(1) and (18), if a party, Ausenco's representatives would be required to make themselves available to answer any question within their knowledge or means of knowledge regarding any non-privileged matter in question, and provide names and addresses of those other parties who may be expected to have that knowledge, whereas to compel attendance under R. 7-5, the applicants will have to provide evidence as the matters for which the applicant believes the proposed witness will have evidence, and that they have refused to give a responsive statement either orally or in writing relating to their knowledge. In other words, under R. 7-5, Ausenco can provide a limited response or statement, which may require cumbersome follow up, and back and forth, inquires in order to obtain all relevant information. The differences may also frustrate the ability of the applicants to get sworn evidence from Ausenco through cross examination as to the issues in dispute, or transcripts that can be read into court at the trial.

[43] As to the prejudice of Ausenco, the applicants note that the fact that a party may be affected negatively does not necessarily equate to a finding that a party is prejudiced. Rather, they argue, prejudice is to be considered based upon the ability of the proposed third party to be able to respond to the claims being made against them: *Gordon v. Krieg,* 2011 BCSC 1248, at para. 42.

[44] In this case, the applicants point to the fact that the action is still in its infancy, with discovery incomplete, such that Ausenco will have the full opportunity to mount its defence and argue that the inconvenience of having to participate as a party is not sufficient to establish prejudice.

[45] Ultimately, the applicants argue that if the purpose of a trial is to get to the truth, it is necessary that Ausenco be a party to these proceedings.

[46] It is this balancing of the inconvenience and prejudice of parties who have entered into a settlement with the potential prejudice to non settling parties who may seek to have liability apportioned and be denied procedural remedies which was considered in *BC Ferry*:

> 29 While I am of the view that the general rule against sanctioning actions brought for purely procedural relief will always be an important consideration governing the exercise of the court's discretion to grant declaratory relief, I do not accept the proposition that it must be regarded as a controlling consideration in all cases. There will be instances, albeit rarely, where the declaratory relief should be granted notwithstanding the fact that it is needed only for such purpose.
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> 30 In my view this is just such a case. While it is true to say, as did the judge below, that the suit between the plaintiffs and the defendants will require a determination of the fault of the defendants limited as it may be by the fault, if any, of other persons or companies, the fact is that unless those others are joined as parties the ability of the defendants to demonstrate such fault on their part will be adversely affected - perhaps severely so - by the defendants' inability to invoke those procedures under the Rules designed to enhance the ability of one party to an action to prove its case against another. One has only to consider the importance to the process of proof of such procedures as the right of discovery, the notice to admit and the ability to call parties as adverse witnesses, to realize that there will be circumstances in which the need to resort to such procedures will meet the expanded definition given to the term "relief" by Lord Justice Bankes in the *Guaranty Trust Company of New York* case.

> 31. It is important to keep in mind that the defendants had a perfect right to bring third party proceedings against the respondents, based on the allegations of fault attributed to them in the Third Party Notices, for the purpose of seeking contribution or indemnity in the event that the plaintiffs succeed in proving some or all of their claims against the defendants. The Rules provide the same procedural framework for third party proceedings as they do for ordinary actions, a circumstance that clearly recognizes the importance of that framework to all party litigants who seek to establish or defend claims of liability. It would, in my view, be manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action on which all parties had joined issue. But that is precisely what will occur here if the defendants are denied the declaratory relief they seek under Rule 5(22). In those circumstances, I am of the view that the third party claims for declaratory relief should be allowed to proceed.
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> [emphasis added]

[47] The plaintiff argues that this case does not rise to the rare circumstance where the seeking of declaratory relief justifies the granting of leave to file a third party notice, as was the case in *BC Ferry*. Specifically, the plaintiff and Ausenco argue that having Ausenco brought into the proceedings notwithstanding their early settlement undermines the goal of promoting early settlement, which brings necessary certainty to the parties and a narrowing of issues that will ultimately need to be litigated. It is that goal, they argue, that the use of the BC Ferries Clause for settlement is intended to foster, and one that would be undermined if settling parties are brought back into litigation absent exceptional circumstances.

[48] In addition, they say that if the purpose of third party proceedings is to avoid a multiplicity of proceedings and risk of inconsistent findings, there is no real purpose being served as there can be no action taken as a result of the terms of the settlement. Further, as the court noted in *Cheslatta,* courts do routinely apportion liability to joint tortfeasors who are not parties to the action.

[49] I accept that to apportion liability it is not necessary that Ausenco be a party. Rather, for the purpose of these applications, it is necessary to determine if there is prejudice, or merely inconvenience to them being third-parties, and whether there would be a greater injustice by not having them added for that purpose.

[50] In *BC Ferry*, the court found that the balance lied in favour of allowing the settling parties to be added as third parties. However, the plaintiff and Ausenco emphasise the difference in *BC Ferry* and the case at bar and say that those differences illustrate why this is not a circumstance where the balance of prejudice lies in favour of granting leave, namely that:

a) In *BC Ferry,* the dispute involved complex multi-party asbestos litigation spanning 20 years, which is significantly more complex then this five party litigation;

b) The application in issue was by the third parties to strike the third party notice against them after they had settled their claims. Here, the primary claim has been amended to remove any claims against them, meaning that in *BC Ferry* there remained claims in the initial pleadings for contribution and indemnity which have, in this case, been waived;

c) Finally, the relationship between the parties was more intertwined. In *BC Ferry,* the defendants were the manufacturers and the third party were the installers and sub contractors who installed the offensive materials. Thus, there was a lack of understanding of each other's roles and involvement which required further examination, and therefore discovery rights, absent which the defendants were at a marked disadvantage in being able to establish how their liability was to be limited. The plaintiff and Ausenco argue that, in this case, Stasuk entered into the contract with Ausenco, so is well aware of what work they did and the scope of the work that they were retained to do, and was and is privy to their findings and reports, such that they should independently know the particulars of any failings on Ausenco's part. In fact, in their own pleadings, Stasuk pleads and relies upon the actions being taken by Ausenco under the Inspection Subcontract.

[51] In *Amoco Canada Petroleum Co. v. Propak Systems Ltd,* 2001 ABCA 110, the court outlined the purpose and intention of the *BC Ferry* settlement approach,

and the difficulty with allowing declaratory claims to continue notwithstanding such a settlement by giving undue influence to *potential* prejudice of non-settling defendants:

> [22] The Canadian cases in which proportionate share settlement agreements have been considered attempt to balance the right to settle against the right to pre-trial disclosure. One approach is represented by the decision of the British Columbia Court of Appeal *in British Columbia Ferry Corp. et al. v. T&N plc. et al.* (1995), 1995 CanLII 1810 (BC CA), 27 C.C.L.T. (2d) 287. There, the court decided that the non-settling defendants could not maintain a claim for contribution or indemnity against third parties that had settled with the plaintiffs, pursuant to the terms of a proportionate share settlement agreement. However, the court allowed the non-settling defendants to maintain a claim for a declaration to determine the degree to which the plaintiff's damages were attributable to the settling defendants. The court therefore permitted the action for declaratory relief to remain, keeping the settling defendants in the lawsuit for the purely procedural purpose of allowing the non-settling parties access to pre-trial procedural rights.
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> [23] The court concluded that the non-settling defendants would be prejudiced in establishing the fault of the third parties, and thus in maintaining their own defence, if they did not retain the benefit of full pre-trial procedural rights against the settling parties: at 302. The decision is based on the proposition that it would be "manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action": at 302 (emphasis added).
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> [24] The difficulty with the B.C. Ferry approach is its emphasis on the potential prejudice a non-settling party might suffer. Indeed, it is likely that a non-settling party will always be able to allege some possible disadvantage when it remains as the sole target for liability after other parties abandon the litigation. That is true whether a partial settlement occurs during the course of litigation or even before an action is launched. The B.C. Ferry approach would seem to permit an action for declaratory relief to be maintained for purely procedural purposes against anyone who settled, whether or not they were ever a named party to the litigation, and even though there were no possibility that they might be liable.
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> [25] Litigation, including settlement, is all about advantage, and corresponding disadvantage or prejudice. Settlement, after all, is nothing more than a compromise, in which parties gamble by trading prospective rights for certainty. Nor does prejudice run in only one direction. Failure to allow settlement by parties who want an exit ramp from costly and prolonged litigation may give a party who refuses to settle an even stronger tactical advantage. An unreasonable party can hold the other parties at ransom, virtually dictating the terms of settlement.
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> [emphasis added]

[52] The actual prejudice that the plaintiff and Ausenco argue tips the scale into their favour is the resulting reluctance of parties to settle early in proceedings if such settlements are not given effect by the courts, and they are required to continue to participate in legal proceedings, solely for the purpose of disclosure and/or examination rights which can largely be obtained from them as strangers to the proceedings under the *Supreme Court Civil Rules* as available to the parties.

[53] Notably, as acknowledged by the court in *Amoco,* the Alberta courts deal with these types of settlements differently than BC Courts, giving less weight to arguments that there is potential prejudice noting at para. 32 and 33 that the flaws in such an approach include that it discourages early settlement, provides little guidance to judges and creates uncertainty to litigants as to how such applications are to be dealt with, concluding as follows:

> [35] The fundamental problem with the current approach is that it requires judges to balance two competing interests, but gives judges few tools with which to do so. The *Alberta Rules of Court* contain no express rule permitting third party discovery and at least to this point, no one has come up with a creative way of achieving equivalent disclosure by practice note, statute or private agreement.

[54] Thus, the plaintiff and Ausenco argue that absence evidence of actual prejudice by the applicants, this relief ought not be granted.

[55] The applicants argued that this court has not accepted the approach taken by the Alberta courts as noted in *Amoco*, referencing the more recent decision of *Sidhu v. Hiebert,* 2020 BCSC 1548 (“*Sidhu*”)

[56] In *Sidhu*, the court considered an application by the settling defendant for leave that they would be entitled to “make submissions or take other steps” at the trial of the matter given that the non-settling defendants intended to continue to seek declaratory relief against them as to the apportionment of liability. The non-settling defendants and plaintiff argued that having settled the case on terms of a BC Ferries settlement, they could not re-inject themselves into the proceedings. This court

noted as follows with respect to the different approach taken in this province since *BC Ferry* specifically referencing *Amoco:*

> [29] Canadian law often includes protections for non-settling defendants, such as requiring settling defendants to allow non-settling defendants access to their evidence or previously retained experts: *Sable* at para. 24. The parties, in their submissions, appear to agree that the procedural rights of non-settling defendants are emphasized to a greater extent in BC than in other Canadian provinces because of the principles set out in the *BC Ferry* decision. The Alberta Court of Appeal, for example, has expressly rejected the *BC Ferry* approach of keeping settling defendants as parties to the litigation for the purpose of declaratory relief: *Amoco Canada Petroleum Company Ltd. v. Propak Systems Ltd.,* 2001 ABCA 110.
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> [30] *BC Ferry* is the foundational case setting out the principles and procedures that apply to partial settlements in multi-party litigation in BC. That case, which was also an action in negligence, involved an appeal from three orders that effectively struck out all relief sought in the defendants' third party notices. The Court dealt with several issues in that appeal, but the one most relevant to this decision was the issue of whether the defendants were entitled to maintain their third party notices for declarations as to the degree of fault attributable to each party.
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> [31] The Court in *BC Ferry* confirmed that it is not necessary for third parties to be joined as parties to the action for the judge to have jurisdiction to assess and apportion any degree of fault against them: at para. 14. Justice Wood considered jurisprudence holding that courts should be wary of claims for declaratory relief that involve purely academic questions and do not engage real interests of the person raising it. However, he determined that this "general rule" does not need to be "regarded as a controlling consideration in all cases": at para. 29.
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> [32] In Wood J.'s view, the declaratory relief sought in the third party notices in *BC Ferry* was not for purely theoretical purposes. Unless the third party notices were maintained, the non-settling defendants' ability to present their case would be adversely affected by their inability to invoke the procedural steps that are afforded by the *Rules* against third parties, such as discovery, notices to admit, and the ability to call parties as adverse witnesses: *BC Ferry* at paras. 30-31.
>
> [33] In accordance with *BC Ferry*, the non-settling defendants are permitted to maintain third party notices against Nissan in order to have access to the procedural rights that the third party notices afford them under the *Rules.* However, BC Ferry also makes it clear that it is not necessary for them to maintain these notices in order for the Court to have jurisdiction to apportion fault. If the non-settling defendants do not wish to avail themselves of the procedural rights that the third party notices grant them, it is open to them to discontinue their third party notices as Mr. Rattan has done. Discontinuing those notices will not prevent the Court from assessing fault as it is required to do under the *Negligence Act*, R.S.B.C. 1996, c. 333. I accept Nissan's submissions that if the third party notices are maintained and it remains a formal party to this Action, it would not be reasonable to bar

> Nissan's attendance at the trial. I note that none of the other parties seek such an order in any event.

[57] I agree with the plaintiff and Ausenco that while *Sidhu* provides a useful summary of this area, the circumstances were unusual in that the settling defendant sought terms by which it could continue to participate at trial, which is markedly different from application before the court today. In *Sidhu* the order was ultimately made to permit attendance at the trial by the settling party as they remained a third party in the proceedings, however, they were not granted the right to make submissions, present an opening, object to admissibly of expert reports, cross examine exports, or call their own experts, absent further leave.

[58] In *British Columbia v. Imperial Tobacco Canada Ltd.,* 2009 BCCA 540 ("*Imperial Tobacco*"), the court noted that a full understanding of the role of the proposed third party is an important factor to consider:

> [60] While I have not found it necessary to reach the issue of the possible constitutional immunity of Canada from the claim advanced by British Columbia, I have concluded that Canada could not be liable here because it is not within the terms of the *Costs Recovery Act*. Therefore, as the chambers judge held on another basis, Canada has been immune from suit from the outset. Therefore, the reasoning of the chambers judge should be equally applicable having regard to the basis upon which I would strike out the third party claims. However, I wish to emphasize that it appears to me that there is no basis to keep the applicant Canada in this litigation for purposes analogous to those found requisite in *B.C. Ferry* because, as I have observed, the appellants have a very full and complete knowledge of the role of Canada in events that occurred over several decades. I would not interfere with the discretionary ruling of Wedge J.

[59] While the disclosure and examination rights as against Ausenco as available under the *Supreme Court Civil Rules* will be slightly more limited if they are not a party, there are still such remedies available to them.

[60] The concern that documents may have to be enumerated by the applicants in order for them to compel production is less of a concern in the case at bar than it was in *BC Ferry* given Stasuk and Ausenco's contractual relationship through which Stasuk has first hand knowledge as to the involvement of Ausenco in the Upgrade Project and inspections undertaken by them sufficient to enable them to make the

necessary inquiries and have full benefit of the *Supreme Court Civil Rules* in respect of non party disclosure. Thus, the circumstances of this case are more similar to those in *Imperial Tobacco* than *BC Ferry.*

[61] In the circumstances of this case, I am unable to find that the applicants have established that there will be a greater injustice and inconvenience to them if Ausenco is not added as a third party.

[62] While I acknowledge that there are some matters involving Ausenco that Stasuk may not be privy too and may be outside the four corners of the contractual relationship between Stasuk and Ausenco, there is no evidence to support that those would not be determinable through the processes available under the *Supreme Court Civil Rules*. While there may be some inconvenience in having to possibly bring more than one application to obtain complete disclosure, the balance of the prejudice in having to take such steps does not outweigh the prejudice in having to continue to participate in litigation post settlement.

Conclusion

[63] For the above reasons, I dismiss the applications to add Ausenco as a third party.

[64] As there was no opposition to the application by Sandvik to add Stasuk and WB Melback as third parties, I make those orders.

[65] As to costs, counsel for the plaintiff reserved the right to make further submission on that issue. I grant leave for the parties to reappear before me on the issue as to costs if they wish to pursue the issue further, provided that they contact scheduling to obtain a date before me by April 15, 2023. Otherwise, costs shall be in the cause.

"Master Robertson"