

CANADA / JUDGMENT

Kingbaker Owners Corp. v. Thomson

2025 BCSC 205

COURT

Supreme Court of British Columbia

DECIDED

7 February 2025

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2025 BCSC 205 Kingbaker Owners Corp. v. Thomson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kingbaker Owners Corp. v. Thomson,

2025 BCSC 205

Date: 20250207

Docket: S62962

Registry: Kamloops

Between:

Kingbaker Owners Corporation and

Pinnacle Trails Resort Inc.

Plaintiffs

And

Emily Maria Thomson and Clayton John Thomson

Defendants

And

James Frederick Andrew Judiesch, the Estate of

James Frederick Andrew Judiesch, John and/or

Jane Doe as representative of the Estate of

James Frederick Andrew Judiesch and

W.J. MacDonald Law Corporation,
also known as MacDonald & Company

Third Parties

Before: The Honourable Justice B. Smith

Reasons for Judgment

No appearances on behalf of the Plaintiffs:

Counsel for the Defendants:

B. Meckling

Counsel for the Third Party, W.J. MacDonald Law Corporation:

S. Penney

No other appearances:

Place and Date of Hearing:

Kamloops, B.C.

November 18 & December 17, 2024

Place and Date of Judgment:

Kamloops, B.C.

February 7, 2025

Introduction

- [1] The third-party law firm (the "Applicant") applies to strike the third-party notice by the defendants (the "Respondents").
- [2] The issue for determination involves the application of the rule in *Adams v. Thompson, Berwick, Pratt & Partners* (1987), 39 D.L.R. (4th) 314 (B.C.C.A.) [Adams], concerning the law of contribution between tortfeasors and procedural rules governing third party notices.
- [3] The application is brought pursuant to Rule 9-5(1)(b) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, pursuant to which the court may strike pleadings as unnecessary.
- [4] For the reasons that follow, the application is granted.

Background

- [5] The underlying litigation involves the sale of a campground resort property by the Respondents to the plaintiffs, including 26 RV sites and a water well. Following the purchase, the plaintiffs discovered six of the RV sites and the well were on a bordering road allowance in favour of British Columbia. The provincial Ministry of Transportation and Infrastructure (the "Ministry") demanded removal of the encroaching infrastructure at the plaintiffs' expense.
- [6] The actions of a lawyer who worked for the Applicant and was the real estate solicitor for the plaintiffs in the acquisition and transfer of the property (the "Lawyer") is a central issue in the underlying litigation. The Lawyer is now deceased. Although the Lawyer and his estate were originally included in the third-party notice, the Respondents have since discontinued the third-party claim against both.

Notice of Civil Claim

- [7] The plaintiffs allege false statements by the Respondents. The plaintiffs say that the Respondents allegedly made the false statements directly to the plaintiff, Pinnacle Trails Resort Inc., and indirectly to the plaintiff, Kingbaker Owners Corporation. The plaintiffs say that the allegedly false statements were designed to, and did, persuade them to purchase the property, causing them pecuniary loss. The plaintiffs allege breach of contract and fraud. They say the Respondents knew or were wilfully blind to the fact that their statements to the plaintiffs were false, and knew or were wilfully blind to the fact that their false statements put the plaintiffs' pecuniary interests at stake.

Response to Civil Claim

- [8] The Respondents say the plaintiffs engaged the Lawyer as their real estate solicitor in connection with their contemplated purchase of the property, and that at all material times he owed the plaintiffs a common law and contractual duty to exercise the reasonable care, skill and diligence of a reasonably prudent solicitor in providing advice to the plaintiffs in connection with their purchase of the property.
- [9] The Respondents deny any false statements, and say the plaintiffs' allegation constitutes a vexatious and abusive allegation of fraud. They say the plaintiffs failed to carry out the requisite due diligence before purchasing the property, and that if the precise location of the resort's infrastructure was important to the plaintiffs, then the plaintiffs are solely responsible for any damages they have suffered due to their professional advisors' incompetence, negligence and failure to protect their interests.

Third Party Notice

- [10] The Respondents subsequently issued a third-party notice to the Lawyer, his estate and the Applicant, in which they assert the Lawyer breached his duties by:
- a) failing to advise the plaintiffs of the location of the road allowance;
 - b) failing to confirm that the resort's facilities lay within the boundaries of the property;
 - c) failing to advise the plaintiffs to properly investigate the property to confirm the resort's facilities lay within the boundaries of the property;
 - d) failing to advise and warn the plaintiffs of the risks of not confirming the location of the resort's facilities by way of survey or otherwise prior to purchase;
 - e) failing to advise and warn the plaintiffs of the risk of the Ministry requiring the removal of any resort facilities which lay in the road allowance; and
 - f) failing to ensure the purchase and sale agreement was conditional upon the plaintiffs being satisfied as to the location of the resort's facilities.
- [11] The Respondents assert that the Applicant is vicariously liable for the Lawyer's acts and/or omissions.
- [12] The Respondents claim contribution and indemnity from the Applicant in the event they are found liable to the plaintiffs.

Positions of the Parties

- [13] The Applicant says an alleged failure by a third party to protect the interests of the plaintiffs falls into the first branch of the rule in Adams, referring to the category of acts for which the plaintiff is responsible, which can be raised as a defence to the claim, and includes a plaintiff's failure to mitigate.
- [14] The Applicant says the first branch of the rule in Adams applies here, because the Respondents do not allege the Lawyer breached his duty to anyone other than the plaintiffs, or acted outside the scope of his retainer. The Applicant says the third-party claim is based entirely on the Lawyer's alleged failure to properly advise the plaintiffs and perform due diligence.
- [15] The Applicant says the principles established in the rule in Adams, as outlined and applied in Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc., 2012 BCCA 22 [Laidar], and Sun Life Assurance Company of Canada v. 482147 B.C. Ltd., 2013 BCSC 1187 [Sun Life], apply regardless of whether the Lawyer is implicated in the "initial loss". The Applicant says the third-party notice is unnecessary and must be struck.

- [16] The Respondents say the Lawyer is implicated in the "initial loss". Consequently, they say, based on Laidar, the first branch of the rule in Adams does not apply, and the third-party notice must be allowed to stand. The Respondents say the second branch of the rule in Adams applies, and claim contribution and indemnity pursuant to s. 4 of the Negligence Act, R.S.B.C. 1996, c. 333 [NA].

Discussion

- [17] It is undisputed that the issue for determination involves the application of the rule in Adams.
- [18] The Applicant says the British Columbia decisions in Laidar and Sun Life, both of which involved the application of the rule in Adams, support its position that the third party notice should be struck. The Respondents disagree and say that the reasoning in the Ontario case of Davy Estate v. CIBC World Markets Inc., 2009 ONCA 763 should apply.

Adams

- [19] Adams involved an appeal from a chambers judge's decision striking a third-party notice brought by a defendant engineering firm against the plaintiff's law firm. The plaintiff engaged the engineering firm for advice about subdivision and development of some property. There was delay due to a stop work order and a setback issue. The market for the lots had failed by the time the stop work order was lifted. The plaintiff sued the defendant engineering firm for negligent design of the development. The defendant engineering firm brought a third-party claim against the plaintiff's law firm. It alleged the law firm breached its fiduciary duty to the plaintiffs in failing to provide appropriate services, in particular as it concerned advice about what to do when the delay first arose.
- [20] The engineering firm 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, under s. 4 of the Negligence Act, R.S.B.C. 1979, c. 298 [Negligence Act, 1979], and the then-applicable rules of court.
- [21] As described at paras. 8-9 of Adams:
- [8] The chambers judge allowed the application and struck out the claim against the solicitors. She held that since the engineers' breach of duty predated any breach by the solicitors, the wrongs were not concurrent but consecutive, with the result that the engineers and the solicitors could not be said to have contributed to a single loss. The engineers and the solicitors, in her view, were responsible severally for the delays each caused. She added that it was open to the engineers to raise as a defence the allegation that the plaintiff's loss was the result of their solicitors' conduct and not their own.

- [9] The chambers judge labelled the engineers' claims that the solicitors failed to advise the plaintiffs to market such lots as soon as they could as "astonishing". They amounted, in her view, to allegations to failure to mitigate. As such, while they might permit a reduction in the damages to which the plaintiffs were entitled, they were not the proper subject of a third party claim.
- [22] What has come to be known as the rule in *Adams* was stated at para. 16, where the Court said:
- [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.
- [23] Concerning the distinction in the *Negligence Act*, 1979 between claims for contribution and indemnity between co-defendants (under s. 4) and the reduction of damages recoverable by a plaintiff who has contributed to his own loss (under s. 1), the Court at paras. 17-18 said:
- [17] 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.
- [18] 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.

Laidar

- [24] *Laidar* involved a situation in which a property owner entered into a lease with a chocolate manufacturer. The chocolate manufacturer wanted to use the property to make and sell chocolate. After discovering that zoning did not permit these activities, the chocolate manufacturer did not take possession of the property and did not make any lease payments. In the ensuing litigation, a leasing agent was added as a third party. The leasing agent applied to join the chocolate manufacturer's solicitors as a fourth party. A chambers judge dismissed the application. The leasing agent appealed.

- [25] The leasing agent argued that the chambers judge erred by declining to follow two Ontario cases which distinguished Adams in situations involving professional advisors: *Cardar Investments Ltd. v. Thorne Riddell* (1989), 71 O.R. (2d) 29 (Div. Ct.) [Cardar]; and *478649 Ontario Ltd. v. Corcoran*, 20 O.R. (3d) 28 (O.N.C.A.) [Corcoran].
- [26] The court in *Laidar* began by setting out an explanation of the historical evolution of third-party claims and the rules governing them, followed by references to the NA, the then-applicable rule of court, and a statement of the rule in Adams.
- [27] After discussing the rule in Adams, the decisions in Cardar and Corcoran, and the facts of *Laidar*, the Court turned to the issues on appeal, noting at para. 33 that the appellant leasing agent had misconceived the chamber's judge's reasoning and the task before her:
- [33] I must say on the outset that in my view, grounds 3 and 4 rest on a misconception of the chambers judge's reasoning and the task before her. She did not find, nor could she find as facts, that Blakes acted solely as Lindt's agent or that any negligence of Blakes would be attributed to Lindt. Rather she found on the pleadings that no "independent" tort, such as misrepresentation made directly to DTZ, was alleged that would support a claim for contribution or indemnity by DTZ against Blakes.

[Emphasis in original.]

Sun Life

- [28] Sun Life involved the construction of a shopping centre in which the plaintiff who purchased the building claimed the defendants negligently designed and constructed the shopping centre after the building suffered water ingress issues. The plaintiff sought compensation for anticipated costs and repair against the defendants and the defendants added a contractor and its senior principal, who visually inspected and provided advice on the roof of the shopping centre for the plaintiff, as a third party. The trial judge granted the third parties' application to dismiss the third-party claims.
- [29] The defendants argued that the actions of the third party could not have been part of the plaintiff's mitigation efforts because the plaintiff had not yet purchased the property when it received advice from the third party and had suffered no loss: *Sun Life* at para. 46. The court rejected this argument for four reasons, which the Applicant submits apply to this application:
- a) the third-party notices did not raise events related to the "initial loss". Instead, the alleged deficiencies in design and construction were complete when the plaintiff contracted the third-party;
 - b) the substance of the allegation in the third-party notices was that the third party failed to protect the interest of the plaintiff, which is the same kind of allegation found to fall within in the first branch of the rule in Adams in *Laidar*;

- c) the fault alleged against the plaintiff in the third-party notices was that the plaintiff failed to protect itself and the third party should have advised the plaintiff of the risks. This was an obligation "belonging to" the plaintiff that could and had been raised in defence by the defendants; and
 - d) the timing of the loss did not prevent the court from striking the third-party notice because the plaintiff's failure to perform proper due diligence was akin to a failure to mitigate. Thus, it falls within the first branch of the Adams test.
- [30] The Respondents argue Sun Life is distinguishable because the plaintiffs claim fraud. Consequently, they say, the Applicant was directly involved in the false statements the plaintiffs allege against the Respondents. In other words, unlike in Sun Life, the third-party notice raises events related to the "initial loss".
- [31] I agree that Sun Life is distinguishable on the basis that the plaintiff there did not claim fraud. However, I do not agree that this distinction prevents the application of the first branch of the rule in Adams. Even if the alleged fraud can be said to raise events related to the "initial loss", the other reasons the court relied on in Sun Life continue to apply. The most significant point the court relied on in Sun Life was that the fault alleged against the plaintiff in the third-party notice was an obligation that belonged to the plaintiff. In this case, the substance of the allegations in the third-party notice is that the Lawyer breached his duty to properly advise the plaintiffs in connection of the purchase of the property. The Respondents seek to attribute liability to the Applicant for this breach of duty in the event they are held liable to the plaintiffs. This is an obligation that belongs to the plaintiffs that can be raised as a defence to the claim, which is exactly the type of situation which engages the rule in Adams.

Adams - First Branch

- [32] Adams and Laidar described two kinds of situations in which a plaintiff will be responsible for the conduct of a proposed third party under the first branch of the rule in Adams. The first is where the acts of the third party fall within the scope of an agency relationship between the third party and the plaintiff. The second is where the claim is that the third party should have advised or assisted the plaintiff to mitigate his damages.
- [33] Concerning the first situation - agency - the Respondents say that here the question of agency is far from clear.
- [34] The Respondents rely on the reasoning in Corcoran, in which the court declined to apply the first branch of Adams because of the possibility that having acted reasonably in retaining reputable lawyers to advise it on the terms of an agreement, the plaintiff might argue successfully that it should not be responsible on agency principles for any negligence on the lawyer's part.

- [35] In Corcoran, the court ruled that it was not "plain and obvious" that the fault alleged against a proposed third party, the plaintiff's solicitor, would be attributable under agency principles to the client, and that the first branch of Adams should not be applied.
- [36] This is the same argument which the Respondents advance as to why they say the first branch of the rule in Adams should not apply here. As counsel for the Respondents put it, there is the potential for "daylight" between a solicitor's failure to protect a client's interest and where they are "implicated in the initial loss". There is no such "daylight" here. The Respondent's pleadings concerning the Lawyer all pertain to his alleged failures to competently perform his duties for the plaintiffs.
- [37] At para. 36 of Laidar, the court said:
- [36] In normal circumstances, I would end this already too-long and tedious analysis here, and conclude simply that the first branch of Adams governs. However, since counsel for DTZ made lengthy submissions based on Corcoran, I turn to explain why apart from the fact it involved different pleadings and different legislation in my opinion that case does not, and could not, displace Adams.
- [38] For the reasons then discussed by the court in Laidar at paras. 37-45, I find the reasoning in Corcoran does not displace the first branch of the rule in Adams, which I find applicable here.

Adams - Second Branch

- [39] The pleadings do not allege any independent tort, such as fraudulent misrepresentations by the Lawyer made directly to the Respondents, which would support a claim for contribution or indemnity by the Respondents against the Applicant. Accordingly, I find the second branch of the rule in Adams does not apply.

Conclusion:

- [40] The situation here is fundamentally indistinguishable from the one in Laidar.
- [41] What the Respondents are essentially alleging here is a breach by the Lawyer of duties owed only to the plaintiffs, which does not give the Respondents an independent right of contribution against the Applicant.
- [42] The Respondents have a complete remedy by way of reduction of the plaintiffs' damages for which the Respondents could be liable. The first branch of the rule in Adams applies, and the third-party claim is unnecessary. This finding is supported by Laidar and Sun Life.
- [43] While the Respondents seek to distinguish Sun Life based on the reasoning in Laidar that the first branch of the Adams test does not apply where the third-party solicitor is implicated in events giving rise to the initial loss, I do not find this argument persuasive, for two reasons. First, it is based on obiter comments in Laidar, where the court was distinguishing the Ontario decisions in Cardar and Corcoran. Second, it was rejected in Sun Life for

reasons based on the principles underlying the rule in Adams which, in my view, apply to his application.

[44] In the result, the application is granted, and the third-party notice is struck.

Costs

[45] The Applicant is entitled to its costs in defending the third-party notice and for the application.

"B. Smith J."

B. SMITH J.

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