SUPREME COURT OF NOVA SCOTIA

Citation: *Fan Yang v. McInnes Cooper*, 2024 NSSC 308

Date: 20241023
Docket: HFX No. 517562
Registry: Halifax

Between:

Fan Yang and 3268652 Nova Scotia Limited, carrying on business as Keller Williams Select Realty, a body corporate

Applicant

v.

Benjamin Pryde and McInnes Cooper, a partnership

Respondent

DECISION

Judge: The Honourable Justice John A. Keith

Heard: April 16, 17, 18, and 19, 2024, in Halifax, Nova Scotia

Counsel: Andrew Sowerby and Kelcie White, for the Applicant
Justin Adams, for the Respondent

By the Court:

BRIEF SUMMARY OF THE FACTS AND ISSUES

[1] The Applicant Fan Yang is a real estate agent who, at all material times, worked for the real estate brokerage and co-Applicant 3268652 Nova Scotia Limited carrying on business as Keller Williams Realty (the "**KW Parties**").

[2] Sushi Nami Franchising Limited ("**Sushi Nami Franchising**") is the franchisor for a chain of Japanese sushi and ramen noodle restaurants that operate under the brand name Sushi Nami.

[3] Sushi Nami Franchising also owned a commercial property in downtown Halifax, Nova Scotia bearing P.I.D. No. 00023390 and known municipally as 6450/6452 Quinpool Road (the "**Property**"). At all material times, the Property was subject to the following two leases:

1. A ten-year commercial lease between Sushi Nami Franchising as landlord/franchisor and Noodle Nami Quinpool Restaurant Inc. ("**Noodle Nami Quinpool**") as tenant/franchisee. The lease commenced June 1, 2020, and included an option to extend the tenancy for a further five years (the "**Commercial Lease**"). Noodle Nami Quinpool operated a Sushi Nami franchise restaurant in the leased premises. Sushi Nami Franchising and Noodle Nami Quinpool were separate corporate entities but they shared the same sole shareholder: Jon and Family Holding Inc. ("**Jon Holdco**"); and

2. A residential lease in which Sushi Nami Franchising rented an apartment to certain unrelated persons.

[4] By Seller Brokerage Agreement dated June 24, 2021, Sushi Nami Franchising engaged the KW Parties to market and sell the Property.

[5] By Agreement of Purchase and Sale dated July 21, 2021, Ionian Sea Investments Inc. ("**Ionian**") offered to buy the Property for $1,250,000. The offer was incorporated into the Nova Scotia Real Estate Commission standard form 400.

[6] Ionian intended to develop the Property. Thus, its offer kept the boilerplate language requiring vacant possession upon closing. Clause 2.1 stated: "Upon completion, vacant possession of the Property shall be given to the Buyer unless otherwise provide as follows: [Intentionally left blank]".

[7] Sushi Nami Franchising did not want to give vacant possession of the Property. Sushi Nami Franchising specifically told the KW Parties that the residential lease could likely be terminated but insisted that the lease with Noodle Nami Quinpool must stay in place. Those instructions were clear to Mr. Yang and the KW Parties.

[8] Unfortunately, despite the plain wording of clause 2.1, the KW Parties (Mr. Yang in particular) misunderstood its meaning and significance. Mr. Yang assumed that clause 2.1 somehow applied only to the residential tenancy and excluded the Noodle Nami Quinpool tenancy – as his client Sushi Nami Franchising expected. At para. 89 of his sworn affidavit, Mr. Yang testified that:

> When I received the Offer, I read clause 2.1 and I understood it to mean that Noodle Nami would not be required to vacate its premises when the Property sold, but instead that Sushi Nami would transfer possession of the Property including the Noodle Nami lease to Ionian.

[9] It is equally unfortunate that Mr. Yang never communicated his misguided reading of clause 2.1 to anyone. He simply believed it to be true. As such, when Mr. Yang presented Ionian's offer to the Sushi Nami Franchising representative, Catherine Luo, he neither expressed concern over nor mentioned clause 2.1. Instead, their discussions focussed on price and several comparatively minor issues.

[10] On July 21, 2021, Sushi Nami Franchising counteroffered. The only significant amendment increased the purchase price to $1,390,000. Clause 2.1 requiring vacant possession was undisturbed. According to Mr. Yang's affidavit "The Counteroffer did not refer to the Noodle Nami lease, because I understood that Ionian Sea was offering to purchase the Property with the lease intact" (at para. 91).

[11] Ionian accepted Sushi Nami Franchising's counteroffer a few hours after receiving it.

[12] Section 8.1 of the Agreement of Purchase and Sale contained a "lawyer review clause" which entitled either party to terminate on or before July 23, 2021, if either side notified the other that the agreement was unacceptable after review by their respective lawyers "acting reasonably with respect to wording and content". Absent such notice, the agreement "shall be deemed to have been acceptable to both parties." Clause 8.1 stated:

> This Agreement is subject to review by both the Buyer's and the Seller's lawyers, acting reasonably with respect to wording and content within the Agreement. This review shall be deemed to have been acceptable to both parties, unless the other

> party or their Agent is notified to the contrary, in writing, on or before the 23rd day of July, 2021. If notice to the contrary is received, either party shall be at liberty to terminate this Agreement and the deposit shall be returned to the Buyer.

[13] At 1:24 p.m. on July 22, 2021, Ms. Luo of Sushi Nami Franchising emailed the agreement to Sushi Nami's lawyer Ben Pryde, a partner with the law firm McInnes Cooper. She asked Mr. Pryde to "please check and advise what I need to do next."

[14] Prior to the July 23, 2021 lawyer review deadline, nobody from the KW Parties or Sushi Nami Franchising told anyone from the MC Parties (including Mr. Pryde) that:

1. Sushi Nami Franchising insisted that the Noodle Nami Quinpool tenancy remain in place;

2. Sushi Nami Franchising gave explicit instructions to the KW Parties that the Noodle Nami Quinpool lease must remain in place; or

3. Clause 2.1 of the agreement requiring vacant possession failed to reflect Sushi Nami Franchising's intentions or instructions to the KW Parties.

[15] Between the time of receiving the agreement and July 23, 2021, when the "lawyer review clause" lapsed, Mr. Pryde only very briefly scanned the agreement. There were some basic discussions between Mr. Pryde and representatives from Sushi Nami Franchising, but none involved Clause 2.1 and vacant possession. The July 23, 2021, deadline for lawyer review came and went.

[16] On August 6, 2021, Ionian's real estate agent emailed Mr. Yang and asked if Noodle Nami Quinpool was interested in remaining as a month-to-month tenant after closing. If so, Ionian was prepared to negotiate a reasonable rent. It was only upon receiving this email that the KW Parties, Sushi Nami Franchising, and Noodle Nami Quinpool awoke to the contractual problems created by Clause 2.1. By that time, the agreement had become binding and could not be amended.

[17] Sushi Nami Franchising belatedly attempted to terminate the agreement. Ionian demanded that the transaction close. The dispute spawned the following lawsuits:

1. An application in court by Ionian seeking an order for specific performance of the APS ("**Application 1**");

2. An application in court by Sushi Nami Franchising and Noodle Nami Quinpool against the KW Parties for damages, if Ionian's claim for specific performance was allowed ("**Application 2**"); and

3. This application in court by the KW Parties against Mr. Pryde and McInnes Cooper (the "MC Parties") for contribution and indemnity if the KW Parties were required to pay damages to Sushi Nami Franchising and/or Noodle Nami Quinpool. ("**Application 3**").

[18] Application 1 and Application 2 were settled on the basis that:

1. Sushi Nami Franchising would close the APS with Ionian and convey vacant possession of the Property in exchange for the agreed purchase price. Noodle Nami Quinpool's lease interest would also be terminated and it would also be required to vacate the Property;

2. The KW Parties would pay Sushi Nami Franchising and Noodle Nami Quinpool a total of $340,000; and

3. The KW Parties would continue this proceeding (Application 3) for contribution and indemnity from the MC Parties.

[19] The remaining dispute may be reduced to the following questions:

1. At law, are the KW Parties precluded from seeking contribution or recovery from the MC Parties?

2. If the KW Parties are not precluded from seeking contribution or recovery from the MC Parties, were the MC Parties negligent?

3. If the MC Parties were negligent, to what extent are the KW Parties entitled to recover a portion of the settlement paid ($340,000) from the MC Parties?

ISSUE 1: ARE THE KW PARTIES PRECLUDED FROM SEEKING CONTRIBUTION OR RECOVERY FROM THE MC PARTIES?

[20] There is a preliminary legal issue as to whether the KW Parties may, at law, claim contribution or indemnity from the MC Parties. At para. 165 of their pre-hearing submissions, the MC Parties argue that:

> (a) Because the Sushi Nami Parties[1] were contributorily negligent, all three parties' liability is several. Accordingly, in choosing to settle with the Sushi Nami Parties, the KW Parties can settle for their proportionate share of the damages and any overpayment, if any, is not recoverable against the MC Parties;
>
> (b) The claims against the MC Parties are effectively claims that the Sushi Nami Parties were negligent and failed to protect their own interests (which would be subsumed within Sushi Nami's proportionate share of the loss if proven to be contributorily negligent) or are an allegation the Sushi Nami Parties failed to mitigate their loss (again an allegation if proven would mean that the torts are distinct and would be subsumed within the Sushi Nami Parties' proportionate share of the loss if proven to be contributorily negligent);
>
> (c) Even if damages are assessed as being attributable to the MC Parties, those damages are unrecoverable because the Sushi Nami Parties did not advance a claim against the MC Parties.

[21] I agree that <u>if</u> the MC Parties are found to be negligent:

1. Their liability would be several and concurrent with the KW Parties; and

2. Any liability on the part of the MC Parties would be spent (and the KW Parties would have no right to contribution or indemnity against the MC Parties) if the MC Parties' several negligence was either subsumed with the contributory negligence of Sushi Nami Franchising or Noodle Nami Quinpool or part of a larger effort on the part of the Sushi Nami Parties to mitigate their damages.

[22] Respectfully, I disagree with the positions that:

1. The KW Parties are precluded from seeking recovery from the MC Parties for any overpayment because Sushi Nami

[1] The MC Parties refer to Sushi Nami Franchising and Noodle Nami Quinpool collectively as the "Sushi Nami Parties". However, they are distinct entities. It is important to separate their different legal identities and interests – not amalgamate them under a single name. For example, Sushi Nami Franchising (not Noodle Nami Quinpool) agreed to sell the Property to Ionian. Any contributory negligence regarding a failure to appreciate the meaning of clause 2.1 ("vacant possession") falls on Sushi Nami Franchising as the vendor with control over the terms of the agreement of purchase and sale. The fact that Jon Holdco is sole shareholder for both Sushi Nami Franchising and Noodle Nami Quinpool does not alter that basic legal premise. I note that Jon Holdco is not a party to this litigation and nobody has suggested piercing the corporate veil and/or approaching the legal issues as if Sushi Nami Franchising and Noodle Nami Quinpool were one entity. There are other concerns. I return to this issue below.

Franchising was contributorily negligent and liability between all these parties is several; and

2. The KW Parties cannot pursue a claim against the MC Parties due to contributory negligence attributable to Sushi Nami Franchising and/or because Sushi Nami Franchising did not advance any such claim against the KW Parties.

[23] The underlying legal issues are technical and relatively complicated – conceptually and historically. To untangle and clarify the issues, my reasons are structured as follows:

1. A review of the following basic forms of liability (or responsibility) for tortious acts: joint liability; several liability; and concurrent liability. This review also considers Nova Scotia's *Contributory Negligence Act*, R.S.N.S. 1989, c. 95, as amended (the "***Contributory Negligence Act***") and *Tortfeasors Act*, R.S.N.S. 1989, c. 471, as amended (the "***Tortfeasors Act***") and concludes that any liability which may attach to the KW Parties and the MC Parties is several and concurrent;

2. A review of the law regarding contributory negligence on the part of an original plaintiff. The specific question is: can a tortfeasor (the KW Parties in this case) settle with a contributorily negligent plaintiff (Sushi Nami Franchising) and, at the same time, preserve the right to seek recovery for any overpayment from another alleged, severally liable tortfeasor (the MC Parties)? The provisions of the *Contributory Negligence Act* and the *Tortfeasors Act* are again engaged. This section concludes that contributory negligence on the part of the plaintiff does not necessarily bar subsequent attempts by the settling tortfeasor to seek contribution or indemnity from other alleged tortfeasors for any overpayment. The analysis is nuanced, fact-sensitive and requires the Court to compare the quality and nature of the subsequent claims for contribution against the original plaintiff's contributory negligence;

3. A review of the law on the more specific issues which arise where a tortfeasor seeks contribution or indemnity from a person drawn into the litigation due to a contractual relationship with the original plaintiff. In this case, the MC Parties are involved because they

were retained to close the APS on behalf of the vendor, Sushi Nami Franchising. This section ends with the conclusion that, in the circumstances of this case, the quality and nature of the allegations against the MC Parties does not preclude a claim for recovery by the KW Parties if the MC Parties are found to be negligent, as alleged; and

4. Application of the law to the facts in this case.

BASIC CONCEPTS REGARDING LIABILITY

Joint Tortfeasors

[24] At law, where two or more persons commit a tort while engaged in a concerted action to a common end, they are jointly liable for the losses caused by their shared tortious acts.

[25] In *Remedies in Tort* (Online: Thomson Reuters, 2024) at §29:11, the authors explain:

> A joint tort signifies a common wrongful act by several persons, in which there is but one *injuria*, giving rise to a joint and several liability by all, and in which each is liable for the whole damage. One way of answering the question of who are joint tortfeasors is to ask whether the cause of action against them is the same. If the same evidence would support an action against each, they are joint tortfeasors.
>
> In each case, there is only one tortious act, omission or course of conduct committed by one defendant on behalf of, or in concert with another. The law imputes the commission of the same act to two or more persons at once. The mere fact that a group of persons are doing things together does not make them joint tortfeasors. On the other hand, the separation of the acts in point of time has no necessary connection with determining whether the tort is joint or several. It is possible for the torts to be several, although they are contemporaneous in time.
>
> To be joint tortfeasors, it is not necessary for persons acting in concert to realize that they are committing a tort. The critical element is that they have acted in furtherance of a common design.
>
> [Emphasis added]

Several Tortfeasors

[26] Tortfeasors become severally liable where:

1. Each is responsible for a cause that effects a consequence;

2. Each is responsible for a cause that is sufficient to effect the consequence; or

3. The actions of a single tortfeasor would not produce any damages were it not for the intervening act of another person.

(*Remedies in Tort at* §29:12)

Concurrent Liability

[27] Concurrent liability addresses the legal and practical possibility that multiple tortfeasors may be responsible for the same damage.

[28] Joint tortfeasors are, by definition, concurrently liable for the full loss. First, their actions constitute a single "chain of causation leading to the single damage but also … mental concurrence in some enterprise." (*Surrey (District) v. Carrol-Hatch & Associates Ltd.*, 1979 CarswellBC 235, [1979] 6 W.W.R. 289, 101 D.L.R. (3d) 218 (B.C.C.A.) ("***Surrey District***") at para. 51, quoting from Glanville Williams, *Joint Torts and Contributory Negligence (*1951*)*).

[29] Several tortfeasors may be concurrently liable for the full loss if their separate acts combined to produce a single unit of damage. Whether concurrence exists among several tortfeasors "is exclusively in the realm of causation" (*Surrey (District)* at para. 51). In other words, each several tortfeasor is responsible for a distinct cause that ultimately effected the same damage/consequence. By contrast, non-concurrent liability among several tortfeasors occurs where the damages may be identified; split into separate and distinct parts; and then attributed to each tortfeasor (*Remedies in Tort at* §29:12, emphasis added).

[30] In the first instance and in so far as the primary plaintiff is concerned, each individual, concurrent tortfeasors are liable to pay the entire loss - regardless whether they are deemed joint or several. Referring again to *Remedies in Tort* at §29:13:

> Concurrent tortfeasors are liable in full for damage done by all; it does not matter whether the concurrence is joint or merely several. Thus, if A and B excavate on their respective lands and cause C's land to subside, the extent of their liability is the same whether A and B acted in concert, in which case they are joint tortfeasors, or whether they did not. In either case they are concurrent tortfeasors, whose acts produce a single damage, and are each responsible in full for it.

[31] There is an important difference between a concurrent tortfeasor being held fully liable to pay the plaintiff's entire loss and the same tortfeasor's ability to seek contribution and indemnity from another tortfeasor. Thus:

1. A proven loss arising out of tortious acts will be apportioned between each concurrent tortfeasor – usually expressed as a percentage of the loss; and

2. If a concurrent tortfeasor pays an amount beyond their individual degree (or percentage) of responsibility, they may seek contribution and indemnity from the other concurrent tortfeasors.

[32] The legal origins of a tortfeasor's entitlement to contribution and indemnity from another tortfeasor are germane. Historically, at common law, a tortfeasor had no right to seek contribution and indemnity for overpayment from other tortfeasors. The common law rule against contribution and indemnity among tortfeasors was deemed to be overly harsh. Legislation was enacted to correct the perceived injustice. In Nova Scotia, the reform occurred through the following provisions of the *Contributory Negligence Act* and *Tortfeasors Act*:

The *Contributory Negligence Act*

Apportionment of liability

> 3 (1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

Interpretation of Section

> (2) Nothing in this Section operates so as to render any person liable for any damage or loss to which his fault has not contributed.

Determination of degrees of fault

> 4 Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree to which each person was at fault.

The *Tortfeasors Act* provides:

Remedies

> 3 Where damage is suffered by any person as a result of a tort, whether a crime or not,
>
> …

> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this Section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

Amount recoverable between tortfeasors

> 4 (1) In any action for contribution under this Act or on the summary application of any one of two or more tortfeasors found liable in damages in any action, the amount of the contribution recoverable from any person shall be such as may be found by the judge presiding at the trial or the court on appeal, to be just and equitable having regard to the extent of that persons responsibility for the damage, and the judge or the court on appeal shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

Recovery after tortfeasor settles with injured person

> (2) A tortfeasor may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage to any person suffering damage as a result of a tort, by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

[33] These statutory provisions were designed to ensure that each individual tortfeasor will ultimately be responsible for their degree of responsibility for the loss, and that they will not be obliged to overpay without recourse to recover from the other tortfeasors. The principle is philosophically rooted in a concern around unjust enrichment. One tortfeasor should not be unjustly enriched by failing or refusing to contribute their apportioned share of responsibility for a loss. Similarly, a tortfeasor who paid an amount in excess of their apportioned share should not be denied recourse against another tortfeasor (i.e. effectively compelling one tortfeasor to cover another tortfeasor's share of the loss).

[34] The same principle holds true where the original plaintiff settles with one of multiple potential tortfeasors. In Andrew Botterell et al., Fridman's *The Law of*

Torts in Canada, 4th ed. (Toronto: Thomson Reuters, 2020), the authors explain at page 1125:

> There is another possibly, namely that the plaintiff settles the claim with one tortfeasor and releases that tortfeasor from further liability. In Ontario, Nova Scotia and Saskatchewan there is a specific provision dealing with the right to contribution after such a settlement…. It has been held, however, that such a provision must be read into the statute. This is eminently reasonable. To exclude the operation of the statutory provisions with respect to contribution when there has been a settlement rather than a judicial determination of liability would create a significant gap in the law. Moreover, the purpose of the legislation would be negated and frustrated. The ultimate aim of the statutes is to encourage and foster settlements with a view to preventing or shortening litigation. To hold that a party who settled, admitting liability without the necessity for a judicial determination, thereby lost the opportunity, indeed the right under the legislation, to contribution from other tortfeasors would be unjust. It is important to note that the statutory provision with respect to contribution after settlement of an action requires the tortfeasor who has settled to satisfy the court that the amount of the settlement was reasonable. If the court finds that amount to be excessive, the court can fix an amount at which the claim should have been settled. The rationale for this limitation is that to permit a tortfeasor to settle at an exorbitant amount might lead to abuse given the knowledge that the impact of an excess payment would be borne by other tortfeasors rather than the one settling.

[35] In my view, if the MC Parties are negligent as alleged, they would be several and concurrent tortfeasors with the KW Parties. They did not act in concert. The KW Parties were engaged to market and assist in negotiating the terms of any sale of the Property. The MC Parties were only retained after an agreement was signed for the purpose of conducting an initial lawyer's review and then to close the transaction. However, if the MC Parties are liable, their separate acts would have combined with the KW Parties' tortious act to cause a single unit of loss (i.e. the loss of an existing Sushi Nami franchise on the Property, contrary to Sushi Nami Franchising's expectation that Noodle Nami Quinpool's tenancy would survive closing and continue for the remainder of the lease term).

[36] A question of apportionment arises. Where the concurrent tortfeasors are jointly liable, apportioning responsibility for the loss is straightforward. Each wrong doer/concurrent tortfeasor is deemed equally responsible. Where the concurrent tortfeasors are severally liable, apportioning the loss is more complicated. The Court will determine an individual tortfeasor's percentage responsibility based on the facts and the degree to which each caused the loss in question. I return to this issue below.

Contributory Negligence on the Part of the Plaintiff

[37] At common law, the principle that precluded tortfeasors from claiming contribution and indemnity from one another was similarly severe in terms of a plaintiff's rights of recovery. A plaintiff who was found to be contributorily negligent for his/her injuries was completely barred from any recovery against the tortfeasor(s). Sections 3 – 4 of the *Contributory Negligence Act* and sections 3 – 4 of the *Tortfeasors Act* (quoted above) also addressed this historical inequity.

[38] In *Fridman's The Law of Torts in Canada,* 4th ed., the authors refer to the Nova Scotia Court of Appeal decision in *Inglis Ltd. v. South Shore Sales & Service Ltd.*, 31 N.S.R. (2d) 541, 1979 CanLII 2714 (N.S.S.C.(A.D.)) ("***Inglis #2***"), when describing how these legislative reforms involving contributorily negligent plaintiffs and rights of contribution and indemnity between severally liable tortfeasors operate and interact. They write at p. 1127:

> In *Inglis Ltd. v. South Shore Sales & Service Ltd.*, for example, the plaintiff suffered an electric shock from a refrigerator. It was held that the injury was caused in part by negligent manufacture of the refrigerator and in part by the plaintiff having used a two-prong plug in a three-prong outlet. Hence, the plaintiff was found to be 50% contributorily negligent. The manufacturer then sued a corporation that had removed the original three-prong plug from the refrigerator before it was sold to the plaintiff. It claimed contribution but the Nova Scotia Court of Appeal dismissed the claim. The corporation was not a tortfeasor who would, if sued, have been liable in respect of the same damage. Its negligence in relation to the plug had been imputed to the injured party. He had been assigned responsibility for that portion of his damage related to the plug. Therefore, he could not have sued the corporation for what was his own negligence. As the court indicated, the right under the statutes is a right *sui generis*, of its own kind and class. Its existence depends upon fulfilment of the statutory requirements. It accrues only when the liability of the defendant, from whom contribution is sought, has been ascertained.

[39] In order to fully understand and apply the reasoning in *Inglis #2*, it is necessary to more carefully scrutinize its complicated procedural history, facts, and related conclusions.

[40] *Inglis #2* was preceded by an earlier appellate decision cited as *Smith v. Inglis Ltd*., 25 N.S.R. (2d) 38,1978 CarswellNS 103 (S.C. A.D.) ("***Inglis #1***"). The two appellate decisions relate to the same original accident but involve two separate actions. The background facts are:

1. Inglis Limited ("**Inglis**") manufactured a refrigerator which was sold by Simpsons-Sears Limited ("*Simpsons-Sears*") to Olive Corkum on June 12, 1972. The fridge was delivered to Ms. Corkum by Douglas Whynott, an independent contractor

> hired by Simpsons-Sears. The electrical cord on the refrigerator had a three-prong plug, with one of the prongs being a ground prong. None of the outlets in Ms. Corkum's home could take a three-prong plug, so Mr. Whynott, at Ms. Corkum's request, cut off the ground prong. Ms. Corkum used the refrigerator without incident for 11 months before trading it in at South Shore Sales and Service Limited ("**South Shore**") when she purchased a freezer.
>
> 2. In May 1973, Maynard Smith purchased the refrigerator from South Shore. He had no problems with it until April 29, 1975, when he received a severe electric shock after touching the metal handle of an electric oven with his right hand while holding the refrigerator handle with his left hand. The electric shock was caused by the terminals of the thermostat control in the fridge coming into contact with the capillary tube, thereby charging the cabinet of the refrigerator with electricity, which would have gone to ground through the electric plug if the ground prong had not been removed.
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> 3. Mr. Smith suffered injury and brought an action for damages against:
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>   (a) Inglis, alleging that the capillary tube was negligently installed during manufacturing; and
>
>   (b) Simpsons-Sears, alleging that the deliveryman (Douglas Whynott) was negligent in removing the third prong from the plug, and in failing to notify customers of the danger of removing the prong.
>
> 4. Mr. Smith did not sue the company that re-sold the refrigerator (South Shore) or the deliveryman who originally installed the refrigerator (Mr. Whynott).

[41] The trial judge in *Inglis #1* (Cowan, J., as he then was) dismissed the action, concluding that neither defendant was responsible. He found that the refrigerator was properly manufactured, and that the thermostat control must have been tampered with or improperly repaired after the initial sale of the refrigerator. He further found that Simpsons-Sears was not liable because Mr. Whynott was not its employee, and

because it had no duty to notify customers about the third prong. The trial judge went on to make gratuitous findings that Mr. Whynott was negligent in removing the grounding prong and that South Shore was negligent in selling and delivering the appliance with grounding plug cut off.

[42] Mr. Smith appealed against the manufacturer only (Inglis). In *Inglis #1*, MacKeigan, C.J.N.S. wrote the appellate decision. He allowed the appeal concluded that the capillary tube was, in all probability, improperly installed at the Inglis factory. As such, Inglis was severally liable but only for half (50%) of the loss. He concluded at para. 52 that:

> On my analysis, taken with the learned Judge's findings as to causation, the respondent is a tortfeasor, responsible jointly with any others against whom it might claim contribution, and as such is liable, subject to possible contributory negligence by the appellant, for all damages suffered by the appellant, even though, when it comes to possible contribution, its "just and equitable" share of "responsibility for the damage" (s. 3(1) of the Act) might well be much smaller than that of the other tortfeasors.

[43] MacKeigan, C.J.N.S. further concluded that the Plaintiff (Mr. Smith) was, in fact, contributorily negligent on the basis that he "should…have checked the plug when he bought the refrigerator and had it installed. He must have been aware of the danger of using a two-prong plug in a three-hole outlet and did not reasonably guard against the danger" (at para. 69).

[44] Finally, MacKeigan, C.J.N.S. provided the following observations regarding other potential tortfeasors who were not named in the action (i.e. Simpsons-Sears, the original vendor; South Shore, the retailer who re-sold the refrigerator to Mr. Smith; and Douglas Whynott, the deliveryman who installed and cut one of the three prongs) at para. 71:

> Since neither Simpsons-Sears Limited, Whynott nor South Shore Sales have in this suit been found liable to the plaintiff, the fact that he would in any event probably be barred from recovering from them by his assumption of the risk arising from the third prong removal, need not here concern us. Neither do we have to consider whether in that event the respondent could have successfully obtained contribution from them, in addition to the contribution in effect made by the appellant's contributory negligence.

[45] These comments merely reflect the basic proposition that a plaintiff cannot claim compensation from others for his/her own negligence. They also left open the possibility of Inglis seeking contribution or indemnity from other potential tortfeasors. In fact, that is what happened.

[46] After the Court of Appeal's decision in *Inglis #1*, Inglis launched a new action against South Shore and Mr. Whynott (the person who originally delivered the refrigerator and cut off the third prong), claiming contribution from them with respect to Inglis's liability to Mr. Smith. The insurers of South Shore, The Canada Accident and Fire Assurance Company ("**Canada Accident and Fire**"), were later joined as a third party.

[47] With the consent of all the parties, Inglis filed an application in chambers for a determination of the following question of law: "Whether in the event that all the facts as alleged in the plaintiff's statement of claim are correct, the plaintiff has at law any cause of action against the defendant or either of them."

[48] Distilled to its essence, the insurer Canada Accident and Fire argued that:

1. Under the Tortfeasors Act, Inglis had the right to claim contribution and indemnity from any other tortfeasor in the original action;

2. Under the Contributory Negligence Act, the Court must be deemed to have finally and specifically determined Inglis's fault – implicitly taking into account any other tortfeasors who may have contributed to the loss;

3. The damages payable by Inglis cannot be further subdivided or apportioned, and must be considered *res judicata*.[2]

[49] The chambers judge disagreed and found that Inglis had the right to pursue the defendants for contribution and indemnity. All of the defendants (South Shore, its insurer Canada Accident and Fire, and Mr. Whynott) appealed, thus prompting the Court of Appeal's decision in *Inglis #2*.

[50] The insurer's arguments were, in effect, the same as those being advanced by the MC Parties: that the KW Parties have no claim for contribution with respect to the $340,000 monetary settlement because the Sushi Nami Parties, the "plaintiffs" in the application in court against the KW Parties, were contributorily negligent. Therefore, KW's responsibility for any losses would have been finally and exclusively determined in the concluded settlement. Further, the MC Parties say, the KW Parties agreement to pay $340,000 as full and final settlement must be deemed to have taken into account the responsibility of any other tortfeasor, including MC, such that any further claim for contribution or indemnity is lost.

[2] The appellants' arguments were summarized at para. 26 of *Inglis #2*.

[51] MacDonald, J.A. wrote the Court of Appeal's decision in *Inglis #2*. He responded to these arguments by reviewing the history of the *Contributory Negligence Act* and the *Tortfeasors Act* in this province; confirming how these statutory initiatives sought to reform perceived inequities in the common law; illustrating the importance of distinguishing between a plaintiff's contributory negligence and apportioning fault between opposing tortfeasors; and explaining how all of this informs the interaction between (and interpretation of) these two statutes. It is helpful to quote MacDonald, J.A.'s decision at length at paras. 28 - 41:

> The Conference of Commissioners on Uniformity of Legislation in Canada (hereinafter referred to as the Uniformity Commissioners) proposed a Model *Contributory Negligence Act* in 1924. Section 2 of this Model Act provided:
>
> > 2. Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree each person was at fault.
>
> As stated by the Commissioners the primary purpose of the Model Act was to prevent the bar to recovery which contributory negligence of the plaintiff created.
>
> By 1925 (N.S.), c. 5 the first contributory negligence legislation was introduced in this Province. The following year Nova Scotia adopted the 1925 Model or Uniform Act by enacting the *Contributory Negligence Act*, 1926 (N.S.), c. 3. Section 2 [now s. 4 of the current *Contributory Negligence Act*] of that Act stated:
>
> > 2. Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault; Provided that:
> >
> > > (a) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally, and
> > >
> > > (b) Nothing in this section shall operate so as to render any person liable for any loss or damage to which his fault has not contributed.
>
> At the 1929 meeting of the Uniform Law Conference a resolution was passed with respect to providing in contributory negligence legislation for apportionment of fault between wrongdoing defendants liable to an *innocent* plaintiff. (See p. 21 of the report of the 1929 proceedings.)
>
> Although at first blush it appears rather paradoxical to make provision for apportionment of fault between wrongdoing defendants to an innocent plaintiff in an enactment dealing with contributory negligence it must be remembered that in 1929, and for some years thereafter, there was no legislation in this country providing for contribution or indemnity by one tortfeasor to another nor did the common law provide such relief.

At p. 30 of the report of the proceedings of the 1933 meeting of the Uniformity Commissioners the following appears with respect to contributory negligence legislation:

> All acts in force and drafts under consideration have provided that the court should apportion the damage in proportion to the degree of negligence. It is submitted that the duty of the court is to apportion the damages in proportion to the extent to which the negligence of the respective parties contributed toward the damage. After adopting this view the committee made the necessary changes throughout the Act.

The *Contributory Negligence Act* as revised and approved by the Uniformity Commissioners in 1935 provided by s. 2 [now s. 4 of the current Act] thereof that:

> 3. Where damages have been caused by the fault of two or more persons, the court shall determine the degree in which each was at fault, and where two or more persons are found liable they shall be jointly and severally liable for the fault to the person suffering loss or damage, but as between themselves in the absence of any contract express or implied, they shall be liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault. (The italics are mine.)

The portion italicized is similar to what is now s. 2 of the *Contributory Negligence Act* of this province earlier set forth herein [now s. 4].

In 1953 the model *Contributory Negligence Act* was revised by the Uniformity Commissioners. Section 2(1) and (2) of that Act are identical to 1(1) and (2) of s. 1 of the Nova Scotia Act as enacted by 1954 (N.S.) c. 7. Section 3(1) and (2) of the 1953 Model Act provided:

> 3(1) Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree in which each person was at fault.
>
> (2) Except as found in sections 4 and 5, where two or more persons are found at fault they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of any contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

It will be noted that s. 3(1) of the Model Act is identical to s. 2 [now s. 4 of the current Act] of the current Nova Scotia Act but that s. 3(2) of the Model Act was not enacted in this Province. Thus our [*Contributory Negligence*] *Act* does not provide for contribution or indemnity between wrongdoing defendants.

The Model Contributory Negligence Act (sic.) has been adopted by various Provinces, including Alberta, New Brunswick, Prince Edward Island, British Columbia, Saskatchewan and Newfoundland.

> The *Tortfeasors Act* was first enacted in this Province by 1945, c. 19, and has remained unchanged except that s. 3(2) [now s. 4(2)] was enacted by 1961, c. 49.
>
> A review of the relevant legislation in the other common law Provinces discloses that, where a section similar to s. 2 [now s. 4 of the current Act] of the Nova Scotia *Contributory Negligence Act* exists, it is always found in conjunction with a provision similar to s. 3(2) of the Model Act of 1953.
>
> When considered in the light of the background of the legislation s. 2 [now s. 4] of the *Contributory Negligence Act* of this Province, in my view, relates only to the situation where damage or loss to an *innocent* plaintiff is caused by the fault of two or more defendants. The situation where a plaintiff and multiple defendants are all responsible for the plaintiff's damage or loss is covered by s. 1 [now s. 3] of the [*Contributory Negligence*] *Act*. Obviously, s. 2 [now s. 4] must relate to a different situation and, in my view, as stated above, it does.
>
> [Emphasis added]

[52] MacDonald J.A. went on to note that even if his interpretation of s. 2 [now s. 4] was too narrow, the provisions of the *Tortfeasors Act* take precedence over those of the *Contributory Negligence Act* in the event of conflict between them. Again, the point is more helpfully made by quoting the decision at length at paras. 42 – 46:

> In addition and in the event that I have placed too narrow an interpretation on s. 2 [now 4] of the Act I am of the opinion that the reasoning of Mr. Justice Dickson in *County of Parkland No. 31 v. Stetar et al.; County of Parkland No. 31 v. Woodrow et al.* (1974), 50 D.L.R. (3d) 376, [1975] 2 S.C.R. 884, [1975] 1 W.W.R. 441 (S.C.C.), is persuasive in support of the argument that should there be any overlap between the *Contributory Negligence Act* and the *Tortfeasors Act* that the provisions of the latter Act take precedence. In the *Parkland* case Dickson, J., pointed out the differences between the *Contributory Negligence Act* and the *Tortfeasors Act* of Alberta and held that the *Tortfeasors Act* prevailed. At p. 385 D.L.R., pp. 450-1 W.W.R., Dickson, J., said:
>
> > The relationship of the *Contributory Negligence Act* and the *Tort-feasors Act* on the issue of contribution between tortfeasors is such that in my opinion s. 4(1)(c) of the latter Act must prevail over s. 3(2) of the former Act. These Acts cover related subject-matter and must be read the one with the other. Section 3(2) of the *Contributory Negligence Act* in its last clause states a general rule reflected as well in the *Tort-Feasors Act* that tortfeasors are liable to make contribution and indemnify each other in the degree in which they are found to be at fault or negligent. While the *Contributory Negligence Act* concerns generally the question of contributory negligence, the *Tort-Feasors Act* addresses itself more particularly to the relationship of tortfeasors. Section 4(1)(c) of the latter Act is specifically directed to the question of recovery as between tort-feasors and in my opinion takes precedence over s. 3(2) of the *Contributory Negligence Act.*

Professor Glanville Williams in his work *Joint Torts and Contributory Negligence* (1951), stated at pp. 408-9, that:

> In Canada the matter is partly covered by express legislation. Most Provinces (Alberta, British Columbia, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan) follow the wording of the Maritime Conventions Act (sic.), and enact that where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault. It is submitted that this means that if P, himself guilty of contributory negligence, is damaged by the concurrent negligence of D1 and D2 the two latter are each responsible only for a part of P's damage corresponding to his own negligence. In other words, liability is not *in solidum* ...

In my view the approach adopted by this Court in apportioning liability between Smith and Inglis on the basis of 100% and ignoring the responsibility, if any, of Whynott and South Shore, who were not sued, was correct. Professor Williams in his work stated at p. 416 that such was the preferable course and pointed out at p. 417 that:

> The task of the court in apportioning degrees of blame is troublesome enough in any case, but it is likely to be doubly difficult if the court is required to allot a portion of the responsibility to a party who is not present and whose defence the court does not hear. Such a rule would also be unfair to the plaintiff, for it would burden him with the litigation of issues that he should be entitled to avoid.

The following footnote appears at p. 420:

> See *Royal Trust Co. v. Toronto Transportation Commn* [1935] S.C.R. 671, [1935] 3 D.L.R. 420, 44 C.R.C. 90.P sued Dl, and they were held equally negligent. The court took the view that a third party not sued was also negligent. P was nevertheless awarded 50 per cent, of his damages against Dl, the proportion of the third party's negligence not being determined. It is submitted that this was the desirable result.

In light of all of the foregoing it is my opinion that as a general principle contributory negligence does not activate s. 2 [now 4] of the *Contributory Negligence Act* of this Province in the manner suggested by Mr. Wrathall [the insurer's legal counsel] to render nugatory in all cases the provision of ss. 2 and 3 [now 3 and 4] of the *Tortfeasors Act.* For reasons I shall give, however, the nature and quality of the negligence of Smith in the present case does have the effect of making inapplicable at the suit of Inglis the contribution provisions of the *Tortfeasors Act.*

[Emphasis added]

[53] In short, a finding of contributory negligence on the part of a plaintiff does not necessarily render the contribution provisions of the *Tortfeasors Act*

inapplicable. To determine whether the contribution provisions apply, the court must go on to consider the nature and quality of the plaintiff's contributory negligence, and the relationship between that negligence and the negligence alleged against the third party from whom a defendant tortfeasor (i.e. not the plaintiff) seeks contribution. Where the only negligence of the third party is attributable to the plaintiff's contributory negligence, the defendant tortfeasor may not demand contribution from the third party.

[54] Before making this inquiry, MacDonald J.A. considered, and rejected, South Shore's argument that any action or claim for contribution must take place in the original action. He concluded at paras. 52 - 53:

> The right given by s. 2(c) of the *Tortfeasors Act* of Nova Scotia to a defendant tortfeasor to claim contribution from any other tortfeasor is a right *sui generis* (of its own kind or class) and accrues when the liability of the defendant has been ascertained: see *MacKenzie v. Vance et al.* (1977), 74 D.L.R. (3d) 383 at p. 395, 19 N.S.R. (2d) 381 at p. 399, and cases therein cited.
>
> Desirable though it may be to have all issues disposed of in the one action the fact remains that the *Tortfeasors Act* gives, in my view, the right to a defendant tortfeasor found liable in whole or in part to the plaintiff, to bring a separate action for contribution against other tortfeasors liable to the plaintiff in respect of the same damage. In my opinion, therefore, the *ratio* or rule (if it may be so-called) in the *Cohen* case does not apply in this Province.

[55] In *Inglis #2*, MacDonald J.A. concluded that the nature and quality of the Plaintiff's [Mr. Smith's] contributory negligence precluded Inglis from asserting a right to recover contribution from Mr. Whynott or South Shore in the circumstances of that case. He wrote at paras. 59-60:

> The negligence of Smith, as set out earlier herein, was his failure to have checked the plug when he bought the refrigerator and had it installed. The consequence of this finding is that the negligence of Whynott in cutting off the prong and of South Shore in failure to inspect became spent and of no further effect, with the result that it cannot be said that their respective faults contributed to the damage or made them responsible therefor in whole or in part (s. 3(1) *Tortfeasors Act).* The result therefore, in my opinion, is that since Smith could obviously not maintain an action against either Whynott or South Shore based on what really was his own negligence neither of them is, in so far as Inglis is concerned, a tortfeasor "who is, or would if sued have been, liable" to Smith "in respect of the same damage": *(Tortfeasors Act* — s. 2(1)(c)). Inglis therefore cannot recover contribution from them.
>
> The situation to my mind would be different if the negligence found against Smith was unrelated in kind and nature to that of Whynott and South Shore. Here, however, it was not. The negligence relating to the third prong removal has been

> taken from them. The effect of the finding by this Court that Smith was negligent was to make him responsible for one-half of his damage. The remaining one-half was found attributable *solely* to defective manufacture by Inglis. In result degrees of fault were apportioned between Smith and Inglis. In light of the circumstances here present it is at this point that this case ends. Inglis surely cannot recover contribution from Whynott or South Shore for that portion of Smith's damages for which it has been found solely responsible.

SUMMARY OF KEY POINTS

[56] The key points described above may be briefly distilled as follows:

1. The common law historically precluded contribution and indemnity for overpayment from other tortfeasors and also precluded any form of recovery to a contributorily negligent plaintiff. These common law rules came to be viewed as overly harsh and inequitable. The Nova Scotia legislature enacted the *Contributory Negligence Act* and *Tortfeasors Act* to reform this common law rule and, among other things, allowed the Court to:

   (a) allocate a portion of an alleged loss to a contributorily negligent plaintiff – not deny the plaintiff recovery altogether; and

   (b) fairly apportion the plaintiff's loss (less any reduction for contributory negligence) among the defendant tortfeasors.

2. One of the underlying policy concerns is rooted in a desire to avoid unjust enrichment. Two corollary propositions arise. First, an injured plaintiff should be entitled to recover its losses but must equally accept responsibility for any contributory negligence. Second, a defendant tortfeasor should be required to pay the plaintiff in accordance with its degree of liability but must also be entitled to claim against another tortfeasor for any overpayment to the plaintiff. Overall, justice is served where all parties are required to accept their respective responsibility for the compensable loss. No more, and no less.

3. In seeking contribution or indemnity from a third-party tortfeasor, the defendant tortfeasor is not required to prove that it has an independent cause of action against the third-party tortfeasor; or that the third-party tortfeasor owed it a separate duty of care. It is enough if the alleged third-party tortfeasor is jointly or concurrently liable for a portion of the plaintiff's losses otherwise payable by the defendant tortfeasor. This point is also very clearly made in the Ontario Division Court's decision of *Ottawa Carleton Standard Corp. No. 838 v Redevelopment Group*, 2019 ONSC 7005 at paras. 18 – 21.

4. The right to contribution or in recovery is not unlimited in scope. The limitations include:

   (c) A proven tortfeasor cannot use a subsequent, separate action to avoid paying his/her share of the plaintiff's loss. Recovery from another alleged tortfeasor will be limited to any overpayment; and

   (d) Where the original plaintiff was contributorily negligent and responsible for a portion of their loss, the Court in the subsequent, separate action must consider the nature and quality of the original plaintiff's contributory negligence. As indicated, a tortfeasor may not obtain recovery from a third-party tortfeasor (or allege that they risk overpaying for their fair share of the plaintiff's loss) if the alleged negligence of the third-party tortfeasor subsumes the plaintiff's own contributory negligence. Again, the third-party's liability must be joint or severally concurrent with the original tortfeasor and independent of the plaintiff's contributory negligence.

5. The failure to name a potential third-party tortfeasor in the original action is not ideal, but that fact alone is obviously not determinative. In appropriate circumstances, a proven tortfeasor may still be entitled to claim contribution and indemnity from the third-party tortfeasor in a subsequent action.

[57] I turn now to the more specific issues which arise where a defendant tortfeasor seeks contribution or indemnity from the plaintiff's lawyers.

Claim for Contribution or Indemnity Against the Plaintiff's Lawyers

[58] The KW Parties seek contribution or indemnity from legal counsel for an opposing party: the law firm McInnes Cooper and Ben Pryde, a partner with that law firm. In these circumstances, the law is more nuanced because, among other things, an "obvious mischief" arises if one party presumes an unfettered right to sue another party's lawyer (*Davy Estate v. Egan*, 2009 ONCA 763 ("***Davy Estate***") at para. 28). However, as will be seen, the key principles summarized above continue to illuminate the analysis. Thus, the Court considers the nature and quality of any contributory negligence on the part of the original plaintiff. In particular, the Court examines whether the claims being made against the lawyer are attributable to the plaintiff, including any contributory negligence on the part of the plaintiff. In addition, concerns around unjust enrichment continue to inform a defendant tortfeasor's entitlement to assert a claim against the plaintiff's lawyer.

[59] As a further preliminary point, the analysis does not change if a tortfeasor joins legal counsel as a third party in the main proceeding or, alternatively, settles and then seeks recovery against the lawyer in a separate proceeding. The Court encourages, and does not prejudice or punish, parties who resolve civil claims through agreement. (See, for example, *Nesbitt v. Beattie*, 54 O.R. (2d) 699, 1955 CarswellOnt 43 (Ont. S.C.(C.A.) ("***Nesbitt***")). That said, in any subsequent claim for contribution, the settling tortfeasor must "satisfy the court that the amount of the settlement was reasonable" (*Tortfeasors Act*, s. 4(2)).

[60] The starting point is *Adams v. Thompson, Berwick, Pratt & Partners* (1987), 15 B.C.L.R. (2d) 51 (B.C.C.A.). In this case, property developers sued a firm of engineers for alleged negligence in designing a subdivision. In turn, the engineers issued a third party claim against the property developers' lawyers alleging they had breached certain duties to their client – and that the lawyer's breach would have reduced any alleged loss. McLachlin J.A. (at she then was) wrote at para. 16:

> 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. 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.

[61] *Hengeveld v. Personal Insurance Co.*, 2019 ONCA 497 ("***Hengeveld***"), explains the rationale behind disallowing further claims for contribution or indemnity that are properly attributable to the original plaintiff. At paras. 18 – 29, Zarnett, J.A. wrote:

> *Where negligence of a third party is attributable to the plaintiff no cause of action for contribution and indemnity exists against that third party*
>
> Rule 29.01(a) permits a defendant to commence a third party claim against any person not already a party to the action who "is or may be liable to the defendant for all or part of the plaintiff's claim".
>
> A third party claim, like any action, must have a substantive component -- it must assert a cause of action. Here the third party claim does not rely on any duty allegedly owed by the lawyers to Personal Insurance. It relies on the contribution and indemnity provisions of the *Negligence Act* (ss. 1, 2 and 5) to claim that the lawyers should be liable to Personal Insurance for all or part of the Hengevelds' claim. But Personal Insurance also relies on the contributory negligence provision of the *Negligence Act* (s. 3) to assert that the Hengevelds themselves are responsible for all or part of their own claimed damages. The interaction of those provisions is therefore important.
>
> The *Negligence Act* provides, in s. 1, that where damages have been caused or contributed to by the fault or neglect of two or more persons, each is jointly and severally liable to the plaintiff who has suffered those damages, but as between themselves "each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent." Section 2 permits a defendant who has settled with the plaintiff for more than its proportionate share of the plaintiff's damages to make a claim for contribution and indemnity against another person "who is, or would if sued have been, liable" for those damages. Section 5 of the Act contemplates (sic.) the situation where a defendant has been sued but believes there is another wrongdoer who caused or contributed to the plaintiff's injury and has not yet been sued. It allows a defendant to pursue a right of contribution and indemnity against that person by third party claim, according to the rules of court for adding third parties.
>
> A third party claim based on the contribution and indemnity provisions of the *Negligence Act* does not require that the third party owe a duty of care to the defendant. It is sufficient that the third party owe a duty of care to the plaintiff, making the third party someone who, if sued by the plaintiff, would have been liable in respect of the damage the plaintiff suffered: *Corcoran*, at pp. 35-36 O.R.
>
> The contribution and indemnity provisions of the *Negligence Act* must be understood in light of the purpose they serve. As a general rule a wrongdoer who caused or contributed to a plaintiff's injury is liable to compensate that plaintiff in full, even if another wrongdoer caused or contributed to the plaintiff's injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 22. The

contribution and indemnity provisions allow a wrongdoer not solely at fault but at risk of being held liable for 100% of the plaintiff's injury to recover indemnity from another wrongdoer to the extent of the latter's relative degree of fault: *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181, at para. 48.

However, a plaintiff's own contributory negligence will reduce its claim for damages against a defendant. Section 3 of the *Negligence Act* provides:

> In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

Accordingly, under the *Negligence Act*'s contributory negligence provision, a defendant may raise fault or negligence on the part of the plaintiff that caused or contributed to the plaintiff's damages as a defence. If successful, the plaintiff's claim against the defendant will be reduced according to the plaintiff's relative degree of fault. Under the *Negligence Act*'s contribution and indemnity provisions, a defendant may raise a third party's fault or negligence that caused or contributed to the plaintiff's damages as a third-party claim. If successful, the defendant will remain 100 per cent liable to the plaintiff but may obtain indemnity from the third party according to the third party's relative degree of fault.

But a defendant may not double dip. Where the fault or neglect which a defendant argues caused or contributed to the plaintiff's injury is fault or neglect that will reduce the plaintiff's claim, there is no risk that a defendant will have to pay 100 per cent of the plaintiff's loss notwithstanding that fault or neglect. The basis for a claim under ss. 1, 2 and 5 of the *Negligence Act* -- to allow a wrongdoer to obtain indemnity for a payment to the plaintiff that exceeded the wrongdoer's degree of fault -- does not exist in such circumstances because of the direct reduction of the plaintiff's claim.

This principle was applied in *Taylor v. Canada (Health)*, 2009 ONCA 487, 95 O.R. (3d) 561. In that case, a defendant to a class action sought to add third parties from whom the defendant wished to claim contribution on the basis that they may have been liable for part or all of the class members' injuries. But in order "to preclude the [defendant's] attempt to assert a third-party claim" and with the intention that "[t]he possibility of third-party claims will be obviated", the plaintiff amended her statement of claim to specifically plead that her claim against the defendant was limited to the defendant's proportionate share of fault: at paras. 9-10. In the circumstances, it was clear that she was prepared to reduce the damages claimed by the proportion of fault that would be attributed to the proposed third parties.

> This court upheld the motion judge's striking of the third-party claim as disclosing no reasonable cause of action, stating at para. 20:
>
> > [C]ontribution rights arise only where a defendant is required to pay more than its proportionate share of a plaintiff's damages. In the present case, Ms. Taylor has limited her claim and those of the class members to those losses attributable to [the defendant's] negligence. In other words, she is not seeking all of her damages from [the defendant]; she seeks only the portion of her damages attributable to [the defendant's] neglect and not the portion of her damages that may be attributable to the neglect of the doctor or the hospital. ... Because she is not seeking 100% of her damages, the full compensation principle articulated in *Athey v. Leonati* does not apply; equally, resort to s. 5 of the *Negligence Act* is unnecessary.
>
> *Taylor* was a case where the attribution to the plaintiff of the proposed third parties' negligence came about by the plaintiff's express wish. But the same result flows from attributing negligence to the plaintiff as a matter of law, since s. 3 of the *Negligence Act* has the same effect in respect of the attributed negligence: it reduces the plaintiff's claim so that the defendant is only at risk of being held liable for the portion of the plaintiff's damages attributable to the defendant's negligent conduct and to the distinct negligent conduct of other parties (i.e. negligent conduct that is distinct from the plaintiff's negligent conduct). This makes contribution rights against third parties in respect of the negligence attributed to the plaintiff inapplicable.
>
> Accordingly, whether a claim by a defendant seeking contribution and indemnity from a third party for alleged negligence that caused or contributed to the plaintiff's damages discloses a reasonable cause of action is a function of whether that negligence is attributable to the plaintiff. If it is attributable to the plaintiff, the defendant has no cause of action against the third party.
>
> [Emphasis in original]

See also *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2012 BCCA 22 ("***Laidar***") at para. 1; and *Davy Estate* at para. 44.).

[62] The question becomes: how does the Court distinguish claims which are attributable to the original plaintiff from those which are not? The jurisprudence describes two circumstances which typically inform the analysis:

1. An "agency situation"; and

2. Whether the allegations constitute a failure to mitigate damages which is the plaintiff's responsibility and cannot support a claim against the plaintiff's lawyer.

I address each circumstance separately below.

"Agency Situations"

[63] At paras. 33 – 44 of *Hengeveld*, Zarnett, J.A. confirmed that acts or omissions of a lawyer taken on behalf of a client (i.e. the original plaintiff) and for which the client is legally deemed responsible may give rise to an "agency situation". If so, the non-client (i.e. the defendant tortfeasor) is entitled to pursue a claim of contributory negligence against the original plaintiff; any compensable loss payable to the plaintiff by the defendant tortfeasor will be reduced accordingly, and the defendant tortfeasor is granted a full remedy for the lawyer's impugned acts or omissions. In this circumstance, the lawyer clearly would not owe the defendant tortfeasor a separate and distinct duty of care, and the defendant tortfeasor may not advance a separate and distinct claim in negligence against the lawyer.

[64] That said, if the acts or omissions of the plaintiff's lawyer do not give rise to an "agency situation", the defendant tortfeasor may be able to advance a claim in negligence against the lawyer. Generally speaking, the lawyer's impugned acts or omissions:

1. Must be sufficiently distant from the legal obligations owed exclusively to the client (i.e. the original plaintiff);

2. Must not be entirely subsumed within any contributory negligence which would reduce the original plaintiff's compensable losses; and

3. Must be capable of grounding a distinct and separate claim in negligence by the defendant tortfeasor against the original plaintiff's lawyer.

[65] Assessing whether a lawyer's acts or omissions fall within or, alternatively, outside an "agency situation" involves the exercise of judicial discretion and is fact-sensitive. The underlying factual matters which bear upon the analysis can be complex and intertwining, and they resist being reduced to an easy checklist of factors. However, the following questions may sharpen the focus:

1. **Do the pleadings confirm a separate right of recovery against the plaintiff's lawyer which are not attributable to the plaintiff, including contributory negligence?**

   The pleadings should identify material facts which are sufficiently specific to ground an independent right of contribution or indemnity against the plaintiff's lawyer – as opposed to claims which are attributable to the plaintiff (i.e. the lawyer's client) (*Adams* at para. 1; *Macchi S.p.A. v. New Solution Extrusion Inc.*, 2008 ONCA 585, at para. 1). Broad and unparticularized allegations that the lawyer failed to protect the plaintiff-client's interests weigh in favour of a conclusion that the claim is attributable to the plaintiff and cannot be brought against the lawyer. In *Laidar*, the tenant (Lindt & Sprungli (Canada) Inc.) refused to occupy certain leased premises or pay rent owing under a signed lease with the landlord (Laidar Holdings Ltd.). The tenant stated that the leased premises were not zoned for its intended use. The landlord Laidar sued the tenant Lindt for monies owing under the lease. In turn, Lindt counterclaimed against the landlord for breach of lease and tortious misrepresentation; and commenced a third party claim against its leasing agent. The third party leasing agent sought to bring a fourth party claim against the primary defendant/tenant's lawyers (the law firm "Blakes") for negligent legal advice to the tenant. In dismissing the further party claim, the B.C. Court of Appeal concluded that, among other things: "The proposed fourth party notice against Blakes does not disclose "events giving rise to the initial loss", but simply alleges a failure to protect the interests of Lindt" (at para. 46). See also Hengeveld at paras. 12 – 13 and 37 - 38; and *Sun Life Assurance Company of Canada v. 482147 B.C. Ltd.*, 2013 BCSC 1187 ("***Sun Life Assurance***") at paras. 48 - 49;

2. **What is the scope of the lawyer's retainer and did the lawyer act within that scope? If so, is any negligence by the lawyer encompassed within the plaintiff's responsibilities to the defendant tortfeasor, including any claim for contributory negligence against the plaintiff? If not, did the lawyer stray into an area where the plaintiff can legitimately deny**

contributory negligence or any other legal responsibility to the defendant tortfeasor?

(a) This was a dominant consideration in *Hengeveld*. In that case, one of the plaintiffs was injured in a motor vehicle accident while driving a Hyundai automobile insured by Personal Insurance. He and his family retained lawyers to act for them in connection with their damages arising out of the accident. The plaintiffs commenced their personal injury action on January 6, 2016. Personal Insurance was not a party to that accident.

(b) The defendants were the owner and operator of the other vehicle involved in the accident, the persons alleged to have been responsible for the safety and condition of the road where the accident occurred, the manufacturer of the Hyundai, and the dealership from which it was purchased. On October 20, 2017, the plaintiffs commenced an action against Personal Insurance, alleging that the insurer agreed in 2014 to preserve the Hyundai in safe storage, knowing it would be important to the resolution of liability, but then failed to do so. The plaintiffs alleged that Personal Insurance disposed of the Hyundai, in breach of contract and/or negligently, and that this might impair their ability to prove liability against one or more of the defendants in the personal injury action.

(c) Personal Insurance denied any obligation to preserve the Hyundai for any longer than it did. It also alleged contributory negligence against the plaintiffs and issued a third-party claim against the plaintiffs' lawyers, claiming contribution for any amounts it was ordered to pay to the plaintiffs. The allegations in the third party claim "overlap[ped] significantly" with the allegations in the claim of contributory negligence against the plaintiffs. On its face, this appears to be a mere pleading issue. However, it belies a deeper, doctrinal problem: the scope of the lawyer's retainer was virtually identical to the allegations of contributory negligence made against the plaintiff. This fact reinforced the Court's conclusion that the lawyer was acting

in an "agency situation" and its actions were attributable to the plaintiff. Zarnett, J.A. wrote at paras. 37-38:

> … the Personal Insurance pleadings make clear that the retainer of the lawyers included taking steps, on behalf of the Hengevelds, to preserve evidence, and that the lawyers' dealings with Personal Insurance — what they did and failed to do — were dealings undertaken on the Hengevelds' behalf. Personal Insurance specifically pleads the scope of the lawyers' agency as embracing the lawyers' alleged negligent conduct. There is no pleaded negligence arising from acts outside of the lawyers' retainer. Personal Insurance itself attributes the lawyers' conduct to the Hengevelds by alleging that the Hengevelds were negligent in making and failing to make arrangements about the Hyundai's preservation and inspection: arrangements they allege were actually made by the lawyers on the Hengevelds' behalves. Nor have the Hengevelds distanced themselves from responsibility for, or the consequences of, any negligence on the part of their counsel: *Macchi* (C.A.), at para. 1.
>
> …Even if the initial loss for these purposes is the disposal of the Hyundai and the alleged negligence is that the respondent lawyers, acting as the Hengevelds' agents, caused or contributed to that loss — the same loss that Personal Insurance allegedly caused or contributed to — that negligence (i) is attributable to the Hengevelds, (ii) may be raised (as it has been) by Personal Insurance to obtain a reduction of the Hengevelds' claim, and (iii) cannot support a third party claim.
>
> [at paras. 37 – 38]

3. **Did the lawyer engage with the defendant tortfeasor on behalf of the plaintiff?**

(a) One hallmark of an "agency situation" is where the plaintiff's lawyer directly engages with third parties on the plaintiff's behalf. In that situation, the lawyer's impugned actions or omissions would be attributable to the plaintiff and cannot form an independent claim against the lawyer by the defendant tortfeasor. At para. 44 of Hengeveld, Zarnett, J.A. referred to 478649 Ontario Ltd., v. Corcoran (1994), 118 D.L.R. (4th) 682 (Ont. C.A.) ("Corcoran"), where the Court refused to summarily dismiss a defendant tortfeasor's claim against the plaintiff's lawyer. However,

he noted that Corcoran could be distinguished on the basis that:

> There was no suggestion that the lawyer acted on behalf of the plaintiff in dealing with others in a manner analogous to filing a prospectus (as in *Adams*), filing a financing statement (as in *Macchi*), or dealing with Personal Insurance about the preservation of evidence (as in this case).
>
> [at para. 44, emphasis added]

4. **Will the defendant tortfeasor be unjustly required to cover losses which are not accounted for as part of any contributory negligence on the part of the plaintiff and more properly attributable to the plaintiff's lawyer?**

(a) As indicated, these types of claims engage notions of unjust enrichment. A defendant tortfeasor should not be required to pay for losses which involve negligence on the part of the plaintiff's lawyer and may not be accounted for as part of the plaintiff's own contributory negligence. Laskin, J.A. spoke to this concern in *Corcoran*. In that case, the plaintiff acquired a piece of commercial property for $4.8 million. The property turned out to be worth significantly less than the price paid because it could not be developed as represented. Among others, the plaintiff sued the real estate agent (Stellar) for negligent misrepresentation. The defendant real estate agent brought a third-party claim against the plaintiff's lawyer on the basis that he had an opportunity to review the agreement of purchase and sale before it was executed and that he should have insisted on amendments to protect the plaintiff. The lawyer brought a motion to summarily strike the third party claim. The Ontario Court of Appeal described the third party claim as "somewhat novel" but found that it was not certain to fail and, therefore, allowed it to stand. At para. 18, Laskin, J.A. concluded that the lawyer was alleged to have been:

> … negligent in failing to give proper advice concerning the agreement of purchase and sale and that his negligence contributed to his client's loss. The plaintiff may be able to say that it acted reasonably in retaining the third party to advise it on

> the terms of the agreement and accordingly should not be responsible for any negligence on the part of its solicitor.
>
> [Emphasis added]

(b) In *Davy Estate v. CIBC World Markets Inc.*, 2009 ONCA 763, ("**Davy Estate**"), Sharpe, J.A. expressed a similar concern when he wrote that persons who were "implicated in the events giving rise to the initial loss" may be liable for their proportionate share of the loss (at para. 23). But, if the plaintiff fails to sue the original lawyers, the defendant tortfeasor may be entitled to pursue a claim if "…the only way the defendants could protect their position and avoid being held liable for the entire loss was to claim contribution and indemnity from the solicitors" (at para. 22, emphasis added). Ultimately, no such problem arose in Davy Estate because the allegations against the lawyers amounted to a failure to mitigate which, vis-a-vis a defendant tortfeasor, is a duty falling upon the plaintiff and not the plaintiff's counsel.

(c) Similarly, in *Hengeveld*, Zarnett, J.A. similarly distinguished the facts in *Corcoran* on the basis that, "Unlike in *Corcoran*, Personal Insurance [the defendant tortfeasor] here has not pointed to any alleged act of negligence which the Hengevelds [the plaintiffs] could say was, although committed by their lawyers, not their responsibility vis-à-vis Personal Insurance" (at para. 44).

Mitigation

[66] In *Davy Estate,* Sharpe, J.A. confirmed at paras. 25 – 28 that the duty to mitigate is clearly attributable to the plaintiff alone. The facts which underpin an alleged failure to mitigate cannot be repurposed into a companion claim of negligence against the plaintiff's lawyer. See also *JD1H1 v. Budden,* 2020 NUCA 3, at para. 18.

[67] The decision in *Sun Life Assurance* is also instructive. While this case involved a third party claim against an engineering firm (i.e. not a lawyer), the reasoning is germane. In this case, the plaintiff purchased a shopping centre. After the transaction closed, the plaintiff discovered numerous problems with the building's roof, among other things. The plaintiff sued numerous defendants

involved in the construction of the shopping centre. Certain defendants, described in the decision as the "Three Defendants", filed a third party action against the engineering consulting firm called Morrison Hershfield Limited ("**MH**"). MH had been retained by the plaintiffs prior to closing the transaction to inspect the shopping centre and conduct a visual inspect of the shopping centre roof. MH moved for summary judgment dismissing the third party action. In granting the requested dismissal, Butler, J. observed at para. 47:

> … Here, the Third Party Notices do not raise events related to the "initial loss". The actions which form the basis of all of the claims in the main action are the actions of the developers, contractors, consultants and suppliers who were involved in the construction of the Shopping Centre. The initial loss – that is the alleged deficiencies in design and construction – was complete when Sun Life contracted with MH. The Applicants had no involvement in the development, design or construction of the Shopping Centre. They came on the scene well after the events which resulted in the alleged damage which forms the substance of the claims raised in the main action. As in *Laidar*, the allegations against the Applicants do not disclose "events giving rise to the initial loss".

[68] In sum, it may be important to identify when the alleged loss occurred and to examine whether the lawyer's impugned acts or omissions:

1. Caused or contributed to the "initial loss", in which case the assessment tilts in favour of a viable claim by the tortfeasor against the plaintiff's lawyer; or

2. Alternatively, are part of an alleged post-loss negligence, typically engaging concerns around the plaintiff's duty to mitigate.

Application of the Law

[69] In my view, the KW Parties are not precluded from seeking contribution or indemnity from the MC Parties. The alleged negligence of the MC Parties is not attributable to the MC Parties' client, Sushi Nami Franchising. My reasons include:

1. The KW Parties' pleadings in this proceeding do not broadly accuse the MC Parties of failing to protect Sushi Nami Franchising's interests. They are more specific and focus primarily on the MC Parties obligations under Clause 8.1 of the Agreement (the "lawyer review clause"). They do not overlap the allegations made by Sushi Nami against the KW Parties in Application #2 to the extent as was seen in Hengeveld, for example. Paras. 35 – 37 of the Notice of Application in this proceeding state:

> The Applicants state that the Respondents owed a duty of care to properly review the Agreement in accordance with the lawyer review provision (Clause 8.1) and advise Sushi Nami regarding the wording and content of the Agreement, and the sale of the Property more broadly;
>
> The harm that will occur to the Applicants should specific performance be ordered in the Ionian application [Application #1] and should damages be ordered in the Sushi Nami Application [Application #2] is a reasonably foreseeable consequence of Mr. Pryde's actions and failing to properly review the Agreement and advise Sushi Nami regarding the vacant possession clause in particular
>
> The Applicant say that the Respondents had a duty to among other things:
>
> (a) Render skilled, conscientious and timely advice to Sushi Nami in accordance with the standards expected of a reasonable lawyer;
>
> (b) Review the agreement in a conscientious and timely manner and discover facts pertaining to the agreement that a reasonably prudent lawyer with discovery in order for Sushi Nami to negotiate the sale of the Property in an informed manner;
>
> (c) Diligently ensure Sushi Nami was aware of the implications of the signing of the Agreement.

2. Compared to the other relevant jurisprudence, the circumstances in this case are closer to those in *Corcoran* where the Ontario Court of Appeal recognized a potential claim against the plaintiff's lawyer that was not attributable to the plaintiff. I recognize that there are factual differences between the two cases. In *Corcoran*, the lawyers were engaged before an agreement was signed and actively involved in the negotiations culminating in an agreement. Here, the MC Parties were not involved in the pre-contractual negotiations and were only presented with a signed agreement after negotiations were concluded. Nevertheless, in both cases, legal counsel had an opportunity to review and avoid the agreement before it became fully binding on the client. In the case at bar, Clause 8.1 provided Sushi Nami Franchising with the opportunity to terminate the agreement after consulting with legal counsel, and "acting reasonably with respect to wording and content of the

Agreement". In other words, the MC Parties had the ability to trigger a termination and potentially vitiate the agreement.

3. Clause 8.1 expressly confirmed that the parties' lawyers played a distinct role – as opposed to an agency situation where the lawyer's acts are more quietly or implicitly subsumed within and attributed to the responsibilities of the client they represent. The buyer (Ionian) and the vendor and lawyer's client (Sushi Nami Franchising) reasonably understood that, absent the MC Parties raising concerns as to the agreement's wording and content within the specified timeline in Clause 8.1, the agreement would become binding. Put slightly differently, Clause 8.1 offered a final opportunity to terminate the Agreement, acting reasonably with respect to the wording and content of the agreement. That opportunity was contractually triggered through a separate review by the MC Parties.

4. The lawyer's client (Sushi Nami Franchising) could legitimately distance itself from the MC Parties and allege that any negligence on the part of the MC Parties was not attributable to itself (i.e. the client Sushi Nami Franchising) and may not be simply folded into a claim for contributory negligence against Sushi Nami Franchising. Rather, it related to a separate, alleged failure on the part of the MC Parties.

5. The obligations created under Clause 8.1 did not require the MC Parties to engage with a third party on behalf of its client Sushi Nami Franchising. As such, the allegations against the MC Parties did not represent a clear example of an agent making decisions that would be clearly attributable to its client, Sushi Nami Franchising.

6. The circumstances in this case closely resemble those in *Corcoran* in that the legal counsel in both cases had an opportunity to review and potentially amend an agreement before it became binding on the client. I recognize a factual distinction between this case and *Corcoran*. The lawyers in *Corcoran* were engaged as part of the negotiations leading up to the signing of the agreement. By contrast, here, the MC Parties were not involved in the pre-contractual negotiations. Instead, the MC Parties were presented with a signed agreement after negotiations between Sushi Nami

> Franchising and Ionian were concluded. However, the lawyer review clause in s. 8.1 did provide Sushi Nami Franchising with the opportunity to terminate the agreement "acting reasonably with respect to wording and content of the Agreement". While the MC Parties' role was clearly more limited, it did have the ability to trigger a termination and potentially vitiate the agreement.

While I find that the KW Parties were entitled to claim contribution or indemnity from the MC Parties, that right only arises if the MC Parties were negligent. I turn to that issue.

ISSUE 2: THE MC PARTIES ARE NOT NEGLIGENT

[70] As background for my conclusions regarding the allegations of negligence against the MC Parties, I make the following more detailed findings of fact regarding the MC Parties' involvement:

1. Prior to July 22, 2021, Mr. Pryde's exposure to Sushi Nami Franchising and Noodle Nami Quinpool was very limited. He acted for Sushi Nami Franchising when it bought the Property in 2019 and, in connection with that transaction, his name and signature appear on the Assignment of Rents and Collateral Mortgage registered against the Property in 2019. Mr. Pryde did not negotiate or draft the lease agreement between Sushi Nami Franchising and Noodle Nami Quinpool. There is no evidence Mr. Pryde was familiar with the terms of any franchise agreement between Sushi Nami Franchising and Noodle Nami Quinpool. Finally, Mr. Pryde had not been in the Property, but he knew of it. He was aware that it was a multi-story building with a Noodle Nami branded restaurant on the ground floor.

2. On July 22, 2021, Ms. Luo emailed Mr. Pryde a copy of the Agreement and stated:

> Hi Ben,
>
> We are selling the Quinpool Road building and we have an accepted offer, please check and advise what I need to do next. Attached the accepted offer and I think Fan Yang (our realtor agent) will need some documents from you to provide to the buyer's agent.
> Should you have any further questions please Let me know.

3. Mr. Pryde obtained documents regarding the Property from Nova Scotia Property Online within the lawyer review period. However, he did not substantively review the Agreement prior to the expiration of the lawyer review period.

4. After the lawyer review period expired on July 23, 2021, nothing significant occurred until August 6, 2021, at 2:11 PM, when the real estate agent for Ionian emailed Mr. Yang to determine if Noodle Nami Quinpool wished to stay on as a "month to month tenant" after closing, as Ionian had no immediate plans for the property.

5. Mr. Yang immediately forwarded this email to Catherine Luo of Sushi Nami Franchising and Mr. Pryde. It was only at this time that the problems associated with the vacant possession clause were communicated to Mr. Pryde, and that Mr. Yang's error became apparent.

[71] The problem in this case originates in clause 2.1 of the Agreement and Sushi Nami Franchising's obligation to surrender vacant possession on closing. Sushi Nami Franchising was content to provide vacant possession of the residential lease on the premises but insisted on keeping the Noodle Nami Quinpool lease in place. It explicitly instructed the KW Parties to ensure that commercial tenancy was not disturbed. Unfortunately, the KW Parties (Fan Yang in particular) completely misconstrued the meaning and mistakenly believed that the Noodle Nami Quinpool lease was somehow excluded from the clause that plainly required vacant possession of the entire building.

[72] Notwithstanding their admitted error, the KW Parties allege that the MC Parties should have:

1. Discovered that vacant possession was difficult or impracticable; and
2. Warned Sushi Nami about this problem.

In support of that allegation, they filed the expert opinion of Raffi A. Balmanoukian.

[73] The MC Parties deny breaching the standard of care proposed by Mr. Balmanoukian and argue that imposing this standard would unfairly "place lawyers

in the position of insuring outcomes and would impose a general standard to safeguard a client from all risk that was reasonably rejected by the Ontario Court of Appeal by *Fasken Campbell Godfrey v. Seven-Up Canada Inc.*, [2000 CarswellOnt 89, [2000] O.J. No. 122]" (Respondents' Pre-trial Submissions, at para. 135). They filed the expert opinion of Ian MacLean, K.C. in support of their position.

[74] The expected standard of care is that of a "reasonably competent solicitor" (*Pilotte v. Gilbert*, 2016 ONSC 494 at paras. 32 to 35).

[75] Respectfully, in my view, the standard of care proposed by Mr. Balmanoukian measures the performance of the MC Parties against an unreasonably high standard – well beyond that which might be expected of a reasonably competent lawyer in similar circumstances and approaching an unrealistic degree of prescience and perfection.

[76] For example, it is common ground that the respondent lawyer, Mr. Pryde was neither presented with a copy of the Noodle Nami Quinpool lease nor advised of Sushi Nami Franchising's explicit instruction to the KW Parties that this lease must be maintained. Moreover, Mr. Yang not only failed to appreciate his own misunderstanding of the vacant possession clause but did not provide Mr. Pryde with information that would have allowed Mr. Pryde to expose the error. Nevertheless, Mr. Balmanoukian concludes at p. 8 that:

> Mr. Pryde knew or should have known that the use of the building was inconsistent with the Agreement, based on the combination of his prior activity with respect to the Property, the Assignment of Rents on the parcel register, and his general knowledge of the Property and of Quinpool Road and the associated obligation to raise this inconsistency prior to the expiry of the Lawyer Approval Clause.

[77] Mr. Balmanoukian further asserts that:

> …in my opinion here it was incumbent upon Mr. Pryde—given his prior legal work in obtaining an assignment of leases and recording an assignment of rents; in having reviewed the parcel register no later than midafternoon on July 23, 2023; and in having general knowledge of the property itself and its occupancy —to have identified the issue of vacant possession by the deadline for "lawyer approval" and to have confirmed the client's intentions before the "deemed approval" deadline therein.

[78] As a preliminary note, I disagree that Mr. Pryde had "general knowledge of the property itself and its occupancy" if that is intended to suggest anything more than a passing familiarity with the restaurant. Mr. Pryde's knowledge of the business was modest. He incorporated Noodle Nami Quinpool and was aware it operated a

restaurant on the ground floor of the Property. He also prepared an assignment of leases when Sushi Nami purchased the Property.

[79] I also make the following additional findings of fact:

1. The Agreement was standard form and contained garden variety provisions, including the requirement for vacant possession in clause 2.1;

2. Neither Mr. Pryde nor anybody from the MC Parties assisted in drafting the Noodle Nami Quinpool lease; were given a copy of this lease; or were otherwise familiar with its terms prior to this dispute. In addition, the lease was not registered on title. At most, there was an assignment of leases registered on title as part of the mortgage financing that the MC Parties helped conclude as lawyers for Sushi Nami Franchising. I note that a copy of the lease was entered into evidence. It is a very short document (5 pages) with very basic term as to term, rent, location and a modest contribution towards leasehold improvements. There is no provision for early termination. The lease was signed by Dae Jon as President of Noodle Nami Quinpool and Catherine Luo as Regional Manager for Sushi Nami Franchising. Mr. Jon was also the majority shareholder of Jon Holdco, the sole shareholder for both Sushi Nami Franchising and Noodle Nami Quinpool. Ms. Luo was a minority shareholder of Jon Holdco;

3. Neither Mr. Pryde nor anybody from the MC Parties were consulted during negotiations around the sale of the Property;

4. Neither Mr. Pryde nor anybody from the MC Parties were retained to provide legal advice prior to Sushi Nami Franchising signing the agreement to sell the Property;

5. After the Agreement was signed, it was given to Mr. Pryde for review;

6. Although Mr. Yang on behalf of the KW Parties and Ms. Luo on behalf of Sushi Nami Franchising and Noodle Nami Quinpool were in contact with Mr. Pryde during the time allowed under clause 2.1 to conduct a lawyer review:

(a) Nobody repeated to Mr. Pryde or the MC Parties the key direction previously given by Sushi Nami Franchising to the KW Parties: i.e. that the Noodle Nami Quinpool lease must remain in place; and

(b) Nobody provided Mr. Pryde with information that might alert Mr. Pryde to the fact that Mr. Yang was operating under a mistaken understanding of clause 2.1.

7. In short, Mr. Pryde was provided with a document containing an outwardly normal requirement for vacant possession which was entirely inconsistent with instructions given by Sushi Nami Franchising to the KW Parties but which instructions were never relayed to the MC Parties. Mr. Pryde was left to discover for himself a looming contractual problem, and then defuse it before it was too late.

[80] In my view, there was nothing in the circumstances that might reasonably be characterized as a "red flag" sufficient to put Mr. Pryde on high alert and to prompt him to approach the Agreement with a heightened degree of suspicion. Moreover, a lawyer who was previously retained on tangential corporate matters and who possesses only a superficial understanding of a client's business cannot reasonably be expected to uncover a latent and unintended mistake made by a misinformed real estate agent in an otherwise plainly worded and unremarkable boiler plate agreement of purchase and sale.

[81] While the Court does not simply review competing expert opinions and make a choice as to which it prefers, I accept Mr. MacLean's statement that, in these circumstances, it is:

> … both impractical and outside the scope of the normal practice of real estate law in Nova Scotia to second guess the apparent business decision to provide vacant possession. Certain inquiries must be made, but in my experience asking a Seller if they intend to continue possession of the property is not one of them.

[82] In a related conclusion, I do not find that Mr. Pryde's actions during the lawyer review period (July 22 – 23, 2021) caused the alleged losses or that the MC Parties may be called upon to contribute to those losses. On the issue of causation, I make the following specific findings of fact:

[83] Mr. Yang has candidly acknowledged his errors. In my view, his misunderstandings and missteps led to the losses in question. In the circumstances, the MC Parties cannot be reasonably faulted for failing to detect Mr. Yang's error; correcting it purportedly based on a lawyer's review of an otherwise basic vacant possession clause; and ultimately breaking a causal chain of events set in motion by Mr. Yang. In other words, the losses suffered by the KW Parties were self-inflicted. In the circumstances, they cannot fairly or legally call upon the MC Parties to accept a portion of the loss.

[84] This is not to say that Mr. Pryde's actions during the lawyer period were especially praiseworthy. For example, it is somewhat concerning that upon receiving the Agreement, Mr. Pryde did not conduct even a cursory review of its terms. Nevertheless, for reasons expressed, I am firm in the view the MC Parties neither breached the applicable standard of care nor caused the alleged losses.

ISSUE 3: PROVISIONAL ALLOCATION OF LIABILITY

[85] Finally, had I found the MC Parties negligent, I would provisionally assess their responsibility for the losses paid by the KW Parties at 5%, or $17,000. In making this provisional determination, I make the following additional findings of fact:

1. Mr. Yang and the KW Parties agreed to market and sell the Property as Sushi Nami Franchising's qualified real estate agents. They would be expected to have a basic, working knowledge of the key terms contained in the Nova Scotia Real Estate Commission's standard forms, including clause 2.1 (vacant possession) contained in Form 400 used in this transaction.

2. Ms. Luo and Mr. Yang worked together on the sale of the Property. They did not involve the MC Parties until after the Agreement was signed.

3. Mr. Yang came to be very familiar with the Property and the existing tenancies. For example, on July 13, 2021, Mr. Yang emailed Ms. Luo certain listing documents, including: the operating statement; a link to the existing Property photos; floor plan for all three levels of the Property; notice for viewing; and a "listing document." Mr. Yang then listed the Property for sale on MLS. The final Property Operating Statement included figures

regarding the potential gross income of each of the three floors of the Property.

4. At all material times, Mr. Yang knew (and was instructed) that the Noodle Nami Quinpool lease was to remain in place. In his sworn affidavit, Mr. Yang candidly admits that, "Ms. Luo told me, and I believed, that Sushi Nami intended for Noodle Nami to continue operating in the Property after the Property was sold."

5. On July 21, 2021, Ionian offered to purchase the Property for the price of $1,250,000 (the "Agreement"). The Agreement was prepared by Ionian's real estate agent using the standard form Agreement of Purchase and Sale available through the Nova Scotia Real Estate Commission (Form 400).

6. Mr. Yang presented the offer to Ms. Luo of Sushi Nami Franchising. Ms. Luo also discussed the offer with Mr. Jon. While Ms. Luo's English was not as strong as that of either Mr. Yang or Mr. Jon, I find that the very plain wording of clause 2.1 was capable of being easily understood by all of them. However, none realized that it clearly put the Noodle Nami Quinpool tenancy at risk and, as such, was the opposite of what Sushi Nami Franchising wanted.

7. For his part, Mr. Yang admits that he misunderstood the meaning and effect of the clause 2.1. As such, he did not see any problem with clause 2.1 and, as such, did not bring it to the attention of anyone. On July 21, 2021, Mr. Yang and Ms. Luo exchanged a series of emails in which they were communicating about Ionian's offer. Ms. Luo asked Mr. Yang if there were any conditions. Mr. Yang responded by pointing out the lawyer review condition but said nothing about clause 2.1.

8. Ms. Luo told Mr. Yang to make a counter offer of $1,390,000 to Ionian. On July 21, 2021, Mr. Yang drafted the counter offer for $1,390,000 using the standard NSREC Approved Form 410 (the "Counter Offer"). There were no other changes to the Agreement

9. Ionian previously thought that Sushi Nami Franchising needed the Noodle Nami Quinpool lease to remain in place but now

> understood it was prepared to surrender vacant possession. Immediately after receiving the counteroffer, the directing mind of Ionian asked its real estate agent "but to [sic.] they say anything about the lease? That is very important." The agent quickly responded: No nothing at all they agreed to our terms. Vacant possession on September 30."
>
> 10. Ionian accepted the counteroffer the same day it was received.
>
> 11. On July 22, 2021, the counteroffer was passed along to Mr. Pryde for review. As indicated, no concerns were expressed by either the KW Parties, Sushi Nami Franchising, or Noodle Nami Quinpool. The deadline for lawyer review was July 23, 2021.

[86] The KW Parties ultimately agreed to settle the dispute by paying Sushi Nami Franchising and Noodle Nami Quinpool $340,000. This figure was largely the losses suffered by Noodle Nami Quinpool as a result of the lost tenancy. However, it included a 5% discount for "litigation risk". In my view, that is also an appropriate figure for the contributory negligence of Sushi Nami Franchising. Clause 2.1 is plainly worded and is not at all complex. It clearly and simply creates a requirement for "vacant possession" which can only reasonably mean empty and unencumbered by existing tenants. I find that while Mr. Yang and the KW Parties must accept the bulk of responsibility for the problems which arose, Sushi Nami Franchising would also have been able to sufficiently appreciate the effect of clause 2.1 to at least raise an alarm or ask an appropriate question.

[87] In the circumstances and in my view, the MC Parties' provisional contributory negligence should be no more (i.e. 5%). The KW Parties and Sushi Nami Franchising were clearly capable of passing along to the MC Parties the critical instruction and intention that the Noodle Nami Quinpool tenancy must remain intact. Yet, they left the MC Parties in the dark to hopefully discover this fact for itself. In the circumstances and in my view, any attribution of responsibility beyond 5% would be unjust.

[88] The Application is dismissed. I will accept written submissions on costs if the parties are unable to agree.

Keith, J.