IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Interior Equities Corp. v. Cadence At The Lake Management Ltd.,* 2024 BCSC 2012

Date: 20241104
Docket: S133590
Registry: Kelowna

Between:

Interior Equities Corp. and KF Capital Ltd.

Plaintiffs

And

Cadence At The Lake Management Ltd., Jane Doe, Joan Doe, John doe, Jack Doe, ABC Company and XYZ Company

Defendants

And

Denise McMullen and Burnet, Duckworth & Palmer LLP

Third Parties

And

Grant Thornton LLP

Third Party

Before: The Honourable Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:	J.W.T. Robinson
Counsel for the Defendants:	C.T. Hart
Counsel for the Third Parties:	J. Parker
Counsel for the Third Party:	S.J. Anderson
Place and Date of Hearing:	Kelowna, B.C. September 25, 2024
Place and Date of Judgment:	Kelowna, B.C. November 4, 2024

[1] Grant Thornton LLP (“Grant Thornton”) applies to strike a third party notice filed on March 8, 2024, on behalf of Denise McMullen and Burnett, Duckworth & Palmer LLP. Ms. McMullen is a partner with the law firm Burnett, Duckworth & Palmer LLP (collectively “the Lawyers”).

[2] Grant Thornton says the third party notice is unnecessary based on the Court of Appeal’s decision in *Adams v. Thompson, Berewick, Pratt & Partners*, 39 DLR (4th) 314, 1987 CanLII 2590 (B.C.C.A.) [*Adams*].

[3] For the reasons that follow, I find that the third party notice should be allowed to stand and the application to strike it is dismissed.

[4] As a consequence of that conclusion, it is not necessary to decide the cross-application filed by the Lawyers.

Background

[5] The background of this matter is that the defendant, Cadence At The Lake Management Ltd. (“CLM”) was the general partner of a limited partnership known as Cadence At The Lakes Limited Partnership. The limited partnership agreement is dated November 1, 2007 (“Cadence LP Agreement”), and was created for the purpose of developing some real estate in Lake Country, BC, to the north of Kelowna. The plaintiffs, Interior Equities Corp. and KF Capital Ltd., are two of the limited partners.

[6] Pursuant to the Cadence LP Agreement, CLM has some ability to make amendments to the partnership agreement if, in the opinion of its counsel, such an amendment is necessary to correct or clarify any defects or inconsistencies in the Cadence LP Agreement.

[7] In or about 2019, CLM caused certain amendments to be made to the Cadence LP Agreement (the “2019 Amending Amendment”). The plaintiffs’ claim is that the amendments adversely and improperly affect their position, and seek, amongst other things, that the amendments are of no force and effect.

[8] The key provision of the Cadence LP Agreement as it relates to the litigation is paragraph 7.1, which is headed “Sharing Ratios and Allocations”. Paragraph 7.1(a) sets out the various ratios and 7.1(b) provides for what was referred to as a “catch-up payment". The original text of the Cadence LP Agreement and the 2019 Amendment displayed using strikethrough and underlining is shown below:

> **7.1 Sharing Ratios and Allocations**
>
> Subject to the provisions hereof, assets, Net Income, Net Loss, Taxable Income, Tax Loss, and Available Cash Flow from Operations within the Partnership shall be allocated to the Limited Partners and to the General Partner as described below:
>
> (a) all Net Income, Net Loss, Taxable Income, Tax Loss and cash distributions (excluding Net Proceeds and also excluding returns of Capital) shall be allocated to the Limited Partners and to the General Partner as follows:
>
> (i) 99.99% to the Limited Partners and 0.01% to the General Partner before Payout; and after Payout
>
> (ii) 75% to the Limited Partners and 25% to the General Partner;
>
> (b) for purposes of determining the General Partner's allocation after Payout, Net Income, Net Loss, Taxable Income and Tax Loss shall mean Net Income, Net Loss, Taxable Income and Tax Loss arising both before and after Payout, and for greater certainty, the General Partner's entitlement to cash distributions in respect thereof shall include an entitlement to an amount, payable after Payout before further cash distributions are paid to the Limited Partners, equal to 25% of ~~Net Income accrued~~ cash distributions made to the Partners before Payout;

[9] The issue in the dispute involves the interpretation of clause 7.1 and will require the Court to determine:

a) Is CLM entitled to 25% of all cash distributions made to the partners, both before and after payout, albeit only payable to CLM after payout; and

b) Did the 2019 Amending Agreement reduce the limited partners’ entitlement to cash distributions?

[10] The plaintiffs’ argument is that the 2019 Amending Agreement has the effect of wrongfully reducing their entitlement, and that CLM was not entitled to do so.

[11] The Lawyers drafted both the Cadence LP Agreement and the 2019 Amending Agreement.

[12] Following receipt of the plaintiffs' claim, CLM initiated third party proceedings as against the Lawyers. CLM disputes the plaintiffs' claims, but says that if the plaintiffs' claims succeed, the Lawyers failed to prepare the Cadence LP Agreement or the 2019 Amending Agreement or both of them, in accordance with CLM's instructions and their professional obligations. The key paragraphs of the third party claim brought by CLM against the Lawyers are as follows:

> 28. As a professional lawyer and law firm, the Third Parties, and each of them, owed a duty of care to CLM as a client to exercise reasonable care, skill, diligence and competency as a lawyer and law firm in providing legal services to CLM.
>
> 29. Further, or in the alternative, it was an implied term of CLM's contract with the Third Parties, that the Third Parties, and each of them, would exercise all reasonable care, skill, diligence, and competency as a lawyer and law firm while proving legal services to the Claiming Party.
>
> 30. CLM has allocated the Net Income and cash distributions under the Partnership Agreement based on CLM's belief that the Partnership Agreement reflected the Net Income Understanding and the Cash Distribution Intentions.
>
> . . .
>
> 32. If the Plaintiffs' allegations are correct (i.e. that the allocation of Net Income and the allocation of cash distributions are not in accordance with the Partnership Agreement), then the Lawyer (or, alternatively, another lawyer at the Law Firm) failed to draft the Partnership Agreement in accordance with the Cash Distribution intentions and in accordance with the Net Income Understanding.
>
> 33. If the Plaintiffs' allegations are correct, and the Plaintiffs suffered damage and/or loss as alleged, which is not admitted but denied, and the Claiming Party is found liable to the Plaintiffs, then CLM shall have suffered damage and/or loss as the result of the Third Parties' professional negligence and breach of the standard of care (or, alternatively, breach of the implied term described at paragraph 29), where the specifics of the breach of the standard of care (or, alternatively, breach of the implied term described at paragraph 29) are:

[13] Grant Thornton, who are the applicant on this application, were CLM's accountants and financial advisors, both at the time the Cadence LP Agreement was drafted and when the 2019 Amending Agreement was prepared. The Lawyers

issued their own third party notice to Grant Thornton, seeking contribution and indemnity pursuant to the *Negligence Act*, RSBC 1996, c. 33.

[14] The specific paragraphs of the Lawyer's response to the CLM third party notice asserted regarding Grant Thornton, are paras. 7 and 9, which state the following:

> 7. At all material times, Grant Thornton LLP ("Grant Thornton") acted as financial advisor and accountant for CLM and the principals of CLM in respect of the Lakes Partnership and previous limited partnerships involved in real estate development. At the time of the drafting of the Partnership Agreement, the Lawyers and CLM relied upon Grant Thornton to take all necessary steps required for its engagement with CLM, including confirming that the financial projections for the Lakes Partnership and the terms of the draft Partnership Agreement reflected the intentions of CLM with respect to cash distributions and income allocation. Grant Thornton was provided with the draft Partnership Agreement prior to its execution and did not request any changes to the cash distribution and income allocation provisions of the agreement or otherwise advise the Lawyers or CLM that there were discrepancies between the draft Partnership Agreement and the intentions of CLM in respect of cash distribution and income allocation.
>
> . . .
>
> 9. In reply to paragraphs 24-25 of the Notice, Grant Thornton advised CLM in or around 2019 that the terms of the Partnership Agreement did not reflect the intentions of CLM in respect of cash distribution and income allocation and recommended amendments to the Partnership Agreement. Based on Grant Thornton's advice, CLM instructed the Lawyers to draft the amendments. Grant Thornton reviewed the draft amendments prior to their execution and approved them.

[15] The Lawyers go on to plead at para. 12 the following:

> 12. In further answer to the whole of the Notice, if CLM suffered loss or damage as alleged, all of which is specifically denied, then such loss or damage was caused or contributed by the fault of CLM and Grant Thornton, and each of them, and the Lawyers plead and rely upon the provisions of the *Negligence Act*, RSBC 1996, c 333 and amendments thereto (the "*Negligence Act*").

Legal Basis

[16] Grant Thornton's application is brought pursuant to R. 9-5(1)(a), (b) and 3-5(8) of the *Supreme Court Civil Rules*. It argues that the third party notice is unnecessary.

[17] Rule 3-5(8) states:

> (8) At any time, on application, the court may set aside a third party notice.

[18] Rules 9-5(1)(a) and (b) provide as follows:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,

[19] The relevant provisions of the *Negligence Act* are ss. 1 and 4. Section 1 provides that if the plaintiff is contributorily negligent, it can only recover as against each tortfeasor to the extent of their liability. Section 4, however, provides for joint and several liability as amongst tortfeasors should the plaintiff not be negligent, in which case each of the tortfeasors may recover from the other tortfeasors by way of contribution and indemnity:

> **4** (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
>
> (2) Except as provided in section 5 if 2 or more persons are found at fault
>
> (a) they are jointly and severally liable to the person suffering the damage or loss, and
>
> (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

[20] Grant Thornton argues that the third party notice against it is unnecessary and refers to the Court of Appeal's decision in *Adams*. The *Adams* test was summarized by the Court of Appeal in *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2012 BCCA 22 at para. 1 [*Laidar*]:

> [1] This appeal involves a rule that straddles the line between substantive law – the law of contribution between tortfeasors, codified in the *Negligence Act* – and procedure – the court rules governing third party notices. The rule has been considered several times and is well settled in this province. It was described by McLachlin J.A. (as she then was) on behalf of this court in *Adams v. Thompson, Berwick, Pratt & Partners* (1987) 15 B.C.L.R. (2d) 51 as follows:
>
> > It thus may be stated with confidence, in my view, that a third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defence. Where the only negligence alleged against the third party is attributable to the plaintiff, there is no need for third party proceedings since the defendant has his full remedy against the plaintiff.
>
> (I will refer to this as the first branch of the *Adams* rule.) The Court continued:
>
> > On the other hand, where the pleadings and the alleged facts raise the possibility of a claim against the third party for which the plaintiff may not be responsible, the third party claim should be allowed to stand. [At 55.]
>
> (I will refer to this as the second branch of the rule, although it might also be considered an exception to the first branch.)

[21] The Lawyers acknowledge that Grant Thornton did not owe them a duty of care; rather, its third party notice alleges that Grant Thornton owed a duty of care to CLM which, although the defendant in the action, should be viewed as the plaintiff for the purposes of the authorities, and that the acts or omissions of Grant Thornton lead to a right on behalf of the Lawyers to claim for contribution and indemnity pursuant to s. 4 of the *Negligence Act*.

[22] In *Laidar*, it had been subsequently determined that a property that the parties had contemplated using as a commercial lease space for retail purposes was not zoned for such a purpose. The leasing agents were sued, and one of the leasing agents sought to add the prospective tenant's solicitors as a third party, arguing that the solicitors were obligated to undertake due diligence that would have identified the issue.

[23] The Court of Appeal upheld the chambers judge's decision that the proposed claim fell under the first branch of *Adams* because a lack of due diligence on the part of the plaintiff was a defence that the leasing agent could raise directly in response

to the plaintiff's claim and as such, the third party notice was unnecessary. At para. 10 in *Laidar*, the Court explained the distinction between claims under ss. 1 and 4 of the *Negligence Act* as follows:

> [10] The engineering firm [in the Adams case] argued that if it and the law firm were found to have been at fault, it should be in a position to seek contribution and indemnity from the law firm, and therefore sought to invoke s. 4 of the *Negligence Act*, R.S.B.C. 1979, c. 298, and Rule 22. This court, however, upheld the chambers judge's order striking out the third party notice. The Court cited *Yemen Salt Mining Corp. v. Rhodes-Vaughan Steel Ltd.* (1976) 2 C.P.C. 318 (B.C.S.C.) and *Westcoast Transmission Co. v. Interprovincial Steel & Pipe Corp*. (1985) 60 B.C.L.R. 368 (S.C.), both of which illustrated that, in the words of McLachlin J.A., "Where the fault alleged against the proposed third party is in fact the fault of the plaintiff, the defendant can raise the default by way of defence, making third party proceedings unnecessary." (At 55.) After stating the two branches of the rule in the passage I have quoted at para. 1, she explained the distinction between claims for contribution and indemnity between co-defendants under s. 4 of the *Negligence Act*, and the reduction of damages recoverable by a plaintiff who has contributed to his own loss, under s. 1:
>
> > The same result arises if one views the matter on the basis of the *Negligence Act* and the *Supreme Court Rules*. Where the third party claim can be raised by way of defence, the substance of the matter is that the plaintiff is at fault. That being the case, s. 1 of the *Negligence Act*, which deals with the situation where fault is alleged, against the plaintiff, is applicable. Section 1 makes no provision for contribution or indemnity between co-defendants. By contrast, s. 4 of the *Negligence Act*, which deals with cases where the plaintiff is not at fault, provides for contribution and indemnity between those found at fault in causing the plaintiff's loss.
> >
> > Under Supreme Court Rule 22, a third party claim may be brought for "contribution or indemnity". That remedy is available only where s. 4 of the *Negligence Act* is applicable. It is not available where the claim is for fault for which the plaintiff is responsible. [At 55-6; emphasis added in the *Laidar* decision.]

[24] The Court of Appeal in *Laidar* then went on at para. 11, after describing two ways in which the Court in *Adams* found a plaintiff will be responsible for the acts of a third party, to explain that an argument of failure to mitigate may be raised directly by the defendant in response to the plaintiff's claim, rendering the third party claim unnecessary:

> [11] The Court described two kinds of situations in which a plaintiff will be responsible for the conduct of a proposed third party – where the acts of the third party fall within the scope of an agency relationship between the third

> party and the plaintiff, and where the claim is that the third party should have advised or assisted the plaintiff to mitigate his damages. (At 56.) In applying these principles to the facts in *Adams*, McLachlin J.A. found it unnecessary to decide whether legal advice given by a solicitor to his or her client – as opposed to the legal representation of one's client in dealings with others – would fall outside the agency relationship, as the engineers contended. Even if one assumed that argument was correct, she said, the purported third party claim was "in fact, a claim with respect to an obligation of the plaintiff[s]" – the obligation to mitigate their losses. This being so, the engineers would have a "complete remedy by way of reduction of [the plaintiff's] damages" if the mitigation argument succeeded. Third party proceedings were unnecessary.

[25] In *Yemen Salt Mining Corp. v. Rhodes-Vaughan Steel Ltd.* (1976) 2 C.P.C. 318 (B.C.S.C.), a case referred to by the Court of Appeal in *Laidar*, the defendant's third party notice was struck because the third party was a professional retained by the plaintiff and was the plaintiff's agent. Based on the law of agency, the agent's acts or omissions of the third party were deemed at law to be the acts or omissions of the plaintiff. As such, the defendant could directly raise the argument regarding negligent inspection in response to the plaintiff's claim without the need for the third party claim.

[26] There are other instances where the third party notice may be struck because it is unnecessary. For example, when there are divisible injuries arising out of separate errors and omissions, there is no proper basis for a third party claim because the actions of the subsequent actor did not go to the events giving rise to the initial loss: *Sun Life v. 482147 B.C. Ltd.*, 2013 BCSC 1187 para. 47.

[27] I will now consider Grant Thornton's application in accordance with these principles.

Discussion

[28] Grant Thornton's primary submission is that the third party notice is unnecessary because Grant Thornton was CLM's agent and that the Lawyers can therefore raise the actions of Grant Thornton as a defence to CLM's claim.

[29] Grant Thornton argues that the rule in *Adams* confirms that when professionals provide advice and services to clients, they do so as the client's agent.

[30] Grant Thornton also argues that legal drafting is the sole purview of the Lawyers, and that the claim is really that Grant Thornton failed to notice the Lawyers' own error. As for this argument, it appears to be one that would necessitate factual findings. While the drafting of legally enforceable documents generally falls within the lawyer's purview, I am also mindful that accountants are also involved in the preparation of certain types of documents, such as those that involve taxation statutes.

[31] I also do not agree that the claim made by the Lawyers against Grant Thornton is as broad as counsel says. The allegation is not that the Lawyers sent the agreement to Grant Thornton to proofread it in whole cloth; rather, Grant Thornton's review was expected to be limited to certain financial provisions that include article 7.01 of the Cadence LP Agreement.

[32] Grant Thornton refers to a number of authorities that address the role of professionals as agents in the context of applications to strike third party claims, including *Cowichan Tribes v. Canada (Attorney General)*, 2007 BCSC 1915 at paras. 43 to 50, and *JD1H1 v. Budden*, 2020 NUCA 3. Both cases involve lawyers acting as agents for their clients. In this case, Grant Thornton says that it was acting as agent in its capacity as CLM's financial advisors and accountants.

[33] Agency law provides that an agent can bind the principal, and third parties are entitled to rely on the agent's agency. An agency relationship arises when one person has the ability to affect the legal rights or obligations of another. Agency relationships typically manifest in one of two ways: actual agency or apparent agency: see e.g. *Basyal v. Mac's Convenience Stores Inc.*, 2018 BCCA 235 at para. 65. In the case of actual agency, the agent's authority to act on behalf of the principal results from a "manifestation of consent", which will often involve a written agreement.

[34] The principal may expressly provide the agent's authority or it may be implied from the circumstances, but the authority must be derived from the principal. Apparent authority arises through representations made by the principal to third

parties. In some instances, a principal will be bound even if the agent exceeds their authority. An example may include a lawyer entering into a settlement agreement on behalf of a client.

[35] The difficulty I have with Grant Thornton's argument is that while I accept that accountants, much like lawyers, may be agents for their clients, I do not accept the proposition that a professional is necessarily acting in the capacity of an agent at all times.

[36] Certainly, there are numerous instances when a lawyer or accountant will be acting as their client's agent, such as when they are involved in communications with third parties. However, if a client seeks and obtains advice from a lawyer with regard to a particular situation or circumstance, it does not necessarily follow that the lawyer ever assumes the role of agent for the client. The same would also apply to a client obtaining advice from an accountant.

[37] In this case, the claim is that the Cadence LP Agreement and the 2019 Amending Agreement were the products of discussions between Grant Thornton and the Lawyers, both of whom were the professional advisors for CLM. If Grant Thornton were acting as agents for CLM, the Lawyers would also have been acting as agents for CLM at the same time.

[38] The essence of agency is the binding of the principal by the agent. It is difficult to see how Grant Thornton could be considered to have bound CLM in its dealings with the Lawyers any more so than the Lawyers could bind CLM in their dealings with Grant Thornton. It is also difficult to see how Grant Thornton could have bound CLM by providing advice to CLM in its capacity as CLM's financial advisor and accountant. The professionals were all members of the same orchestra, each contributing their own unique skills or sounds towards a single harmonious production.

[39] Because this is a pleadings application, I must assume the facts as stated in the pleadings to be true. The Lawyers allege that they and Grant Thornton were

working together on CLM's behalf to prepare documents, and that Grant Thornton provided input as to the income distribution aspects of the agreements. The professionals were all working collectively, and for a common purpose. Contrary to the facts in *Yemen Salt Mining Corp.* upon which Grant Thornton relies, there was a relationship between Grant Thornton and the Lawyers.

[40] It is not clear that Grant Thornton would have been acting in the capacity of CLM's agent in its discussions with the Lawyers and in its advice to CLM as a financial advisor and accountant. As such, it follows that it is not plain and obvious that any errors or omissions made by Grant Thornton can be raised by the Lawyers by way of defence to CLM's claims. This is also not a case of divisible injuries arising out of separate errors or omissions. Although there are two distinct events that are pleaded – the drafting of the Cadence LP Agreement and the subsequent 2019 Amending Agreement, there are not multiple losses. Rather, there is, conceptually at least, a single loss. Albeit a loss with alternative causes – either the Cadence LP Agreement was improperly drafted, or the 2019 Amending Agreement should not have been implemented, or perhaps both. More significantly for the purposes of the analysis here, Grant Thornton and the Lawyers were, at least based on the pleadings, involved with both.

[41] I conclude that the Lawyers are entitled to pursue contribution and indemnity pursuant to s. 4 of the *Negligence Act*, and Grant Thornton's application must be dismissed.

[42] It is not necessary for me to deal with the Lawyers' cross-application for a determination by way of summary trial that CLM is vicariously liable for the acts of Grant Thornton because I have dismissed Grant Thornton's application.

"Wilson J."