Court of King's Bench of Alberta

Citation: Westlock Terminals (NGC) Ltd. v Sheets Grain Farmco Ltd., 2024 ABKB 475

Date: 20240731
Docket: 1703 21403
Registry: Edmonton

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Between:

Westlock Terminals (NGC) Ltd.

Plaintiff

\- and -

Sheets Grain Farmco Ltd., Strongco Corporation/Corporation Strongco, Strongco GP Inc./Societe Strongco GP Inc., Strongco Limited Partnership, Strongco Inc. and Nordstrong Equipment Limited/Equipment Nordstrong Limitee

Defendants

\- and -

Strongco Corporation/Corporation Strongco, Strongco GP Inc./Societe Strongco GP Inc., Strongco Limited Partnership, Strongco Inc. and Nordstrong Equipment Limited/Equipment Nordstrong Limitee

Third Party Defendants

Reasons for Judgment
of the
Honourable Chief Justice K.H. Davidson

I. Introduction

[1] This case concerns the scope and interpretation of indemnity clauses contained in a contract for the purchase and sale of the assets of a business.

[2] The business of the vendor, Strongco Limited Partnership, which became Strongco Engineering Services ("Strongco"), was the design, engineering manufacturing and selling of bulk material handling equipment for the agricultural industry, including conveyors and bolted bin systems for grain storage. The purchaser, Nord-sen Metal Industries Ltd ("Nord-sen"), which became Nordstrong Equipment Limited, bought the assets of Strongco's business pursuant to an Asset Purchase Agreement entered into on May 14, 2009 ("APA"). The APA contained indemnity provisions to protect the parties from claims against the other after the closing of the APA.

[3] Prior to entering into the APA, Strongco had a contract (the "Sheets Contract") with Sheets Grain Systems Ltd. ("Sheets") to design and supply grain bins and related equipment to Westlock Terminals (NGC) Ltd. ("Westlock"). The Sheets Contract was in the form of a Purchase Order. Sheets had agreed to construct a grain terminal complex for Westlock (the "Westlock Project") and Strongco had agreed to design, engineer, manufacture, supply, and erect some of the components for Sheets.

[4] After the closing date of the APA, Nord-sen delivered some of these materials, but the design and engineering work in respect of the grain bins and the delivery of most of the components occurred prior to the closing date.

[5] The APA contemplated the transfer of the Sheets Contract from Strongco to Nord-sen. Nord-sen purchased the Accounts Receivable for the work Strongco had done for Sheets prior to the APA. Strongco was paid in full for the work it did on the Sheets Contract by virtue of Nord-sen purchasing the Accounts Receivable for full value.

[6] The grain bins proved to be faulty and Westlock commenced litigation (the "Westlock Action") against Sheets, Strongco and Nord-sen. Strongco then issued a third-party notice against Nord-sen.

[7] Westlock settled the Westlock Action as against Sheets and Strongco on October 14, 2023, immediately before trial. Sheets agreed to pay $1,000,000 in settlement of the breach of contract claim and Sheets agreed to pay $10,750,000 in settlement of the negligence claim. The settlement funds were paid, and the settlement was documented on November 14, 2023. Westlock discontinued its action against Nord-sen and provided Nord-sen with a release without any further consideration. This settlement came into effect on October 17, 2023. Accordingly, only Strongco's third party notice against Nord-sen remains.

[8] Strongco now seeks to enforce the contractual indemnity contained in the APA to recover from Nord-sen the funds Strongco paid to Westlock in settlement of the Westlock Action. Whether Strongco is entitled to recover the settlement funds hinges on whether the indemnity clauses in the APA cover claims related to Strongco's own negligence in the design of the grain bins and equipment supplied to Westlock.

[9] Nord-sen claims that the APA does not indemnify Strongco for these losses. Nord-sen also takes the position that the settlement between it and Westlock released Nord-sen (and therefore Strongco) from any liability to Westlock. It argues that any amounts paid by Strongco to Westlock were gratuitous and are not caught by the indemnity. It also argues that the settlement between Strongco and Westlock was improvident because the facts did not warrant a settlement in such an amount; the amount is therefore not recoverable from Nord-sen.

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II. The purchase and sale of certain assets of Strongco Engineered Services ("SES")

[10] The APA contemplated the purchase by Nord-sen of the assets of Strongco as a going concern, namely:

> all of the assets of SES that are used exclusively in carrying on the Business (the "Purchased Assets"), on a going concern basis including, but not limited to:
>
> 2.1.1 all Equipment;
>
> 2.1.2 the Premises;
>
> 2.1.3 the Assumed Contracts;
>
> 2.1.7 all Work in Progress;
>
> 2.1.8 all Accounts Receivable;
>
> except and only to the extent that any such assets constitute Excluded Assets.

[11] Section 4.4 of the APA provides that "...the Purchasers have not assumed, and shall not be responsible for, any liabilities ... of Strongco ... whether known or unknown, … other than the Assumed Liabilities." Section 4.5 provides that "...Strongco will be solely responsible for valid warranty claims for products and services of the Business sold and rendered prior to the Effective Date, except to the extent that such claims are Assumed Liabilities."

[12] Section 4.6 of the APA reads as follows:

> 4.6 Assumed Liabilities. Upon Closing, the Purchasers shall receive the full benefit of (including the assets represented thereby) and assume the Assumed Liabilities as of the Effective Date and hereby covenant to jointly and severally indemnify and save and hold Strongco free and harmless from and against all liabilities, debts, and obligations (whether absolute, accrued, contingent or otherwise) in connection therewith.

[13] "Assumed Liabilities" are defined in the APA as:

> 1.1.6 "Assumed Liabilities" means: (a) the liabilities and obligations under the Assumed Contracts and the Assumed Leases which accrue as of and from the Effective Date; (b) the Current Liabilities; and (c) all liabilities and obligations of Nord-Sen with respect to the Transferred Employees pursuant to Article 8 hereof.

[14] "Assumed Contracts" are defined in Section 1.1.6 of the APA as:

> 1.1.6 "Assumed Contracts" means the Contracts relating exclusively to the Business including those Contracts listed in Schedule 5.1.22 annexed hereto;

[15] The Sheets Contract was listed as an Assumed Contract in Schedule 5.1.22. The contract with Westlock was not.

[16] Section 6 of the APA is entitled "Indemnification". Section 6.3 provides:

> 6.3 Indemnification by Purchasers. Subject to Section 6.12.2, the Purchasers shall jointly and severally indemnify and save harmless Strongco from and against any Loss suffered or incurred, directly or indirectly, by Strongco as a result of, arising out of or relating to:

6.3.1 any violation, contravention, or breach of any covenant, agreement or obligation of the Purchasers under or pursuant to this Agreement;

6.3.2 subject to Section 5.3, any breach of any representation or warranty made by the Purchasers under or pursuant to this Agreement; and

6.3.3 any of the Assumed Liabilities.

[17] The Purchase Price details are set out in Section 3 of the APA:

3. Purchase Price and Payment

3.1 Purchase Price. The purchase price payable by the Purchasers to Strongco (the "Purchase Price") for the purchase of the Purchased Assets shall consist of the aggregate of the following amounts: …

3.1.1.1 the book value of Inventories …

3.1.1.2 the book value of Accounts Receivable …

3.1.1.3 the book value of Work in Progress …

3.1.1.4 the book value of Prepaid Expenses …; plus

3.1.2 the amount of Three Million and One Dollars ($3,000,001.00).

[18] The term "Loss" is defined in Section 6.1.6 of the APA as meaning:

… any and all loss (including diminution in value), liability, damage, cost, expense, charge, fine, penalty or assessment, resulting from or arising out of any Claim, including the costs and expenses of any action, suit, proceeding, demand, assessment, judgement, settlement or compromise relating thereto (but excluding any claim for loss of profits) and all interest, punitive damages, fines and penalties and reasonable legal, accountants' and experts' fees and expenses incurred in connection therewith;

[19] The term "Claim" is defined in Section 6.1.1 of the APA as meaning:

any act, omission or state of facts and any demand, action, suit, proceeding, investigation, arbitration, trial, claim, assessment, judgement, settlement or compromise relating thereto which may give rise to a right to indemnification under Sections 6.2 or 6.3 hereof.

III. The Failure of the Grain Bins

[20] Dr. John Carson provided an expert opinion as to the cause of the failures of the grain bins. Dr. Carson received a PhD in Mechanical Engineering in 1970. He has published extensively in his area of expertise. He has been accepted as being able to offer expert testimony throughout the United States. His qualifications were not challenged and, having reviewed them, I accept Dr. Carson as an expert witness in the science and engineering of bulk solids storage, handling, and processing. Dr. Carson's conclusions, which were not refuted, were as follows:

1. Strongco and Sheets did not meet the expected standard of care of a reasonable and prudent designer of the grain bins.

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2. Given the intended use of the facility, the grain bins were virtually useless, capable of supporting maximum loads of only 7% of the design requirements.
3. The walls and their stiffeners as designed were grossly incapable of resisting the loads expected to be applied by the grain to be stored.
4. Remediating the structural deficiencies would require disassembling most, if not all, of the existing structure, then replacing it with new and stronger components. This would be far more expensive than demolishing the grain bins and building new ones and would be a less certain of a successful outcome.

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[21] Strongco and Nord-sen jointly retained Carla Ladner to inspect the grain bins and to provide expert advice in response to Dr. Carson’s expert opinion. She never concluded her report. Prior to trial, Nord-sen and Strongco requested that Ms. Ladner not provide her opinion in writing, as it appeared that it was consistent with and supportive of Dr. Carson’s opinion.

[22] Based on Dr. Carson’s evidence, I find that the grain bins supplied by Strongco (and Nord-sen) to Sheets and by Sheets to Westlock were of negligent design and construction, were unfit for their intended purpose, and were incapable of handling the loads of their design requirements. The units were of marginal value to Westlock and required replacement.

[23] Nord-sen takes issue with the manner of the introduction of the expert evidence, alleging that it was not properly adduced, that some of the experts were not called to give testimony, and that their evidence cannot be taken as proof of the failure of the grain bins or of damages.

[24] I am satisfied that the evidence was appropriately adduced and that I can give it weight. In any event, the evidence reveals the information that was in the hands of Strongco in making its decision as to whether to settle the Westlock Action. I find that it was reasonable for Strongco to rely upon such information in assessing the extent and quantum of its exposure in formulating its settlement position with Westlock.

IV. Damages

A. The Cost of Repairs

[25] Craig O’Brien is a professional engineer who was jointly retained by Strongco and Nord-sen to provide an opinion on damages for the alleged negligent design of the grain bins. In light of his joint retainer, both parties must be taken as having conceded his qualifications and his ability to give expert evidence on the maintenance of infrastructure and on mechanical systems diagnosing and retrofitting. I accept his qualifications and find that he is qualified to give expert testimony on those subjects.

[26] Mr. O’Brien provided two expert reports. His report dated January 21, 2021 (Exhibit 9) contemplated three scenarios. The first was the replacement of the existing 15 bin array with a new 15 bin array. He estimated the cost of such replacement to be $6,550,000. The second scenario contemplated the demolition and reconstruction of the existing grain elevator building. The estimated cost was $11,350,000. The third scenario was repair of the existing 15 bin array. The estimated cost of such repair was $4,400,000.

[27] In his first report, Mr. O'Brien postulated that complete demolition of the grain elevator building might not be necessary and indicated that it was feasible to repair the existing 15 bin array rather than replacing the entirety of the project.

[28] Mr. O'Brien prepared a supplementary report dated February 24, 2023 with the benefit of Dr. Carson's expert opinion. In this report, Mr. O'Brien concludes:

> Of the three Costing Scenarios provided in the Report, Costing Scenario No. 1 and Costing Scenario No. 3 are therefore not feasible and it is recommended that only Costing Scenario No. 2 remain. The opinion of probable cost would need to be reviewed considering Dr. John Carson's Expert Report.

[29] Mr. O'Brien then indicated that the only feasible solution for the rectification of the negligently designed grain bins was the demolition and reconstruction of the grain elevator building at a projected cost of $11,350,000. He clarified that that his cost scenarios did not include contingencies or GST and testified that his estimates were accurate to +/- 25%.

B. The Business Losses of Westlock

[30] Mr. Graham Quast was retained by Westlock's counsel to give evidence about Westlock's business losses. He prepared a report indicating that Westlock's economic loss due to Strongco's and Nord-sen's alleged conduct was $5.3 million to July 31, 2021 and would be $11.2 million (present value $9.7 million) to July 31, 2026. Mr. Quast was not called as an expert at the trial, but Nord-sen's expert used his report in coming to her opinion as to losses.

[31] Theresa Reichart of Reichart Financial Litigation Support Services was called by Nord-sen to give expert testimony as to Westlock's business losses. I accept Ms. Reichart's qualifications to give expert opinion evidence on the quantification of business losses suffered by Westlock as a result of the failure of the grain bins. Her opinion is that Westlock's business losses were between $2,011,969 and $5,883,205, depending upon when the reconstruction reasonably could have been completed.

[32] On the evidence, including the expert evidence, I make the following findings of fact:

1. In the Westlock Action, Strongco was likely to have been found to have breached the applicable standard of care. Its liability to Westlock was strongly indicated. Damages were likely to have been proven to have arisen as result of the breaches of the standard by Strongco.
2. Had the Westlock Action proceeded, Westlock may have been entitled to damages of between about $10,525,000 in the best case for Strongco (giving Strongco the benefit of the doubt of the business loss analysis and giving a maximum discount for contingencies on the estimated cost to repair) and slightly over $20,000,000 (giving Westlock the benefit of the doubt on the business losses and the maximum overage on the contingency on the estimated repair costs).
3. At the time of settlement, Strongco possessed expert evidence concerning the nature and degree of its exposure to claims of negligence by Westlock.

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4. Had the Westlock Action proceeded to judgment, Strongco very likely would have been required to pay interest pursuant to the *Judgment Interest Act*, RSA 2000, c J-1 and costs, adding millions to its exposure.

V. Positions of The Parties

A. Strongco's position

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[33] Strongco seeks to enforce the indemnity provisions contained in the APA to recover from Nord-sen the monies Strongco paid to settle the Westlock Action.

[34] Strongco argues Section 4.6 of the APA provides for indemnification because:

1. "Assumed Liabilities" include liabilities under the Assumed Contracts. The Sheets Contract was an Assumed Contract.
2. Under Section 4.6 of the APA, Nord-sen is obligated to indemnify Strongco against all liabilities arising under the Assumed Contracts, which includes the settlement monies that Strongco paid to Westlock.

[35] Strongco also argues that Section 6.3.3 of the APA gives it indemnification:

1. Section 6.3.3 entitles Strongco to indemnification up to the amount of the Purchase Price "from and against any Loss suffered or incurred directly or indirectly, by Strongco as a result of, arising out of or relating to: … any of the Assumed Labilities."
2. The tort aspect of the Westlock Action related to the Sheets Contract which was an Assumed Contract and therefore, indemnification follows.

[36] The thrust of Strongco's argument is that the liability for the settlement monies falls directly under Section 4.2 and Section 6.3.3 of the APA on an ordinary reading of those sections.

B. Nord-sen's position

[37] Nord-sen argues that:

1. Schedule 5.1.22 of the APA lists all Contracts to be assumed by the Purchasers. That section provides that:

   > SES (Strongco) is not in material violation of or in material default with respect to and, to the knowledge of Strongco, no event has occurred which, with the lapse of time or action by any Person, or both, could result in material violation of or a material default with respect to any of the Assumed Contracts …

2. "Assumed Liabilities" is defined as meaning the liabilities and obligations under the Assumed Contracts which accrue as of and from the Effective Date. There is nothing in the APA that makes any reference to the assumption by Nord-sen of Strongco's liability for Strongco's own negligence vis-à-vis Westlock who is not a party to any Assumed Contract listed in Schedule 5.1.22.
3. Section 4.4 of the APA provides that:

> the Purchasers have not assumed, and shall not be responsible for, any liabilities debts and obligations of Strongco of whatsoever nature, kind or description …whether known or unknown, absolute, accrued, contingent or otherwise, and whether arising prior to, on or subsequent to the Effective Date, other than the Assumed Liabilities.

4. Section 4.6 makes no mention of the assumption by Nord-sen of Strongco's liability for Strongco's own negligence.

[38] Nord-sen says there is nothing in either Section 4.6 or 6.3 that specifically indemnifies Strongco for its own negligence and maintains that Strongco must demonstrate that the indemnity provisions expressly and in the clearest of terms contemplate such indemnity.

[39] Nord-sen also argues that for there to be any indemnity for Strongco under the APA in respect of the settlement of the Westlock Action, the settlement must be reasonable. Nord-sen's position is that Strongco had no reasonable belief that it had any exposure to liability.

VI. The Law and Analysis

A. The Law

[40] In ***Dow Chemical Canada ULC v NOVA Chemicals Corporation***, 2020 ABCA 320 at para 47, the Alberta Court of Appeal considered the interpretation of an exclusion cause. The language used by the Court is apposite in the case of an indemnity provision:

> Exclusion clauses should be interpreted like all other contractual clauses, not in isolation, but giving the words used their ordinary and grammatical meaning, considered in harmony with the rest of the contract and in light of their purpose and commercial context: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para. 47, [2014] 2 SCR 633.

[41] The starting point for interpreting indemnity clauses is that "any indemnity which was given to a person was not intended to extend to loss or cost arising by reason of that person's own negligence or the negligence of that person's employees or agents": *Halsbury's Laws of Canada – Guarantee and Indemnity at HGI-130*. While today there is no absolute prohibition against indemnification from damages that arose from an indemnitee's own negligence, there is significant caution exercised in interpreting indemnity clauses in a way that indemnifies a party for its own negligence.

[42] In ***Canada Steamship Lines Limited v R***, [1952] 2 DLR 786, the Privy Council established a three-staged test for construing exclusions clauses that seek to exempt or indemnify a party for its own negligence:

1. The language of the exclusion clause must expressly exclude liability for negligence.
2. If there is no express reference to negligence, the language must be broad enough (after being interpreted *contra proferentem*) to cover negligence.
3. Even if the language is broad enough to cover negligence, there must be no other basis, i.e., no basis other than negligence, upon which the party could be made liable.

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[43] In ***Consumers' Gas v Peterborough***, [1981] 2 SCR 613 at p 615, the Supreme Court of Canada added clarity by adopting this quote from the Ontario Court of Appeal:

> "If one is to be protected against and indemnified for one's own negligence there would have to be an indemnity clause spelling out this obligation on the other party **in the clearest terms**." [Emphasis added.]

[44] Since ***Consumers' Gas***, this "clearest terms" requirement has been the test in Canada for interpreting clauses that purport to indemnify a party for its own negligence. See ***Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc (IMV Projects Inc)***, 2018 ABCA 305 at para 99 (***Canadian Natural Resources***); ***Manson Insulation Products Ltd v Crossroads C & I Distributors***, 2019 ABQB 684 at para 515; ***Khalil v Durant***, 2021 ABQB 241 at para 113.

[45] Many American jurisdictions also demand explicit wording to indemnify a party for its own negligence. This further underscores that protection against a party's own negligence is seen as inconsonant with commercial purpose, and a clear indication of such intention of the parties is required. See for example: ***Ethyl Corp v Daniel Construction Co***, 725 SW (2d) 705 at 708 (Tex Sup Ct 1987).

[46] The "clearest terms" requirement is rooted in the commonsense notion that one would rarely intend to indemnify another for losses caused by that other person. This idea was captured by the House of Lords in ***Smith and others v South Wales Switchgear Ltd,*** [1978] 1 All ER 18:

> While an indemnity clause may be regarded as the obverse of an exempting clause, when considering the meaning of such a clause one must, I think, regard it as even more **inherently improbable that one party should agree to discharge the liability of the other party for acts for which he is responsible**. In my opinion it is the case that the imposition by the *proferens* on the other party of liability to indemnify him against the consequences of his own negligence must be imposed by very clear words. [Emphasis added].

[47] That having been said, there are occasions where the parties do so intend. When the parties are careful and specific about the language they use in a given indemnity clause such wording must be "interpreted and applied according to its plain wording and its commercial purpose": ***Canadian Natural Resources*** at para 100.

B. Application of Law to the Facts

[48] I must determine whether the indemnity provisions permit the recovery sought by Strongco. To make this determination, I must discern the intention of the parties at the time they entered into the APA. That intention is to be gleaned from the language the parties chose to express their agreement. Those words must be given their ordinary and grammatical meaning in the context of the whole agreement considering the commercial context and the joint purpose of the parties.

[49] The indemnity clauses contained in the APA do not spell out Nord-sen's obligation to indemnify Strongco's negligence "in the clearest terms." None of the sections mentions negligence. Instead, they employ the type of general indemnity language eschewed in ***Canada Steamship*** and ***Consumers' Gas***. Absent such clarity, there is no evidence that the parties intended to "shift the risk" of Strongco's own negligence to Nord-sen: ***Neely v MacDonald***, 2014 ONCA 874 at para 7.

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[50] Only “Assumed Liabilities” were undertaken by Nord-sen. The Sheets Contract with Strongco limited Sheets’ remedy to a claim for direct damages not exceeding the aggregate amount of the Purchase Order. Nord-sen would have understood those contractual protections in agreeing to assume liabilities thereunder. Any claim by Sheets would have been met with contractual limitations. Liability beyond the Sheets Contract may arise at law to others, but such claims are independent of the Sheets Contract and do not arise under, out of, or in relation to the Sheets Contract. Indeed, they arise irrespective of the Sheets Contract. They are not Assumed Liabilities.

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[51] Further, Nord-sen assumed no liabilities “known or unknown” other than the Assumed Liabilities (Section 4.3). Strongco was to be responsible for all valid warranty claims for all products sold prior to the Effective Date (suggesting Strongco’s responsibility for pre-closing conduct) except to the extent that such claims were Assumed Liabilities (Section 4.5). Nord-sen was to assume “Assumed Liabilities” as of the Effective Date of the APA (Section 4.6). There was no claim for negligence as of the Effective Date. Assumed Liabilities are liabilities under the Assumed Contracts, which accrue as and from the Effective Date. In context, accrual does not include Strongco’s pre-closing conduct. Rather, the closing of the APA created a clean slate, and the indemnity captures only those claims which begin to accrue post-closing.

[52] The third branch of the test articulated in ***Canada Steamship*** merits analysis here. As explained in *Halsbury’s Laws of Canada - Guarantee and Indemnity* at HGI-130 “Enforceability” (2022 Reissue):

> Absent an express provision dealing with negligence, a right to indemnity will be inferred only where it arises by necessary implication — necessary in the sense that no other interpretation of the indemnity agreement is possible other than that it must extend to negligence in order for the provision to be given meaning. Specifically, if the words used in the agreement are wide enough to encompass negligence, then the court will consider whether there is some non-negligence base of liability that is neither remote nor fanciful that the parties may have had in mind when drafting the contract, rather than negligence. If such an alternative liability exists, then the court will construe the indemnity not to apply to the indemnified person’s own negligence.

[53] The APA’s indemnity clauses do not expressly or by necessary implication state that the indemnities extend to Strongco’s own negligence.

[54] Moreover, the indemnity clause reasonably can be interpreted to cover liability for a breach of contract, a non-negligence base of liability that is “neither remote nor fanciful”. Since the indemnity may apply to a claim in contract, it will not provide protection for a claim in negligence, absent very specific language to that effect.

[55] I can find nothing in the “commercial context” that might support a finding that Nord-sen intended to indemnify Strongco for its own negligence upon entering the APA. Nord-sen had nothing to gain by agreeing to be responsible for Strongco’s preclosing negligence in its performance of its obligations under the Sheets Contract. Strongco was paid in full for the work done by it prior to the closing of the APA. At the time, it was owed $675,000. Nord-sen paid dollar for dollar to acquire the Accounts Receivable. In short, Nord-sen received no (or at best negligible) value for the negligent design work undertaken by Strongco prior to the closing of the

APA. The Sheets Contract was, at closing, about 83% complete. The commercially reasonable interpretation of the APA is that post-closing liabilities of the parties were to follow fault.

[56] Strongco argues that the application of the ***Consumers' Gas*** or ***Canada Steamship*** test, which demands explicit language in indemnity clauses for covering another's negligence, is inappropriate in the case of asset purchase agreements. This, it asserts, would contradict the commercial purpose behind such agreements. Strongco's position is that the primary goal of this APA was to ensure a clean break, effectively severing the relationship so that no liabilities would follow Strongco after the APA closed.

[57] This commercial purpose argument cuts both ways. Asset purchase agreements are not *pro forma* contacts. They are crafted to accomplish the unique purposes of their makers. While asset purchase agreements may be designed to facilitate a clean break, it cannot be said that they presumptively absolve a vendor from past negligent acts. Indeed, it could equally follow from the clean break analysis that a purchaser would not intend to acquire liabilities attached to the vendor's past conduct. It cannot be assumed that parties purchasing a business anticipate being responsible for the vendor's past negligent acts. The "clean break" leaves each party to bear the risk of its own preclosing conduct.

[58] Counsel for Nord-sen highlighted several of the APA provisions that suggest that Nord-sen did not intend to indemnify Strongco for damages stemming from its own negligence. He highlighted Section 10.6 of the APA, which suggests that liability for past negligence giving rise to personal injury was on the parties' minds when they formed the APA. Yet the parties chose not to reference negligent acts in Sections 4.6 or 6.3.3 of the APA. Arguably, this omission was intentional and no indemnity was intended to be granted for the vendor's prior negligent acts. The APA as a whole intimates an intention that each of the parties entered into the transaction with a view of retaining latent liabilities that predated the transaction.

[59] It would be commercially unreasonable for Nord-sen to accept liability for Strongco's negligence. Nord-sen would be unaware of any latent liabilities for negligent acts of Strongco committed prior to the transaction. To fix Nord-sen with such an unknown liability could render the value received for the purchase of Strongco's assets nugatory. It could not have been intended that Nord-sen would accept unknown liabilities and yet pay full book value for the Accounts Receivable and other assets owned by Strongco. Such would not be a commercially reasonable expectation of a purchaser, as the assets (burdened with such contingency), would not have been of the value ascribed.

[60] The language used in the indemnity clause does not demonstrate a clear intention of the parties that Nord-sen agreed to indemnify Strongco for its negligent design of the grain bins.

[61] In ***Beldessi v Island Equip Ltd***, 1973 CanLII 1120 (BCCA), the British Columbia Court of Appeal adopted the following passage from ***Hollier v Rambler Motors (AMC) Ltd***, [1972] 1 All ER 399 at 404 as an example of an indemnity clause that was clear enough to cover the indemnitee's own negligence:

> It is well settled that a clause excluding liability for negligence should make its meaning plain on its face to any ordinary literate and sensible person. The easiest way of doing that, of course, is to state expressly that the garage, tradesman or merchant, as the case may be, will not be responsible for any damage caused by his own negligence . . . I am not saying that an exclusion clause cannot be

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> effective to exclude negligence unless it does so expressly, but in order for the clause to be effective the language should be so plain that it clearly bears that meaning.

[62] In ***Coulter v Canadian National Railway***, 2000 CanLII 16933 (Ont CA), the Court found that the following indemnity clause was clear enough to cover the indemnitee's own negligence:

> To at all times indemnify and save harmless the Railway from all loss, expense and liability howsoever incurred by the Railway, and the Licensee hereby waives this against the Railway all claims of whatsoever nature and kind, where such loss, expense, liability or claims arise directly or indirectly out of or are attributable to the exercise by the Licensee or others of the privileges herein granted and whether such loss, expense, liability or claims result from the negligence of the Railway, or otherwise.

[63] The clause explicitly referenced the possibility of loss, expense, or liability arising from the negligence of the Railway. In ***Coulter***, there was a commercial rationale for including this unusual clause.

[64] In ***Builders Holdings Ltd v Gasland Properties Ltd***, 2001 ABQB 823 at paras 75 - 77, Justice Lee ruled that the following indemnity clause was too vague to mandate indemnification for negligence:

> Contracted retailer covenants to indemnify and save harmless Texaco from and against all claims, demands, losses, costs, damages, actions, suits or other proceedings, whatsoever by whomsoever made, brought or prosecuted in any manner, based upon, occasioned by or attributable to any injury, loss or damage to or infringement of the rights of any person or property whatsoever or howsoever caused, or attributable to any neglect, misfeasance or non-feasance of Contracted Retailer, his employees, agents, servants, representatives, invitees, or licensees on or in connection with the premises.

[65] Though the clause was perhaps even more comprehensive than the indemnity clauses in this case, it still failed to satisfy the ***Consumers' Gas*** test.

[66] The Sheets Contract was entered into the ordinary course of Strongco's business. Both Strongco and Nord-sen acknowledge this. Therefore, section 7.1 of the APA has no application and there is no need to consider it further.

[67] I find that there was no contractual indemnity for amounts paid by Strongco in settlement of the Westlock Action. This disposes of Strongco's claim. What follows are my findings in respect of the other arguments raised by Nord-sen, lest I am mistaken on my interpretation of the scope of the indemnity clauses.

C. The Effect of the Settlements

[68] Nord-sen argues that Strongco and Nord-sen were sued by Westlock as joint tortfeasors. The allegations against them were the same. The same damages were sought. Strongco and Nord-sen acted with common design with respect to Westlock's allegations. Westlock settled its action against Nord-sen separately from its settlement with Strongco. Strongco agreed to pay $10,750,000 for a release and discontinuance ("Strongco Settlement"). As noted above, the

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Strongco Settlement was entered into on or about October 16, 2023, but the documentation was not completed and the settlement funds were not exchanged until November 17, 2023.

[69] Nord-sen secured a release and discontinuance from Westlock without a requirement to pay any further consideration ("Nord-sen Settlement"). The Nord-sen Settlement was concluded on October 17, 2023 and the documentation was finalized before the funding and the documentation of the Strongco Settlement.

[70] Nord-sen argues that at the moment Westlock provided a release to Nord-sen, Westlock's claims against both Nord-sen and Strongco disappeared. Nord-sen submits that its release operated at law to release both Nord-sen and Strongco from any further claims of tortious liability with respect to the grain bin structure failure. Since the release was effective prior to the commencement of the trial and prior to Strongco making any payment to Westlock, any payments by Strongco to Westlock were made without legal compulsion and are therefore unrecoverable against Nord-sen.

[71] In ***Bawitko Investments Ltd v Kernels Popcorn Ltd***, 1991 CanLII 2734 (Ont CA), the Ontario Court of Appeal considered the formalization of documentation of an agreement:

> As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

[72] ***Bawitko*** has been applied in the context of settlement agreements. For example, in ***Bogue v Bogue***, 1999 CanLII 3284 (Ont CA) at paras 13 and 15, the Court stated:

> ...While there was no express discussion about a release, the settlement of the action implied an obligation to furnish releases: *Fieguth v. Acklands Ltd.* (1989), 59 D.L.R. (4th) 114 (B.C.C.A.). At the end of those negotiations, the parties had bound themselves to the settlement. It only remained for the lawyers to reduce the terms to a formal document. This was not simply an agreement to agree.
>
> ...
>
> Generally speaking, litigation is settled on the basis that a final agreement has been reached which the parties intend to record in formal documentation and "parties who reach a settlement should usually be held to their bargains".

[73] In ***Ward v Ward***, 2011 ONCA 178 at para 53, the Court stated:

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> At common law, an agreement is binding if the parties consider that it contains all essential terms, even if the parties also agree that those terms will subsequently be recorded in a more formal document together with the usual terms ancillary to that type of agreement.

[74] Nord-sen contends that the release bar rule, which excuses one party from liability when another is released, applied to Strongco upon Nord-sen receiving a release from Westlock. In this respect, Nord-sen's counsel cites ***Wheeler v Rupp***, 2007 ABQB 119, arguing that Strongco was not obligated to pay settlement monies to Westlock once Nord-sen was released.

[75] While ***Wheeler*** remains authoritative in Alberta, it does not apply here. In ***Wheeler***, Mr. Cox and Mr. Rupp, as joint tortfeasors, were jointly and severally liable for a $70,000 judgment to the Motor Vehicle Accident Fund. Mr. Cox chose to make payments of $100 monthly towards this judgment. Mr. Rupp, on the other hand, opted to pay a lump sum of $14,000 in exchange for a release. Justice Sanderman determined that the release of Mr. Rupp also released Mr. Cox because the release bar rule still applied in Alberta. Therefore, Mr. Cox was not required to continue his monthly payments.

[76] The ***Wheeler*** case is distinguishable in two ways. First, Mr. Cox's payments of $100 per month were made to satisfy a court judgment against him, not because of a contractual obligation to pay this amount. Strongco paid Westlock pursuant to a contractual obligation arising from the settlement of a tort claim, rather than a judgment. Secondly, the only reason Mr. Cox was allowed to stop paying his $100 per month was that Justice Sanderman cancelled the judgment against him. This is captured at para 10:

> Mr. Cox is not entitled to the return of any funds paid by him to the Minister after the release was given to Mr. Rupp. He continued to make payments pursuant to an agreement he made with the Minister to retire a valid judgment in existence. A judgment continues up until the court declares that the obligation to repay no longer exists. That is the relief that has been granted to the applicant. No further payments need be made.

[77] In the circumstances of this case, unlike in ***Wheeler***, there was no cancellation of a judgment against Strongco nor a discharge of its contractual obligations to Westlock arising from the Strongco Settlement. Strongco's obligations to Westlock persisted.

[78] While ***Wheeler*** remains a valid decision and the release bar rule is applicable in Alberta, it does not oust fundamental contract law principles. Strongco's payment to Westlock should be seen not as a gratuitous transfer but as the fulfillment of a contractual commitment to Westlock under the Strongco Settlement, which was entered into before the Nord-sen Settlement.

[79] I find that the timing of the Strongco Settlement does not have the effect urged by Nord-sen. At the moment that Strongco and Westlock were *ad idem* about the terms of the Strongco Settlement, both Strongco and Westlock were bound. The mechanics of documenting the Strongco Settlement do not affect the essence of their settlement agreement – that is, that there was an obligation on the part of Strongco to pay $10,750,000 immediately on the parties being *ad idem* and a reciprocal obligation of Westlock to provide a release. This was all concluded in advance of the Nord-sen Settlement. The fact that the Nord-sen Settlement was documented prior to the finalization of the documentation and payment of consideration for the Strongco

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Settlement did not result in the elimination of Strongco's obligation to Westlock. The nature of the obligation had changed from a tort claim to a contractual one.

D. The Reasonableness of the Strongco Settlement

[80] Nord-sen argues that Strongco agreed to pay too much to settle the Westlock Action, suggesting that Strongco and Nord-sen had strong limitations arguments available to them. The evidence is that some deformation of the grain bin structure was discovered in November 2014. At the time, Westlock treated this as a contractual issue and Sheets attended the site to make some repairs. Nord-sen argues that the limitation period for Westlock's negligence claim ought to have commenced then – that it was then that the negligence was reasonably discoverable.

[81] If November 2014 was the commencement of the limitation period, the limitation period would have expired prior to the filing of Westlock's Statement of Claim. Nord-sen contends that the Strongco Settlement did not adequately reflect the risk of such a finding in assessing Westlock's position. However, there has been no expert evidence as to when the damage was reasonably discoverable.

[82] In regard to the reasonableness of the amount that Strongco paid in settlement of Westlock's claim, Mr. O'Brien's supplementary report, as noted above, estimates the cost at $11,350,000 (+/- 25%).

[83] I find that the settlement amount Strongco agreed to pay was reasonable in the circumstances of this case. The expert advice Strongco received prior to entering the Strongco Settlement was that it was likely to be found liable for negligence and that its exposure was between $10,000,000 and $20,000,000, depending on the assumptions and contingencies.

[84] The Strongco Settlement agreed to by Strongco was at the very low end of the range of its exposure without regard for its exposure to prejudgment interest and costs. Moreover, the discount Strongco enjoyed adequately compensated for the risk that the limitation argument might have succeeded. Although a successful limitation argument might have eliminated the claim, the likelihood of the success of the limitation argument was reasonably considered to be low and the settlement was therefore defensible.

VII. Conclusion

[85] Strongco sold its assets to Nord-sen. Nord-sen purchased only the assets and Accounts Receivable and assumed only the liabilities specified in the APA.

[86] As part of the purchase, Nord-sen agreed to purchase certain contracts that Strongco was in the process of completing at the time of closing, including the Sheets Contract for the design and supply of certain grain bins for Westlock. The design work for the grain bins had been completed before the closing of the APA. Some of the materials had been delivered to the Westlock site. The balance of the materials were delivered by Nord-sen after the closing of the APA. The project was 83% complete by the APA closing date. The grain bins turned out to have been negligently designed; they eventually failed.

[87] Westlock commenced an Action against both Strongco and, its successor, Nord-sen. Just prior to the trial of the Westlock Action, Westlock settled its claims with each of the defendants. Sheets, who contracted with Westlock to build the facility, settled by paying $1,000,000 to Westlock. Strongco agreed to pay Westlock $10,750,000 in exchange for a release and

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discontinuance. Westlock settled with Nord-sen by agreeing to dismiss the action against Nord-sen without costs. On the evidence, the Strongco Settlement was not unreasonable in the circumstances. The Nord-sen Settlement did not relieve Strongco of its obligation to pay the agreed amount to Westlock.

[88] I find the language used by the parties in crafting the indemnity provisions of the APA is insufficiently broad to indemnify Strongco for its own negligent acts. It cannot be discerned from the language used that such was the intent of the parties.

[89] The amounts paid by Strongco in settlement of the Westlock Action are not recoverable from Nord-sen under the APA. The claim by Strongco Corporation, Strongco GP Inc, Strongco Limited Partnership and Strongco Inc. against Nordstrong Equipment Limited is dismissed with costs. Costs may be spoken to if not agreed.

Heard on the 16th and 17th days of October and the 15th and 16th days of November, 2023 and the 21st day of March, 2024.
Dated at the City of Edmonton, Alberta this 31st day of July, 2024.

K.H. Davidson
C.J.C.K.B.A.

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