

CANADA / JUDGMENT

Linaogo v. Canada Trust Company

2024 BCSC 1411

COURT

Supreme Court of British Columbia

DECIDED

16 July 2024

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2024 BCSC 1411 Linaogo v. Canada Trust Company

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Linaogo v. Canada Trust Company,

2024 BCSC 1411

Date: 20240716

Docket: S232662

Registry: Victoria

Between:

Juvy Linaogo

Plaintiff

And:

Canada Trust Company / La Societe Canada Trust as Executor and Trustee

under the last Will and Testament of David Randall Macdonald,

Aisha Arianne Macdonald, Shona Selene Macdonald,

and Hugh Burns Macdonald

Defendants

And:

Juvy Linaogo and Canada Trust Company / La Societe Canada Trust as

Executor and Trustee under the last Will and Testament of

David Randall Macdonald, and as Trustee of the Alter Ego Trust

of David Randall Macdonald

Defendants by Way of Counterclaim

And:

Alan H. Jordan and Horne Coupar LLP

Third Parties

Before: The Honourable Justice Morley

Oral Reasons for Judgment

(Application to Strike Third Party Notice)

(In Chambers)

Counsel for the Defendants Aisha Arianne

Macdonald and Shona Selene Macdonald:

D. McMurtry

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For the Defendant, Hugh Macdonald:

No appearance

Place and Date of Trial/Hearing:

Victoria, B.C.

July 9, 2024

Place and Date of Judgment:

Victoria, B.C.

July 16, 2024

- [1] THE COURT: These are oral reasons delivered in chambers. If a transcript is ordered I reserve the right to edit that transcript for errors, omissions, clarity and repetition and to add references to case law or enactments. The substance of the reasons will not change, nor will the result.

Overview

- [2] Before me is an application by Alan H. Jordan and Horne Coupar LLP (the "Third Parties", sometimes referred to just as "Horne Coupar"), to strike a Third Party Notice filed by the defendants, Shona Selene Macdonald and Aisha Arianne Macdonald (the "Grandchildren"), in this estate litigation.
- [3] The Third Parties were solicitors for the Grandchildren's now deceased grandfather, David Macdonald (the "Deceased" or "Mr. Macdonald"), including as settlor of an "Alter Ego Trust". The Grandchildren are beneficiaries of that trust along with the plaintiff Juvy Linaogo.
- [4] When the trust was first set up in 2013, Mr. Macdonald was the lifetime beneficiary and was given full power to amend or revoke the beneficial interests after his death. Horne Coupar advised him in the settlement of that Alter Ego Trust. In 2014, again advised by Horne Coupar, the Deceased entered into a cohabitation agreement -- according to the Grandchildren, a "purported" cohabitation agreement (but I will just refer to it as a cohabitation agreement without making any comment about that) -- with Ms. Linaogo. In the cohabitation agreement, the Deceased promised that Ms. Linaogo would continue to receive a one-third interest in the capital and income of the Alter Ego Trust after his death. In 2021, once again advised by Horne Coupar, the Deceased signed a deed increasing the beneficial interest of the Grandchildren so that they each received a 40 percent interest. This implied a reduction in Ms. Linaogo's share to 20 percent. On July 26, 2021, the Deceased executed a second revocable deed of appointment of trust fund to beneficiaries (the "2021 Deed"). Mr. Jordan was the lawyer working at Horne Coupar who drafted the 2021 Deed.
- [5] As noted, I will often refer just to "Horne Coupar" because other lawyers worked on other aspects of the case and Horne Coupar would be vicariously libel for anything Mr. Jordan did, in any event.

- [6] In the main action, Ms. Linaogo sues on the grounds that the terms of the 2021 Deed violated the 2014 cohabitation agreement. The Grandchildren defend the 2021 Deed either on the basis that the cohabitation agreement was obtained through undue influence and that it only gives personal rights against the Deceased and his estate, thereby having no effect on how the trust should be divided.
- [7] The first part of the Third Party Notice sets out these transactions and alleges that the Third Parties were negligent and in breach of fiduciary duty when they assisted and advised the Deceased in this "contradictory" way.
- [8] In addition, the Third Party Notice takes aim at a legal opinion prepared by Horne Coupar for the trustees of the Alter Ego Trust after the Deceased's death. The Third Party Notice alleges this opinion conflates the personal liability to the Deceased, and therefore his estate, with how the trustee should pay out the corpus of the trust. It says that this opinion was carelessly put together.
- [9] Horne Coupar says that even if everything the Grandchildren say in their pleading is true, it sets out no cause of action. It seeks an order under Rule 9-5(1)(a) or Rule 9-5(1)(d) striking the Third Party Notice in its entirety and asks for special costs.
- [10] One thing that makes the analysis of this application complicated is that the Third Party Notice is put forward on three bases:
- a) As a claim that the Deceased was financially harmed by the acts and omissions of Horne Coupar. This would be a claim on behalf of the estate. It is not the central thrust of the Grandchildren's complaint about what happened and was abandoned in oral argument. I will briefly say that it is without merit, at least as a claim advanced by the Grandchildren.
 - b) A claim that the corpus of the trust of which the Grandchildren and Ms. Linaogo are beneficiaries was, or will be, financially harmed by the acts or omissions of Horne Coupar. The Grandchildren very much want to pursue this claim. However, for them to do so they have to show a special reason why pursuing such a claim should not be left to the trustees.
 - c) A claim that the Grandchildren themselves were harmed financially separate from the effects on the corpus of the trust. For this they must show that they were owed a private law duty by Horne Coupar even though they were never its clients.
- [11] Assuming the Grandchildren are correct in the facts as they have pleaded them (as I must in an application of this nature), the corpus of the Alter Ego Trust has not yet experienced any loss. It can only experience loss in the future as a result of Horne Coupar's post-mortem advice to the trustees if the Grandchildren (and possibly other parties) become entitled to their litigation costs against the estate. But it is plainly reasonable for the trustees not to take action against their solicitors until and unless this happens. If it does happen, the beneficiaries can ask the trustees to take that action and the trustees are under a duty to consider whether that is in the best interests of the trust. An action on behalf of the trust by the Grandchildren is plainly premature.

- [12] The Grandchildren's claim on their own behalf, on the other hand, has to overcome the hurdle against a non-client suing a lawyer in negligence. They at least arguably could establish that Horne Coupar owed them a duty of care when it was assisting the Deceased in relation to the 2021 Deed because on that occasion the Deceased retained the firm to help him provide a gratuitous benefit to the Grandchildren. However, there is no failure on Horne Coupar's part pleaded in relation to this transaction that could give rise to loss to the Grandchildren. On the contrary, it was the 2021 trust deed that is the basis of their entire position. The Third Party Notice claims that there was some way of doing this without risking a dispute with Ms. Linaogo, but it does not set out what that could possibly be.
- [13] I therefore allow the application and strike the Third Party Notice. However, I will not order special costs. I see no reprehensible litigation conduct on the part of the Grandchildren. Costs are at Scale B and will be offset by two units because of the victory of the Grandchildren on the question of costs.

Pleaded Facts

- [14] Rule 9-5(1)(a) provides that the court may order a pleading struck on the ground that it "discloses no reasonable claim". An application under that rule does not proceed on evidence, but on presuming the facts as alleged in the pleading that is sought to be struck, at least if these facts are capable of proof. The test to be applied is whether "it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiffs' pleaded claims disclose no reasonable cause of action": *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 14.
- [15] *Babstock* establishes that in the appropriate case, courts should strike pleadings, rather than let them proceed to discovery and trial despite being doomed to fail. The situation in which a non-client sues a lawyer is one in which vigorous use of Rule 9-5(1)(a) may be important because the spectre of discovery and litigation where the non-client has interests adverse to the client can be particularly chilling of the confidential relationship it needs to obtain between lawyers and their clients: *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.* (1989), 64 D.L.R. (4th) 167 (B.C.C.A.).
- [16] I will sometimes explicitly qualify my rendition of the facts as pleaded with phrases like "the Grandchildren allege"; sometimes I will just state what they have pleaded as fact, especially when that does not seem to be contentious between the parties to the underlying litigation. Either way, these facts are presumed for the purposes of the application, and my decision is on the assumption that they are true, but they have not been proven and should not be relied on for any other purpose.
- [17] The late David Macdonald died on February 23, 2022. He was predeceased by a wife, Maria, who died in 1999. He was survived by a son, Hugh Macdonald, two granddaughters, Shona Selene Macdonald and Aisha Arianne Macdonald, and by Ms. Linaogo.

- [18] In her notice of civil claim, Ms. Linaogo says she began living in a marriage-like relationship with the Deceased in or around 2008. She pleads that the parties married on March 21, 2019, and remained married and together until Mr. Macdonald's death. The Grandchildren, on the other hand, allege that Ms. Linaogo was merely the Deceased's "part-time caregiver", that she never had a marriage-like relationship with him, and that their marriage was a sham.
- [19] In the main action, Ms. Linaogo seeks various remedies against the estate and the Alter Ego Trust, essentially to put her in the situation she would have been in had the cohabitation agreement been followed. It is important for the issues before me that there is a distinction between a personal remedy by Ms. Linaogo against the estate on the basis that the Deceased breached a contract with her and a trust remedy that would change the beneficial share of Ms. Linaogo in the Alter Ego Trust. The latter remedy would directly affect the interests of the Grandchildren as the other beneficiaries in the trust, while the former would be enforceable against the balance of the estate. Ms. Linaogo is pursuing both remedies.
- [20] The September 10, 2013 trust document created the Alter Ego Trust. This document made the Deceased the lifetime beneficiary and gave him, as settlor, the power to revoke the beneficial interests that would apply after his death. Under the trust instrument, the Deceased retained the power of appointing who would receive the balance of the trust upon his death. The Deceased settled the vast majority of his assets into the Alter Ego Trust. On his death, there was over \$2.8 million in the trust, with minimal assets in his estate.
- [21] Ms. Linaogo and the Deceased entered into what the Grandchildren call a "purported" cohabitation agreement dated February 14, 2014. That agreement contains a provision that the Deceased would allow Ms. Linaogo to receive one-third of the Alter Ego Trust and of the remainder of his estate on his death.
- [22] Horne Coupar, acted as the Deceased's lawyers in drafting both the original trust agreement and the "purported" cohabitation agreement. The Grandchildren allege that Horne Coupar failed to advise him that this agreement was "unnecessary" or that it would disadvantage him or his descendants. They allege that Horne Coupar was unclear about which of Ms. Linaogo or the Deceased, or both, was their client, and they say it is "unclear" whether the Deceased obtained independent legal advice.
- [23] The 2021 Deed set out a new scheme of division of the beneficial interests of the Alter Ego Trust upon the death of the Deceased, stating that each of the Grandchildren would receive 40 percent and Ms. Linaogo would receive 20 percent. As I have mentioned, the other third party, Alan Jordan, is the lawyer at Horne Coupar, and the Grandchildren allege that he was the drafter of the 2021 Deed.

- [24] The Grandchildren allege that Mr. Jordan and Horne Coupar failed to warn the Deceased of the "apparent contradiction" between the 2021 Deed and the "purported" cohabitation agreement. There is no question that this apparent contradiction is the basis for Ms. Linaogo's main action. They say Mr. Jordan failed to advise the Deceased of alternative methods of giving full effect to his wishes. They do not, however, say what these "alternative methods" were.
- [25] Following the Deceased's death, the trustee began to make distributions in accordance with the distribution scheme in the 2021 Deed, but Ms. Linaogo objected, demanding that distributions be in accordance with the one-third, one-third, one-third scheme guaranteed in what the Grandchildren called the "Domestic Contract".
- [26] The trustee sought advice from Horne Coupar and they produced a legal opinion. The Grandchildren allege that the opinion was to the effect that the "Domestic Contract" overruled the 2021 Deed. This is disputed, but I take it to be true for the purposes of this application.
- [27] The Grandchildren say that in taking on the work of this opinion, Horne Coupar was in a conflict and therefore violated its fiduciary duty (it is not entirely clear to whom). The Grandchildren also allege that the opinion does not competently assess the legal distinction between the Deceased acting in his contractual capacity and the Deceased acting as a settlor of the trust with the power to revoke beneficial interests. They say the opinion fails to consider whether there is a defence to Ms. Linaogo's claim or whether it is confined to a personal one against the Deceased for which the trust is not "liable", by which I take it to mean it does not give rise to beneficial claims against the trust corpus.
- [28] The Grandchildren allege that the trustee's reliance on the opinion causes loss and damage to the Grandchildren as beneficiaries and to the trust. (They also allege that it causes damage to the estate, but that has, as I have said, no merit for standing reasons and was abandoned in oral argument.)

Analysis of the Claim Affecting the Interests of the Beneficiaries Qua Beneficiaries

- [29] I will start with an analysis of the claim as affecting the interests of the beneficiaries as beneficiaries separate and apart from whether it has an effect on the trust corpus.
- [30] First of all, I would say there is no basis for a claim in fiduciary duty. Fiduciary duty is a duty of loyalty. Lawyers cannot owe fiduciary duties to anyone other than their client. It is fundamental to a lawyer's role that their loyalty is to their client. So any claim based on breach of fiduciary duty would have to be on behalf of the estate or trust corpus. I will address that later but a claim in fiduciary duty definitely could not be made on behalf of the beneficiaries as such.

- [31] Negligence liability by contrast is based on a duty of care. Liability arises where the defendant owes the plaintiff a duty of care, the defendant has breached the corresponding standard of care, and this breach has caused the plaintiff loss or damage. Historically it was thought that just as lawyers could not owe fiduciary duties to non-clients, they also could not owe duties of care to non-clients. For example, beneficiaries to an estate or trust could not sue the testator or settlor's solicitors of negligence for failing to successfully implement the former's wishes, because the beneficiaries were not the clients.
- [32] That was changed in the classic case of *Whittingham v. Crease & Company* (1978) CanLII 1930 (B.C.S.C.), 88 D.L.R. (3d) 353 (B.C.S.C.), in which the son of the deceased lost his gift under a will because his wife was a witness. Under the Wills Act, as it was at the time, this resulted in a gift to the son being void. The son alleged that the solicitor was negligent in failing to advise his deceased father of this consequence. The estate itself suffered no loss: the corpus of the estate was just as it would have been if the negligence had not occurred, and the void gift just meant that there was more for the beneficiaries whose gifts were made effective.
- [33] In *Whittingham*, this court recognized that in these circumstances it was appropriate to carve out a limited exception to the rule that lawyers do not owe duties of care to non-clients. Better known courts in the Commonwealth eventually followed this development: *Ross v. Caunters*, [1979] 3 All E.R. 580 (Ch. Div.) and *White v. Jones*, [1995] 1 All E.R. 691 (H.L.).
- [34] However, it remains the case that this exception is exceptional. It is difficult for a non-client to establish that a solicitor owes them a duty of care. Something more than foreseeability of loss is necessary to establish proximity; citing *Kamahap Enterprises Ltd.* That additional ingredient may be that the lawyer knowingly induced the non-client to reasonably rely on their opinion or actions, or perhaps, that the lawyer was on notice that their client would use their opinion or actions to defraud the non-client.
- [35] The exception relevant here is where the client engages the lawyer precisely to provide a gratuitous benefit on the non-client. That was the principle in the *Ross v. Caunters* case, and the one that explains the *Whittingham* decision. A beneficiary in a will is an example, but not the only example. If a client hires a lawyer to provide a gratuitous benefit and the lawyer fails to deliver, the loss is not the client's, but this result was precisely what the client sought the lawyer's skill to avoid. If a duty of care is not recognized, then in Lord Goff's phrase, "the only person who may have a valid claim has suffered no loss, and the only person who has suffered a loss has no claim": *White v. Jones* at p. 704.
- [36] As a result, in such a case, the law holds that there is a relation of proximity between the lawyer and the person the client intended to gratuitously benefit, even though they may have had no relationship at all prior to the lawsuit. The modifier "gratuitously" is necessary because if the benefit is the kind that arises in an arm's length commercial transaction, *Kamahap* clarifies that no duty of care can possibly arise.

- [37] Even if proximity arises, a duty of care can be negated if there is a "policy consideration" at the second stage of the Anns test as authoritatively explained in *Cooper v. Hobart*.^[1] In the case of duties of care by lawyers to non-clients, two important such considerations are that the duty of care must not lead into indeterminate liability, and most importantly, it must not interfere with the paramount duty to the client.
- [38] Applying these principles to the Third Party Notice, it is plain and obvious that the only occasion on which the Third Parties could have owed the Grandchildren a direct duty of care (as opposed to a duty not to harm the trust corpus of which they were the beneficiaries) was in their engagement to draft the 2021 Deed, since that was the only occasion on which, on the facts as pleaded, the Deceased retained the Third Parties to provide a gratuitous benefit to the Grandchildren. So long as the scope of the duty of care to the Grandchildren does not obviously conflict with the Third Parties' paramount obligation to the Deceased as their client, its existence is at least arguable, which would be sufficient to survive a Rule 9-5(1)(a) application.
- [39] The Grandchildren have nothing to complain about in the 2013 transaction that created the Alter Ego Trust in 2013. They may complain about the facts or terms of what they have called the "Domestic Contract", but a duty of care to the Grandchildren when the Deceased was instructing Horne Coupar on that occasion would plainly and obviously conflict with their role as his solicitor. It would be untenable if lawyers taking instructions in a matrimonial situation owed duties of care to other family members. This is so even if everything the Grandchildren allege about the relationship between the Deceased and Ms. Linaogo is true. (I am not finding that it is or is not true. I am saying even if it was true it would not be consistent with a role of a lawyer to their client if they could be sued by other family members because of the terms of a domestic contract or even a purported domestic contract they entered into.)
- [40] The hurdle of proximity is overcome in the 2021 transaction because (on the facts as alleged) the Deceased engaged Horne Coupar and Mr. Jordan on that occasion to provide a gratuitous benefit to the Grandchildren. However, the existence of a duty of care is not itself sufficient for a cause of action in negligence. The Grandchildren must also allege facts that could give rise to a finding of a breach of the standard care of an ordinary solicitor and that that breach caused them loss.
- [41] The fatal flaw with para. 10 of the Third Party Notice in this regard is that it fails to say what Horne Coupar could have advised or done that would both have reallocated the beneficial interest in the trust to the Grandchildren and then therefore to Ms. Linaogo's benefit and would have avoided a dispute with her. The Grandchildren obviously cannot complain just because there is an inconsistency between the "Domestic Contract" and the 2021 Deed, because one way to avoid that inconsistency would have been not to change the beneficial interests in a way that reduced Ms. Linaogo's share. It is only if it is within an ordinary solicitor's power to pull off the trick of doing this and not setting up a dispute with Ms. Linaogo later that a case in negligence could be made out. The Third Party Notice does not

say how this would be accomplished, let alone that it would be contrary to the skill of an ordinary solicitor not to accomplish it.

- [42] That is why I do not think that there is a cause of action that is set out. There really in the end is nothing in the Third Party Notice that says, "This is what the lawyer should have done and if they had done that there would have been no dispute with Ms. Linaogo." That is different than, for instance, something like the Whittingham case where the solicitor could have just had someone else witness the will.
- [43] Assuming the advice after the Deceased's death was about how the distribution should be made, and assuming it was wrong and negligent, it would still be the case that no duty of care could possibly arise in favour of the Grandchildren as such. It would not be possible for a solicitor asked for an opinion about how trust property should be shared among beneficiaries to have a duty both to the trustee, the trust corpus and to a subset of the beneficiaries. That is an obvious conflict. So I find that on that occasion no duty of care could have arisen to the Grandchildren as such.
- [44] In any event, if the Grandchildren are able to establish their view of the law at trial -- as I must assume they can for the purposes of this application -- then they will each get 40 percent of the corpus of the trust, exactly as if the opinion had never been issued. They argue that the corpus will be diminished by litigation, quite possibly including an indemnity to them for their legal expenses. This is not a claim specific to the beneficiaries, but a claim that the trustee could bring on behalf of the trust itself. Another way of saying that is that this is a claim for which Ms. Linaogo, who is, by all accounts, a beneficiary of the trust, would suffer the same loss proportionate to whatever her share is ultimately found to be.

Claim on Behalf of the Trust

- [45] In addition to pursuing a claim on their own behalf, in their pleadings, the Grandchildren ask for an order on behalf of the estate and/or the trust against Horne Coupar and Mr. Jordan. As I have said, they have abandoned the claim on behalf of the estate.
- [46] I will analyze first what material facts could possibly give rise to a claim on behalf of the trust against the Third Parties, and then address standing.
- [47] I do not see how the trust corpus, as such could be damaged by the transaction setting it up or changing the shares of beneficiaries. The same reasons I gave for why the Grandchildren could not be owed a duty of care when Horne Coupar advised the Deceased about the "Domestic Contract" or cohabitation agreement -- or "purported" cohabitation agreement -- would apply as well to the trust corpus; in other words, their duty at that time had to be to him as a client, not to the corpus of a trust he had settled.

- [48] In oral argument, Mr. McMurtry focussed on the advice given to the trustees after the death of the Deceased as the source of the loss to the trust. He says that without this advice, the litigation would not have occurred and since litigation costs are likely to be sought from the corpus of the trust, that is the basis for a claim on behalf of the corpus of the trust.
- [49] Accepting that this could be a basis for a claim on behalf of the corpus of the trust, there is still no arguable basis that the Grandchildren themselves could assert the claim or have standing, at least not at this stage.
- [50] A beneficiary can only bring a case on the grounds of damage to the trust corpus in "exceptional circumstances": *Price Security Holdings Inc. v. Klompas & Rothwell*, 2019 BCCA 36, at para. 57. The general principle is the cause of action on behalf of the trust corpus is for the trustees to pursue.
- [51] Justice Tysoe adopted a list of exceptions to this general principle set out by Justice Horner in *Kwinter v. Metrowest Development Ltd.*, 2007 ABQB 713:
- a) The first is where there is alleged to be fraud or collusion between the trustee and the third person. No fraud or collusion between the trustees and the Third Parties is alleged in the Third Party Notice.
 - b) The second is where by reason of conflict of interest or duty it is impossible or difficult for the trustees to sue. The Third Party Notice alleges conflict of interest on the part of Horne Coupar but not on the part of the trustees.
 - c) The third is where there is a failure by the trustees in performing their duty as trustees to protect the trust estate or to protect the interests of the beneficiary in the trust estate, and that is the *Hayim v. Citibank* case, [1987] 3 W.L.R. 83 (Eng. Prob. Ct.). But as Justice Tysoe explains, this *Hayim* exception is not meant simply by a decision not to sue. It would not be sufficient to say that the trustees in this case are following their advice of their solicitors, and that is a sufficient basis.
 - d) The fourth is where the beneficiaries are suing to recover trust property (as opposed to suing debtors of the trust). This does not apply to this case since what is alleged is negligence on the part of the solicitors that caused loss which, even if established, is an in personam claim for damages, not an in rem claim for property that is said to be part of a trust.
 - e) And the final exception is when an exception is set out by statute, which does not apply here.
- [52] So on the face of the pleadings, it is plain and obvious that the trustees would have responses to a demand by the Grandchildren to sue the Third Parties for losses from an incorrect and negligent opinion: first that the losses have not yet materialized (since costs have not yet been awarded against the trust property), and second, that as long as no court has said the opinion is wrong, let alone negligent, it would be premature to sue.

- [53] If a court rejects the substance of the opinion in the main action, as the Grandchildren will urge it to do, then this would not necessarily mean that the opinion was negligent: if the court decision is consistent with the opinion then of course no claim for solicitor negligence could succeed. If they win the main action at that point the Grandchildren would be able to ask the trustees to pursue a remedy against the Third Parties. If they failed to do so then it could be addressed then.
- [54] Even assuming everything is true in the Third Party Notice, it does not provide the basis for a lawsuit against Horne Coupar and it is not in anyone's interests for that to proceed to discovery and trial if it is bound to fail. I therefore strike the Third Party Notice and dismiss the third party claim.

Costs

- [55] The Third Parties asked for special costs. I do not see a basis for that. I do not see reprehensible litigation behaviour of the type that would be a basis for special costs.
- [56] Special costs are a punitive measure designed to punish parties for reprehensible conduct in the course of the litigation; *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 134-136.
- [57] Conduct in the course of the litigation includes the allegations made in a notice of civil claim. Meritless allegations of fraudulent conduct can be considered reprehensible and therefore appropriately deserving the sanction of solicitor-and-client costs; *Roussy v. Savage*, 2020 BCSC 487, at para. 17. However, the fact that an allegation of dishonest conduct ultimately proves unsuccessful is not, in itself, enough to justify such an award: *Roussy*, at para. 19. What matters is whether the allegation is in bad faith.
- [58] In any event, here I do not see an allegation of dishonest conduct amounting to fraud. In some cases an allegation of breach of fiduciary duty or breach of trust will amount to such an allegation of dishonesty, but that is not always true. A person may misguidedly but honestly put themselves in a position of conflict with what should be their primary loyalty. In my view, that was all that was really alleged here. I also find that this was a good faith concern on the part of the Grandchildren. While they did not have the standing to make this argument, it would not be appropriate for me to say it was unfounded, and in any event I have reviewed the affidavits that they provided and I am willing to come to a finding that they made the allegation in good faith based on their concerns about how the advice and actions of Horne Coupar led to the litigation.
- [59] There is, therefore, no reason to depart from the default. So I award costs of the Third Party Notice proceeding to the Third Parties at Scale B. This should be offset by two tariff points to represent preparation for, and argument of, the costs issue, which I award to the Grandchildren.

Order

[60] I therefore make the following order:

1. The Third Party Notice is struck out and the third party claim is dismissed.
2. Costs of the Third Party Notice proceeding are awarded to the Third Parties at Scale B.
3. Costs of the cost application are assessed at two units at Scale B to the defendants, Shona Selene Macdonald and Aisha Arianne Macdonald, and shall offset the costs of the third party claim.

"J. G. Morley, J."

The Honourable Justice Morley

[1] Cooper v. Hobart, 2001 SCC 79 at para. 30, referring to Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.)

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Prepared on 28 October 2026 · Esheria