COURT OF APPEAL FOR ONTARIO

CITATION: SIF Solar Energy Income & Growth Fund v. Aird & Berlis LLP, 2024 ONCA 946
DATE: 20241231
DOCKET: COA-23-CV-0685

van Rensburg, Sossin and Dawe JJ.A.

BETWEEN

SIF Solar Energy Income & Growth Fund, SIF Solar Energy Operating Trust, SIF #2 Solar Income & Growth, and SIF #2 Operating Trust, by their Trustees, Adam S. Heinrich, Leon Zupan, Stewart Bruce, Jim Lotimer, C. Paul Storace, SIF Capital Canada Inc., Solar Power Income Fund GP#2 Inc., Solar Power Income Fund GP#4 Inc., Solar Power Income Fund GP#5 Inc., Solar Power Income Fund GP#6 Inc., Solar Power Income Fund GP#7 Inc., SIF #2 Reliant Essex GP Inc., SIF #2 Solar Income & Growth GP (A) Inc., SIF #2 Solar Income & Growth GP (B) Inc., SIF #2 Solar Income & Growth GP (C) Inc., and SIF #2 Solar Income & Growth GP (D) Inc.

Plaintiffs (Appellants)

and

Aird & Berlis LLP

Defendant (Respondent)

Brett David Moldaver, for the appellants

William Pepall and Rebecca Shoom, for the respondent

Heard: May 7, 2024

On appeal from the order of Justice Michael A. Penny of the Superior Court of Justice, dated May 16, 2023.

van Rensburg J.A.:

A. OVERVIEW

[1] The issue in this appeal is whether the motion judge erred in permanently staying an action commenced by the appellants against the respondent law firm on the basis that the proper procedure was to have moved to add that defendant to an action the appellants were pursuing against other defendants involving the same factual circumstances.

[2] For the reasons that follow, I would not interfere with the motion judge's discretionary decision that it was appropriate for all the related claims to proceed in a single action. I would however allow the appeal to provide that the second action is stayed pending the appellants' motion to add the law firm as a defendant to the first action, and not permanently. It will be for the judge hearing that motion to determine whether the stay will be permanent or will be lifted to permit the stayed action to proceed.

B. FACTS

[3] The appellants are investment trusts created for the purpose of acquiring, developing, and managing solar power projects, as well as their trustees, general partners, and subsidiaries. Until approximately December 2017, the investment trusts were managed by Solar Income Fund Inc. ("SIF Inc."). The unitholders of the trusts appointed new trustees on or about December 22, 2017.

[4] On August 9, 2019, the appellants commenced Action No. CV-19-625232-00CL on the Commercial List in the Superior Court (the “Main Action”). The Main Action is against SIF Inc., its officers and directors and various individuals and entities related to SIF Inc., and the auditors and valuators retained by SIF Inc. The Main Action asserts that the defendants breached various duties owed to the appellants, including misappropriating business opportunities, engaging in improvident and self-dealing transactions, extracting excessive fees, and failing to properly manage and oversee the business of the trusts and their subsidiaries. The Main Action asserts that the defendant valuators (Richter Advisory Group Inc. and Vimal Kotecha) failed to disclose material information, including three prior valuations and two prior engagement letters, and that the defendant accountants and auditors (MNP LLP) failed to investigate and report on material misstatements and omissions. The appellants seek damages for breach of contract and breach of fiduciary duty, as well as an accounting and disgorgement of profits and other amounts.

[5] On December 18, 2019, the appellants commenced Action No. CV-19-00633126-00CL (the "A&B Action") against Aird & Berlis LLP (“A&B”). A&B was not named as a defendant in the Main Action. The A&B Action alleges that A&B was counsel for some of the appellants and for certain defendants, including SIF Inc. The A&B Action alleges that A&B, negligently and in breach of its contractual and fiduciary duties, failed to identify or report the misconduct of the defendants in

the Main Action. The A&B Action seeks, among other things, damages against A&B equivalent to the damages sought in the Main Action, as well as restitution and return to the appellants of all profits and other amounts received, including legal fees. The Main Action is referred to in the Fresh as Amended Statement of Claim as the "Companion Action". The appellants plead at para. 15:

> The claim herein against [A&B] is contingent upon the establishment of wrongdoing by former management and/or related entities and/or their agents and non-legal advisors who are named as defendants in the [Main] Action and resulting losses to the Plaintiffs. The claim herein against [A&B] incorporates, adopts, repeats, and pleads all allegations of fact set out by the Plaintiffs in the Statement of Claim in the [Main] Action. [Emphasis added.]

[6] A&B objected to the commencement of the A&B Action, asserting that the action created an unnecessary multiplicity of proceedings, and that it was an abuse of process for the appellants to have commenced a new proceeding as a means to circumvent the requirement under r. 26.02 of the *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194, that leave of the court be obtained before adding A&B as a non-consenting defendant to the Main Action. A&B sought the consent dismissal of the A&B Action or alternatively a motion to determine the issue. By agreement of the parties, the motion was delayed until after the release of a decision of the Ontario Securities Commission ("OSC") in a related matter.

[7] Shortly after the release of the OSC decision[1], A&B brought a motion for an order striking out and dismissing or staying the A&B Action. The appellants brought a cross-motion for consolidation or trial together of the A&B Action and the Main Action, or alternatively for a temporary stay of the A&B Action until the determination of the Main Action.[2]

[8] At the time the motions were heard, all but one of the defendants had responded to the Main Action. Four defendants had pleaded reliance on legal advice provided by A&B in their Statements of Defence, and had commenced Third Party Claims seeking contribution and indemnity from A&B. A&B had filed Notices of Intent to Defend the Third Party Claims, but had not yet delivered Statements of Defence to the Third Party Claims or the Main Action.

[9] The record before the motion judge on the A&B motion and the appellants' cross-motion consisted of brief affidavits confirming the status of the two proceedings, and attaching the correspondence between counsel, the Statements of Claim in the two actions, the Third Party Claims and A&B's Notices of Intent to Defend the Third Party Claims in the Main Action, and the OSC decision.

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[1] *Solar Income Fund Inc*. *(Re)*, 2022 ONSEC 2.

[2] The cross-motion appears to have been brought only in the A&B Action. There is no indication in the record that counsel for the parties in the Main Action were served with the cross-motion. By the time the motion was heard, the appellants had different counsel in the two actions. The counsel slip attached to the motion judge's endorsement lists counsel for the plaintiffs in the Main Action and counsel for one of the defendants to the Main Action as "observing".

C. THE MOTION JUDGE'S DECISION

[10] After setting out the procedural history, the motion judge turned to the parties' submissions. A&B relied on this court's decision in *Maynes v. Allen-Vanguard Technologies Inc. (Med-Eng Systems Inc.)*, 2011 ONCA 125, 274 O.A.C. 229, in support of its argument that the A&B Action was an abuse of process because the appellants ought to have moved under r. 26.02 for leave to add A&B as a defendant to the Main Action. The appellants relied on *Abarca v. Vargas*, 2015 ONCA 4, 123 O.R. (3d) 561, where this court concluded that an action against the plaintiffs' own insurer based on the underinsured motorist coverage in their auto insurance policy was not an abuse of process, and permitted that action to proceed in tandem with a tort action against the other driver. The appellants asserted that, while the A&B Action arose out of the same factual matrix as the Main Action, the claims against A&B were distinct and sought unique, contingent relief against A&B. They also argued that the A&B Action was commenced separately to preserve their claim of solicitor-client privilege in the Main Action.

[11] The motion judge cited paras. 38 to 40 of *Maynes*, where this court concluded that there was an abuse of process where the plaintiffs had commenced a new action instead of seeking to add defendants to an existing action. He expressed the view that *Abarca* turned on "the legal and procedural complexities of multivehicle accidents involving tort, contract and insurance law, as well as

administrative proceedings under the SABS." He also noted that the Court of Appeal in *Abarca* distinguished *Maynes* on three grounds: (i) that the relief sought against the defendant insurer in the second action was distinct from the relief sought in the first action; (ii) that the claim against that defendant was not known when the first action was commenced; and (iii) that there was a real possibility that the claim against the insurer would be out of time, and the plaintiffs would be deprived of access to the underinsured motorist coverage. The motion judge observed that none of these features were present in the case before him.

[12] The motion judge concluded that "the reasoning in *Maynes* applies". He stated that s. 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*"), the rules of joinder in r. 5.02, and the provisions of r. 26.02 set out the appropriate procedures to follow in this case. The claim against A&B, in the absence of A&B's consent, ought to have been advanced by way of a motion for leave to amend the Main Action under r. 26.02(c).

[13] The motion judge rejected the appellants' argument, based on the correspondence between counsel that was in the limited record on the motion, that the A&B Action was commenced to "somehow preserve the plaintiffs' privilege." He noted that he failed to see how that concern was operative at all, or even if potentially operative, how it would justify another proceeding involving the same series of events and circumstances. He concluded that the appellants had commenced the A&B Action for strategic reasons, and not substantive reasons

that would justify a multiplicity of proceedings. He stated that his concern was supported by the fact that other professional entities were sued in the Main Action, with essentially the same allegations against them as were made against A&B in the A&B Action.

[14] The motion judge observed that the commencement of the A&B Action had the result of depriving A&B of important procedural rights in two respects. First, the appellants circumvented the court's jurisdiction under r. 26.02(c): (1) to assess whether A&B would be prejudiced by an amendment and to determine whether that prejudice could be compensated for by costs; (2) to impose costs in favour of A&B for granting the amendment; and (3) to impose other terms that were just.

[15] Second, the motion judge noted that A&B would be precluded from pleading to the allegations in the Main Action in respect of the other closely related parties and events in the same factual matrix, from access to documentary and oral discovery of the other parties to the Main Action, and from the ability to cross-examine the other parties. He also noted that the proceedings would be exposed to the risk of inconsistent results. While he acknowledged that these deficiencies might be curable by making consolidation and other procedural orders, the motion judge rejected that approach, stating that "if everything can be 'fixed' by bespoke consolidation and other procedural orders, the principle in *Maynes* would not exist and there would be no need for the procedural specificity of Rule 26.02."

[16] The motion judge concluded that the commencement of a separate action against A&B was an abuse of process, and that the appropriate remedy was a stay of the A&B Action and a direction that the appellants must move under r. 26.02 for leave to amend the Main Action if they wished to add A&B as a party and plead the allegations made in the A&B Action. Addressing a potential limitation period argument, the motion judge confirmed that the commencement of the A&B Action on December 18, 2019 tolled the running of the limitation period in respect of the appellants' claims against A&B. He concluded that the appellants' cross-motion was moot.

[17] I note that, while not specified expressly in the motion judge's endorsement whether the stay was permanent or only temporary, the court order under appeal provides for a permanent stay of the A&B Action.

D. ISSUES AND POSITIONS OF THE PARTIES

[18] The issues on this appeal are (1) whether the motion judge erred in concluding that the commencement of the A&B Action was an abuse of process; and (2) whether the motion judge erred in ordering a permanent stay of the A&B Action.

[19] The determination that proceedings constitute an abuse of process is a finding of mixed fact and law which is entitled to deference on appeal absent an extricable error of law: *Davies v. Clarington (Municipality)*, 2023 ONCA 376, 167

O.R. (3d) 33, at para. 48. An appellate court should intervene "only if the motion judge misdirected himself, came to a decision that is clearly wrong … or gave no or insufficient weight to relevant considerations": *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at para. 24, leave to appeal refused, [2019] S.C.C.A. No. 284.

[20] The appellants contend that the motion judge erred in concluding that the A&B Action is an abuse of process. They submit that the motion judge erred in law in holding that this court's decision in *Maynes* stands for the proposition that there is an abuse of process every time there are duplicative claims asserted in separate proceedings. They argue that the motion judge erred in concluding, without evidence, that they had "strategic" reasons for commencing the A&B Action that did not justify the multiplicity of proceedings involved, when in fact the relief sought in the A&B Action is distinct and contingent upon the resolution or determination of the Main Action. They also argue that the motion judge erred in dismissing their concerns about preserving solicitor-client privilege. They contend that a permanent stay of the A&B Action was not a proportional remedy.

[21] A&B asserts that the appellants do not allege an error of law, but that they simply take issue with how the motion judge applied the relevant test for abuse of process. A&B submits that the motion judge correctly applied this court's decision in *Maynes*, when he concluded that the A&B Action was an abuse of process, that the continuation of the A&B Action could not be justified, and that A&B would suffer

prejudice if the A&B Action were permitted to proceed. A&B submits that any remedy short of a permanent stay would not have adequately remedied the prejudice suffered by A&B as a result of the appellants' approach in commencing the A&B Action rather than moving to add A&B as a defendant to the Main Action. A&B contends that the permanent stay "[did] no more than unwind the prejudice suffered by [A&B], giving it the opportunity it always should have had to resist a motion to be added as a party to the Main Action."

E. ANALYSIS

[22] In the discussion that follows I will explain why, although I would uphold the motion judge's decision to stay the A&B Action to permit the appellants to bring a motion to add A&B to the Main Action, I do not agree with every aspect of his analysis, including his determination that the A&B Action is an abuse of process. I will also explain why I would set aside the permanent stay of the A&B Action in favour of a temporary stay.

[23] I will begin by laying the necessary groundwork, referring to the *CJA* and the *Rules of Civil Procedure* respecting a multiplicity of proceedings and joinder of claims and parties, and the test for an abuse of process where the basis for the claim is duplicative proceedings. I will turn to this court's decisions in *Maynes* and *Abarca*, and explain why I do not agree with the interpretation of *Maynes* proposed by A&B, which appears to have been adopted by the motion judge in this case.

I will then address the motion judge's decision and explain why, although I do not agree that the commencement of the A&B Action was an abuse of process, I would not interfere with the procedural direction that the appellants must bring a motion to add A&B as a defendant to the Main Action. I will conclude by explaining why I would substitute a temporary stay for the permanent stay that was ordered by the court below.

(a) Avoiding a Multiplicity of Proceedings, Amendment and Joinder

[24] Section 138 of the *CJA* provides that "[a]s far as possible, [a] multiplicity of legal proceedings shall be avoided." This is a general rule that informs the specific rules available to parties in civil proceedings concerning joinder of claims and parties, amendments to pleadings, consolidation and trial together of proceedings, and rr. 21.01(c) and (d) when invoked to stay or dismiss duplicative proceedings.

[25] Apart from r. 5.03, which requires all necessary parties to be joined as a party to a proceeding, the choice of parties to pursue in a proceeding is for the plaintiff or applicant. The rules of joinder are permissive; that is, a plaintiff may, but is not obliged to, pursue all of its claims involving the same factual circumstances in a single action.

[26] The rules respecting the amendment of pleadings to add a defendant to an action are also permissive. Rule 26.02 provides that a party may amend its pleading (a) without leave, before the close of pleadings, if the amendment does

not include or necessitate the addition, deletion or substitution of a party to the action; (b) on filing the consent of all parties and where a person is to be added or substituted as a party, the person's consent; or (c) with leave of the court. Rule 5.04(2) provides that "[at] any stage of a proceeding the court may by order add, delete or substitute a party … on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment." Again, a plaintiff may seek leave to add a defendant to an existing proceeding but is not required to do so.

[27] The joinder rules are similarly flexible and permit parties to move before the court for orders respecting the scope of a proceeding, particularly where the issue is whether claims should be advanced in a single proceeding.

[28] A defendant that objects to the joinder of claims or parties in a single action can bring a motion under r. 5.05 for relief against joinder. Where the court is satisfied that the joinder of multiple claims or parties in the same proceeding "may unduly complicate or delay the hearing or cause undue prejudice to a party", the court can make various orders including ordering separate hearings; requiring one or more of the claims to be asserted in another proceeding; and staying the proceeding against a defendant pending the hearing of the other proceeding on condition that the defendant to the stayed proceeding is bound by findings made at the other hearing. Rule 5.05 reflects the reality that there may be any number of

reasons why, even where the factual matrix is the same, it might be preferable for claims or parties to be pursued in separate proceedings.

[29] By contrast, r. 6 is available so that parties can seek consolidation or trial together of two or more proceedings that are pending in the court. An order can be made where the court is satisfied that (a) the proceedings have a question of law or fact in common; (b) the relief claimed in the proceedings arises out of the same transaction or occurrence or series of transactions or occurrences; or (c) for any other reason such an order should be made. The motion is necessarily brought on notice to the parties in all affected proceedings. The court can order that the proceedings be consolidated or heard together or one after the other, that one proceeding be stayed while the other proceeds, or that claims in one proceeding be asserted by way of counterclaim in another, and may give such directions as are just to avoid unnecessary costs or delay.

(b) Dismissing or Staying Duplicative Proceedings for Abuse of Process

[30] Where a plaintiff or plaintiffs have commenced multiple proceedings against a defendant, a defendant can move for relief before the court to dismiss or stay one or more of the proceedings.

[31] The authority to dismiss or stay an action that is an abuse of process derives from r. 21.01(3)(d) of the *Rules* (referring to an action that is frivolous or vexatious

or is otherwise an abuse of the process of the court) and the inherent and residual jurisdiction of the court. The abuse of process doctrine "engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute": *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37, citing *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved, 2002 SCC 63, [2002] 3 S.C.R. 307).

[32] Rule 21.01(3)(d) has been invoked to fill a gap when all of the elements of issue estoppel or *res judicata* could not be made out, but where the defendant asserts that the commencement of a second proceeding that overlaps with one already determined (through court order or settlement) would work an injustice: see e.g., *Niagara North Condominium Corp. No. 125 v. Waddington*, 2007 ONCA 184, 222 O.A.C. 66. More recently, r. 21.01(3)(d) has been relied on in support of motions to dismiss or stay an action where there is another, overlapping, proceeding pending. While 21.01(3)(c) permits a defendant to move to dismiss or stay an action on the ground that "another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter" (emphasis added), this rule does not assist a defendant who has not been sued in the other proceeding.

[33] Even where r. 21.01(3)(c) applies, that is, where the parties and subject matter are the same, a dismissal or stay of the second proceeding is not automatic. The court must be satisfied that such relief is warranted in the particular circumstances of the case. The moving party must demonstrate that the continuation of the action would cause it substantial prejudice or injustice (beyond inconvenience and expense) because it would be oppressive or vexatious or would otherwise be an abuse of the process of the court, and that the stay would not cause an injustice to the responding party. Factors relevant to prejudice include the likelihood and effect of the two matters proceeding in tandem, the possibility and effect of different results, the potential for double recovery, and the effect of possible delay: *Birdseye Security Inc. v. Milosevic*, 2020 ONCA 355, at paras. 15-16.

[34] Where the court finds that a proceeding is an abuse of process, the appropriate remedy will be case-specific. As this court observed in *Abarca*, at para. 29:

> There is no law supporting the conclusion that an abuse of process must lead inevitably to the dismissal of the associated claim. In each case the court must assess the gravity of the abuse in determining the severity of its response, bearing in mind the principle of proportionality. This approach is not surprising, since instances of abuse of process fall across the spectrum from egregiously contemptuous conduct to relatively minor breaches of procedural rules.

(c) *Maynes*, *Abarca*, and other relevant cases

[35] The central issue before the motion judge was whether the A&B Action was an abuse of process. While it is not clear whether the parties confined their arguments to these two cases, the motion judge approached the issue as depending on which of this court's decisions in *Maynes* and *Abarca* he should follow. Keeping in mind that the determination of whether a proceeding is an abuse of process depends on all of the relevant circumstances (see *Birdseye Security Inc.*, at para. 15), it is helpful to recall the facts and reasoning of each case.

[36] In *Maynes* the plaintiffs had commenced three actions. The third repeated substantially the same allegations against the same defendants in two other ongoing actions and added new defendants. The motion judge granted the defendants' motion to strike the statement of claim in the third action and dismissed the plaintiffs' cross-motion seeking leave to amend that claim or to join the claim to the two ongoing actions. A number of issues were before this court on appeal: whether the third action was an abuse of process; whether the third action disclosed a reasonable cause of action against the new defendants; and whether any remaining claim against the new defendants ought to have been joined or consolidated with the ongoing actions.

[37] This court concluded that the third action was an abuse of process. The pleadings in the ongoing actions had closed and documentary and oral discovery

in those actions was substantially complete. The plaintiffs initially sought to combine the ongoing actions and to add the new defendants and the claims against them to those proceedings, providing a draft amended statement of claim. The plaintiffs did not obtain the consent required by r. 26.02(b) to add a party after the pleadings had closed. Instead of bringing a motion under r. 26.02(c), the plaintiffs commenced the third action and sought joinder or consolidation of that action with the ongoing actions. The third action duplicated the same five claims the plaintiffs made against the original defendants in the ongoing actions and added new claims for declaratory relief against the new defendants.

[38] It was in those circumstances that this court upheld the finding in the court below that the third action constituted an abuse of process. This court held that the motions judge correctly identified the claims against the original defendants in the new action as an abuse of process “because they were virtually identical to the claims asserted against them in the [ongoing actions]”, and that if such claims were allowed to proceed “it would amount to a relitigation of the same issues as between the same parties”: at para. 36. This court went on to state that the claims against the new defendants were also an abuse of process because the purpose of the commencement of the new action was to name the added defendants as parties to the related litigation, effectively circumventing the express procedural requirement in r. 26.02(c) that leave of the court be obtained to add a non-consenting party to the proceeding after pleadings were closed.

[39] This court also upheld the motions judge's dismissal of the new action on the basis that it did not disclose a reasonable cause of action against the new defendants. As such, there was no issue about the appropriate remedy for abuse of process, and the court did not have to consider the alternative claim for consolidation or trial together of the actions.

[40] In *Abarca* the plaintiffs commenced a tort action against an underinsured driver following a motor vehicle accident. This court upheld a motion judge's finding that the plaintiffs, in commencing a new action, had abused the court's process by disregarding an earlier direction of the court to bring a motion to amend a claim on notice. Lauwers J.A. held that this abuse of process, which he characterized as minor, did not warrant a dismissal of the second action because the result would be a potential loss of underinsured coverage by operation of a limitation period. He concluded however that the motion judge had erred in finding that, absent the earlier direction, it was an abuse of process for the plaintiffs to start a new action against the insurer in relation to the underinsured motorist coverage. He disagreed with the premise that starting a new action was necessarily abusive, and he rejected *Maynes* as the "ruling precedent". He pointed out a number of circumstances in *Maynes* that were not present in the case before him, including that the third action had been commenced after the plaintiffs failed to obtain consent to add the new defendants and claims to the ongoing proceedings; that five of the six claims asserted in that action were "virtually identical" to the original

claims and the sixth was for declaratory relief alone and disclosed no reasonable cause of action; and that "key representatives" of the new defendants were already involved in the original actions.

[41] I read this court's decision in *Abarca* as rejecting the general principle that A&B advances here: that it is always an abuse of process when a second action is commenced in circumstances where the first action could have been amended to add a defendant or claim. Rules 26.02 and 5.04 govern the amendment of pleadings and adding parties to an action, but do not preclude the issuance of separate proceedings even if they involve common factual matrices and overlapping parties. Rather, the rules of consolidation and joinder exist to address situations where actions should be tried together or consolidated.

[42] I agree with the appellants that the result in the present case did not depend on whether *Maynes* or *Abarca* should be followed, but on how the principles in those and other cases respecting abuse of process and overlapping proceedings ought to be applied. In my view *Maynes* reflects the application of the relevant rules to the facts of that case, but does not mandate a finding of abuse of process in every case where a second proceeding is commenced instead of adding a defendant to an overlapping existing proceeding, nor does it preclude consolidation or other procedural orders as an appropriate response to a multiplicity of proceedings.

[43] Subsequent cases have recognized that whether the commencement of a second and overlapping action is an abuse of process will depend on the particular factual circumstances, including the purpose of the commencement of the subsequent action. In a number of cases, judges have determined that a second action was an abuse of process when it was commenced in order to circumvent a court order, such as a costs order (see *Living Water (Pressure Wash Services) Ltd. v. Dyballa*, 2011 ONSC 5695), or an order requiring the posting of security for costs (see *Carbone v. DeGroote*, 2018 ONSC 109). In *Nuco Jewelry Products Inc. v. Lynott*, 2016 ONSC 5532, the court found that claims alleging conspiracy and fraud were inextricably intertwined with the liability of a defendant to a related action, and the defendants' liability was alleged to be joint and several. The court stayed the second action to permit the plaintiff to bring a motion to add a new defendant to the related action, anticipating that the stay could be lifted if such relief were refused.

[44] In other cases, judges have declined to find an abuse of process where a second and overlapping action was commenced, and instead have addressed concerns about a multiplicity of proceedings by granting orders for consolidation or trial together: see e.g., *Zhu v. Siew*, 2020 ONSC 7045, 153 O.R. (3d) 219; *Dimakos v. Dimakos*, 2021 ONSC 3248; and *Howlett v. Northern Trust Company*, 2023 ONSC 4531.

[45] These cases recognize that, while the commencement of a second proceeding may give rise to concerns about overlapping questions of law and fact or the risk of inconsistent verdicts, it is not necessarily an abuse of the process of the court. While a party might require a remedy in order to avoid prejudice caused by a multiplicity of actions, that remedy is frequently an order under r. 6.01 for consolidation or trial together, with appropriate procedural directions to address the interests of all parties.

(d) Application to this Case

(i) Commencing the A&B Action was not an abuse of process

[46] In my view the motion judge erred in concluding that the commencement of the A&B Action was an abuse of process.

[47] First, as I have already observed, he assumed that the commencement of a new action against A&B was an abuse of process because it circumvented r. 26.02. For there to be an abuse of process, there must be something more than the commencement of a second proceeding in which there are overlapping issues or parties. There must be evidence that there was a “misuse of the court’s procedure” based on the circumstances of the case. In my view the motion judge did not consider all of the relevant circumstances, many of which differed from the circumstances in *Maynes*.

[48] Although the A&B Action involves the same factual matrix, events and occurrences that gave rise to the Main Action, the A&B Action is distinguishable from *Maynes* and other cases relied on by A&B as authorities upholding the approach applied in *Maynes*. First, the A&B Action is not a duplication of the Main Action in the way that occurred in *Maynes* and *Gale v. Rothbart Centre for Pain Care*, 2021 ONSC 4535. In *Maynes* the plaintiffs had named as defendants to the third action all of the same defendants that were already involved in the first two actions, adding new defendants that were related to the existing defendants. Indeed, that appeared to be the plaintiffs' objective: to add other defendants to the litigation to enhance their ability to recover damages. In *Gale*, the plaintiffs had commenced a second action, adding eight new defendants to three defendants who had been named in the first action. Here, A&B is not a defendant to the Main Action and is the only defendant to the A&B Action.

[49] Second, although the A&B Action pleads the facts alleged in the Main Action, and, as the motion judge noted, includes claims against other professionals, the claims that are asserted against A&B are of a different nature. Contrary to A&B's submissions, the A&B Action does not allege that A&B "participated in" the wrongdoing alleged in the Main Action, nor does it claim that A&B are jointly and severally liable with the defendants to the Main Action. The A&B Action is an action for solicitors' negligence, breach of contract and breach of fiduciary duty. I agree with the appellants' submission that it is not unusual for a

solicitor's negligence action to be commenced when there is a separate action against the alleged wrongdoers based on the same factual matrix: see, e.g., *1014864 Ontario Ltd. v. 1721789 Ontario Inc.*, 2010 ONSC 3306; *Gowling Lafleur Henderson LLP v. Meredith*, 2011 ONSC 2686, 32 C.P.C. (7th) 209; and *Hurst v. Hancock*, 2020 ONSC 1216. In such cases, where issues are overlapping and to prevent inconsistent verdicts, procedural orders can be made, including for case management, joint discovery on common issues, and/or for trial together: see e.g., *Kelkas v. Kilicaslan et al.*, 2020 ONSC 3596, 5 C.C.L.I. (6th) 218.

[50] Since there is no mandatory requirement for all claims and parties to be joined in the same proceeding, the appellants' purpose for bringing the A&B Action separately was relevant. While I agree with A&B that the appellants' subjective intention in bringing a second action rather than seeking to join the A&B to the Main Action is "not a determining factor", it is relevant to whether the A&B Action is an abuse of process and to any remedy the court should impose. In *Maynes*, this court observed that the plaintiffs had commenced the third action "for the purpose of naming the Added Defendants as parties to the related litigation": at para. 38.

[51] This takes us to the motion judge's second error. In my view, he concluded that the A&B Action was brought for "strategic, not substantive reasons", without properly considering the appellants' evidence about why they commenced a separate action against A&B instead of seeking to join A&B to the Main Action.

The reason articulated by the appellants' former counsel for doing so was their concern about preserving their right to assert solicitor-client privilege with respect to their communications with A&B in the Main Action. They asserted that having discovery in a separate action against A&B and the deemed undertaking rule would prevent A&B from making their solicitor-client communications available to the defendants in the Main Action.

[52] The motion judge briefly referred to and rejected the appellants' articulated reasons for commencing the A&B Action as a separate proceeding. First, he suggested that there would be an implied waiver of privilege once a client sues the lawyer: that is, that the commencement of the A&B Action would result in the waiver of any privilege the appellants might assert. The appellants' contention was that any waiver of their privilege in the A&B Action would not extend to the Main Action, since A&B was not a defendant to that action; that was their reason for commencing a separate proceeding. Typically, the waiver of solicitor-client privilege resulting from a client's lawsuit against their lawyer is for the limited purpose of allowing the lawyer to defend the solicitor's negligence claim and not for all purposes. This was the case in *Kelkas*, where, in refusing consolidation of a solicitor's negligence action with an action against a wrongdoer based on the same facts, the court considered as a factor that the plaintiff had only waived solicitor-client privilege within the confines of the solicitor's negligence action and not in the

other two actions, and gave specific directions for documentary and oral discoveries.

[53] Second, the motion judge stated that, even if solicitor-client privilege were operative, he failed to see how it would justify yet another proceeding involving the same series of events and circumstances. With respect, the issue was not whether the appellants' concerns about maintaining solicitor-client privilege outweighed any interest there might be in avoiding a multiplicity of proceedings. Rather, the question was whether the A&B Action was commenced by the appellants to avoid, circumvent, or otherwise abuse the process of the court; that is, whether the appellants were misusing the court's processes.

[54] In argument on the appeal, A&B submitted that there was no basis for the solicitor-client privilege claim because the Fresh as Amended Statement of Claim pleaded a common or joint retainer, and that, according to the Law Society of Ontario's *Rules of Professional Conduct*, parties to a common or joint retainer cannot assert privilege against each other. The appellants argued that, although they plead that A&B acted for various parties, on a plain reading of their Fresh as Amended Statement of Claim, they allege that A&B acted for various parties during distinct time periods, and there is no claim to a joint or common retainer of A&B.

[55] The motion judge's function was not to determine the merits of any claim to solicitor-client privilege, nor is it the role of this court to do so. Rather, the issue is

whether the appellants' articulated reasons for pursuing their claims against A&B in a separate action should be rejected out of hand in favour of a finding that the A&B Action was commenced to circumvent or avoid the court's proper procedures.

[56] In the circumstances of this case, I do not agree that the commencement of the A&B Action was an abuse of process because the appellants could and should have moved to add A&B to the Main Action rather than commence a new proceeding. There is no evidence here, as in *Maynes*, that the appellants had started a new action after attempting to join A&B as a defendant to the Main Action; nor does the A&B Action duplicate the Main Action, which is against different defendants. Further, unlike in *Maynes*, where pleadings were closed and documentary and oral discovery substantially complete in the ongoing proceedings, the Main Action was at the pleadings stage at the time the motions were advanced in this case.

[57] As in many of the cases that are cited in these reasons, the primary issue before the motion judge was essentially procedural: whether it would be appropriate for the claims asserted in the Main Action and the A&B Action to proceed separately or together. In approaching this issue, the motion judge had to determine how best to ensure that claims asserted in a separate action that relied on and overlapped with claims in another proceeding, could be litigated while respecting the parties' procedural and substantive rights.

[58] In *Maynes*, all of the parties to the new action and the ongoing actions were represented by counsel at the motion. The court was able to consider all of the circumstances relevant to all of the three actions, and how best the interests of the parties and the administration of justice could be served. Here, by contrast, the only proceeding that was before the motion judge was the A&B Action. Although it was assumed that a motion to add A&B to the Main Action would be required because A&B was not consenting, there was no indication of the positions that would be taken by the defendants to the Main Action in response to any such motion. Nor were all of the necessary parties before the court in respect of the cross-motion for consolidation or trial together, a motion that ought to have been served in both proceedings.

[59] The potential for prejudice matters. While the A&B Action is stated to be contingent on the appellants' success in the Main Action, it also "incorporates, adopts, repeats and pleads all allegations of fact" set out in the Statement of Claim in the Main Action. While I do not agree that the commencement of the A&B Action deprived A&B of procedural rights that they would have had under r. 26.02 (the rule not being mandatory), I do agree with the motion judge that the A&B Action would preclude A&B from fully and effectively participating in the determination of the issues in the Main Action. The appellants did not argue to the contrary: their pleading at para. 15 of the Fresh as Amended Statement of Claim imports all of the allegations about the transactions and occurrences pleaded in the Main Action,

together with the alleged wrongdoing of the defendants, which if established, would support their "contingent" claim against A&B. I accept that A&B has a real interest in how the Main Action proceeds and should be able to fully participate in that action. And, in bringing their cross-motion, the appellants have signalled their belief that their concerns about solicitor-client privilege could be managed with appropriate directions within a consolidated proceeding.

[60] While consolidation or an order for trial together of the two proceedings might have been the solution (as in *Howlett*, *Zhu* and *Dimakos*), this relief was not available to the motion judge in this case because the parties to the Main Action were not before the court. While the appellants brought a cross-motion for consolidation or trial together, it was only served in the A&B Action. Accordingly, even if consolidation was a viable option, it could not be ordered without hearing from the defendants to the Main Action.

(ii) A temporary stay of the A&B Action is appropriate

[61] Having concluded that the motion judge erred in finding an abuse of process, I am reluctant to simply allow the appeal, and to permit the A&B Action to proceed, with the very likely prospect of a proper motion for consolidation. In my view a motion to join A&B as a defendant to the Main Action – brought on proper notice to all of the defendants and to A&B, is appropriate. A&B confirmed in the appeal that it would not consent to be joined to the Main Action, referring to possible

arguments that the appellants' claims are statute-barred and that any pleading by the appellants would fail to disclose a reasonable cause of action. While those arguments would be available to A&B in responding to and defending the A&B Action, I acknowledge that there may be an advantage in addressing such issues at the front end, that is, in the context of a motion to add A&B as a defendant to the Main Action. The motion will permit the existing defendants to the Main Action to express their views as to whether proceeding against A&B in the Main Action would prejudice their interests. And, if A&B is added as a defendant, it will provide the opportunity for the parties to obtain any necessary directions for the proceeding, including in respect of documentary and oral discovery.

[62] If A&B is added to the Main Action, the appellants may seek further directions with respect to the privilege issue, and its impact on the discovery process. The scope of disclosure of the solicitors' files, and whether and to what extent solicitor-client privilege applies or has been waived, can be addressed in the parties' discovery plan or raised by way of motion in the discovery process. As A&B acknowledged during oral argument on the appeal, the privilege issues will have to be decided in the context of how the Main Action progresses.

[63] While I would uphold the motion judge's decision to stay the A&B Action so that the appellants can bring their motion to join their claims against A&B to the Main Action, as well as his determination that the commencement of the A&B Action tolled the limitation period in respect of the appellants' claims against A&B,

it is not necessary or appropriate to impose a permanent stay of the A&B Action. The stay of the A&B Action should be temporary at this stage, with the prospect that it will become permanent if A&B is added as a defendant to the Main Action. If such relief is denied, it would be unjust for the A&B Action to have been permanently stayed. As in *Nuco*, a permanent stay would put the defendant in a better position than if the plaintiffs had brought a motion to add it to the existing action.

F. CONCLUSION AND DISPOSITION

[64] For these reasons, I would allow the appeal in part. I would order that paragraph 1 of the motion judge's order be set aside and replaced by an order that the A&B Action is stayed pending the determination of a motion to add A&B as a defendant to the Main Action, and subject to the court's determination at that time whether a permanent stay is in order.

[65] Since success is divided, I would order no costs on the appeal.

Released: December 31, 2024 "K.M.v.R."

"K. van Rensburg J.A."
"I agree. Sossin J.A."
"I agree. J. Dawe J.A."