

CANADA / JUDGMENT

The Owners, Strata Plan KAS3204 v. Navigator Development Corporation

2020 BCSC 1954

COURT

Supreme Court of British Columbia

DECIDED

9 December 2020

Source: bccourts.ca - Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1954 The Owners of Strata Plan KAS3204 v. Navigator Development Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

The Owners of Strata Plan KAS3204 v. Navigator Development Corporation,

2020 BCSC 1954

Date: 20201209

Docket: S155327

Registry: Vancouver

Between:

The Owners, Strata Plan KAS3204

Plaintiff

And

Navigator Development Corporation, New Town Architecture Inc., Bains Leslie Engineering Corp., Bains Engineering Corp., Golder Associates Ltd., Golder Associates Ltee, Richardson Mechanical Ltd., Laing Roofing Ltd., Okanagan Caulking & Sealants, GTA Architecture Ltd., Garry J. Tomporowski, ABC Company #2 to #10 and John Doe #2 to #10

Defendants

And

Interior Testing Services Ltd., Navigator Development Corporation, Greyback Construction Ltd., 0590398 B.C. Ltd. formerly New Town Architecture Inc., Bains Leslie Engineering, Bains Engineering Corp., Golder Associates Ltd. Golder Associes Ltee, Richardson Mechanical Ltd., Laing Roofing Ltd. and Okanagan Caulking & Sealants

Third Parties

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:

A. Maltas

K. McLean, A/S

Counsel for New Town Architecture Inc.:

N. Carfra

Counsel for Golder Associates Ltd. Golder Associes Ltee:

J.J. Weisman

Counsel for Greyback Construction Ltd.:

B. McLean

Counsel for Laing Roofing Ltd.:

R. Moore

Place and Date of Hearing:

Vancouver, B.C.

November 6, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 9, 2020

Overview

- [1] This is a summary trial application brought by a third party, Greyback Construction Ltd. ("Greyback"), pursuant to Rule 9-7 of the Supreme Court Civil Rules. Greyback seeks a declaration that the Plaintiff has limited its claim "to the several extent of liability of named defendants remaining in the action" and, consequentially, it seeks orders dismissing all third party claims against it.
- [2] Greyback's application arises in the context of a multi-party construction dispute. New Home Warranty Providers (the "Plaintiff") brought a subrogated claim, in the name of the Owners of Strata Plan KAS3204 (the "Strata"), for damages arising from alleged deficiencies in the construction and design of the Strata's building in Kelowna, BC (the "Lofts"). Three of the defendants -- Golder Associates Ltd. ("Golder"), Laing Roofing Ltd. ("Laing"), and New Town Architecture Inc. ("New Town") -- subsequently asserted third party claims against Greyback. Although Greyback was not named as a defendant in the Plaintiff's claim, it was involved in the construction of the Lofts by providing excavation, preload, and construction management services.
- [3] After commencing the action, the Plaintiff entered into two BC Ferry settlement agreements with some of the defendants and a third party (the "Settlement Agreements"). Named for British Columbia Ferry Corp. v. T & N, (1995), 16 B.C.L.R. (3d) 115 (C.A.) [BC Ferry], a BC Ferry settlement agreement obliges the plaintiff in a multi-party proceeding to forego recovery from the non-settling defendants of any portion of the loss ultimately attributable to the fault of the settling parties, thereby removing the basis for claims by the non-settling defendants for contribution and indemnity against the settling parties and extricating the settling parties from the litigation. As contemplated by the Settlement Agreements, the Plaintiff subsequently amended its Notice of Civil Claim to expressly waive any right to recover any portion of the loss that may be attributable to the fault of any of the settling parties for which any non-settling party might advance a claim for contribution and indemnity.
- [4] Golder, Laing, New Town, and Greyback are not parties to either of the Settlement Agreements. Nevertheless, Greyback bases this application on the Settlement Agreements; specifically, a portion of one sentence in each of them that provides that the Plaintiff will limit its claim "to the several extent of liability of the Remaining Defendants". Greyback submits that it is entitled to rely on the "principled exception to the doctrine of privity of contract" described in London Drugs Ltd. v. Kuehne and Nagel International Ltd., [1992] 3 S.C.R. 299 and Fraser River Pile and Dredge Ltd. v. Can-Dive Services Ltd., [1999] 3 S.C.R. 108 to enforce the Settlement Agreements, which it says had the effect of extinguishing the joint liability of the non-settling parties for the portion of the loss ultimately attributed to them as a group, leaving each liable only for the portion of the loss ultimately attributed to that specific non-settling party. Greyback submits that, consequentially, the third party claims against it must be dismissed because Golder, Laing, and New Town cannot have a claim over against Greyback if each of them is only severally liable.

- [5] Golder, Laing, and New Town support Greyback's application. Greyback, Golder and Laing submit that the effect of a BC Ferry settlement on the joint liability of non-settling parties is at best unsettled in law. New Town goes further, asserting that this Court in *Huang v. Canadian National Railway Company*, 2018 BCSC 1235, the Court of Appeal in *BC Ferry*, and the Supreme Court of Canada in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 all held that the effect of a partial settlement is to extinguish the joint liability of non-settling parties for the portion of the loss attributed to them as a group. Golder, Laing, and New Town all say that if their liability as individual defendants is several, the third party claims they have against Greyback must be dismissed.
- [6] The Plaintiff opposes Greyback's application. It says the law is clear--a BC Ferry settlement does not eliminate the joint liability of non-settling parties for the loss attributed to them as a group. Moreover, it disputes Greyback's interpretation of the Settlement Agreements and says that, in any event, as a stranger to the Settlement Agreements Greyback cannot rely upon them.
- [7] For the reasons that follow, Greyback's application is dismissed. A BC Ferry settlement does not have the effect, as a matter of law, of converting the joint and several liability among non-settling wrongdoers into several liability. Put another way, such a settlement does not result in the plaintiff losing the right to recover for loss attributed to the fault of the non-settling wrongdoers as a group on a joint basis from any one of them. It follows that such a settlement does not, as a matter of law, affect claims of contribution and indemnity as between non-settling wrongdoers.
- [8] A BC Ferry settlement extinguishes the joint liability between settling parties, as a group, and non-settling parties, as a group, through the circumscription of a plaintiff's claim against the non-settling parties, not through the settlement contract itself. In this case, the Plaintiff's amended Notice of Civil Claim does not affect the potential joint liability of the non-settling defendants for losses that are not attributable to the fault of the Settling Parties. Further, Greyback is a stranger to the Settlement Agreements with no legal right to enforce their provisions, and it has not established any applicable exception to the doctrine of privity. In any event, Greyback's interpretation of the Settlement Agreements is incorrect; when properly construed they do not purport to extinguish the joint liability of the non-settling defendants for loss attributed to their fault, as a group.

Background

The Plaintiff's Claim and the Parties Involved

- [9] The Plaintiff commenced this action on June 29, 2015. The initial Notice of Civil Claim named 38 defendants. Only some of those defendants are relevant in this application:

- a) Navigator Development Corporation ("Navigator") is alleged to have been the builder, developer, construction manager, and/or general contractor who developed, built, and marketed the Lofts.
 - b) New Town is alleged to have been the architect of record for the Lofts. It claims contribution and indemnity against Greyback.
 - c) Golder is alleged to have been the geotechnical engineer consultant for the Lofts. It filed a third party claim against Greyback.
 - d) Laing was the roofing contractor engaged by Navigator for the Lofts. It filed a third party claim against Greyback.
 - e) Kodiak Drywall Ltd. ("Kodiak") is alleged to have been the drywall and exterior insulation and finish system contractor for the Lofts.
 - f) Livingwood Floors Inc. ("Livingwood") is alleged to have been the flooring contractor for the Lofts.
 - g) Smith + Anderson Falcon Engineering Ltd. ("Falcon") is alleged to have been the electrical engineer consultant for the Lofts.
 - h) John Bryson & Partners, John Bryson Engineering Corporation, and John Zickmantel Engineering Corporation (collectively, "Bryson") are alleged to have been the structural engineers for the Lofts. Bryson filed a third party claim against Elbury Consulting Ltd. ("Elbury").
- [10] Although Navigator is ostensibly at the heart of the Plaintiff's claim, it has not filed a Response to Civil Claim. It is assumed for the purposes of this application that Navigator is insolvent.
- [11] There is no suggestion of contributory negligence on the part of the Plaintiff.

The Settlements and Subsequent Amendment of the Pleadings

- [12] The Plaintiff entered into the Settlement Agreements in 2019. On May 14, 2019, it settled with Livingwood Floors, Falcon, Bryson, and Elbury (the "Livingwood Agreement"). On November 6, 2019, the Plaintiff settled with Kodiak Drywall (the "Kodiak Agreement"). I shall collectively refer to the above parties as the "Settling Parties".
- [13] The Plaintiff subsequently amended its pleadings. In the Amended Notice of Civil Claim filed November 21, 2019, the Plaintiff removed the Settling Parties from the claim, discontinued the claim against eight non-settling defendants, and added two new defendants. The Plaintiff also expressly circumscribed its claim against the remaining defendants through the following paragraph in Part 3 of its Amended Notice of Civil Claim:

The plaintiff expressly waives any and all right to recover from the defendants or any other party, any portion of the plaintiff's loss that may be attributable to the fault, tort, negligence and/or breach of contract or breach of any equitable, common law or statutory duty of [the Settling Parties], and for which the defendants might reasonably be entitled to claim from the [Settling Parties] contribution, indemnity or an apportionment either at common law, in equity, pursuant to the Negligence Act, R.S.B.C. 1996, c 333 and amendments thereto, or any successor legislation.

[14] The Plaintiff continues to allege in the Amended Notice of Civil Claim that the defendants are jointly and severally liable.

Issues

[15] The overarching question on this application is whether a settlement between a plaintiff and some but not all alleged wrongdoers has the effect of extinguishing non-settling wrongdoers' claims for contribution and indemnity against each other. In answering this question, four issues must be addressed:

- a) Is this matter suitable for summary trial?
- b) If so, what is the effect of a BC Ferry settlement on non-settling parties?
- c) Can Greyback enforce the Settlement Agreements even though it is not a party to them?
- d) Do the Settlement Agreements, properly construed, extinguish the potential joint liability of the non-settling parties?

[16] The third and fourth issues are interrelated, with both turning on the construction of the Settlement Agreements to ascertain the intention of the parties to them. Nevertheless, for clarity I deal with each separately.

Analysis

Suitability for Summary Trial

[17] All parties agree that this matter is suitable for summary trial. I concur. The relevant facts are not in dispute. The issues raised are not interwoven with the underlying litigation and the application raises no "litigating in slices" concerns. I am satisfied that I am able to find the facts necessary to decide the issues and that it would not be unjust to do so on a summary basis.

What is the effect of a BC Ferry settlement on non-settling parties?

[18] Greyback submits that it would be unfair if a BC Ferry settlement did not extinguish the joint liability of the non-settling parties and leave each liable only for the portion of the loss ultimately attributed to that specific non-settling party; otherwise, the non-settling parties will be "left holding the bag" for Navigator, which is assumed to be insolvent. They say the extrication of the Settling Parties from the litigation prejudices the contribution rights of the

remaining defendants by narrowing the pool of wrongdoers that could theoretically share the burden of the part of the Plaintiff's loss ultimately attributed to Navigator's fault.

- [19] Greyback's submission is premised on a fundamental misunderstanding of the nature of a claim for contribution. It is well settled that no wrongdoer can be compelled by another wrongdoer to pay more than the amount that corresponds to the former's proportionate share of fault. It is also clear that a plaintiff cannot compromise the contribution rights of a concurrent wrongdoer against a settling party by granting a release to the settling party. However, a plaintiff can prevent a defendant from advancing a claim for contribution against a settling party by limiting its claim to loss that is not ultimately attributed to the fault of the settling party. A BC Ferry settlement obliges the plaintiff to forego recovery from the non-settling defendants any portion of the loss ultimately attributed to the fault of the settling parties, thereby eliminating the foundation for any claim for contribution against the settling parties. This does not prejudice the non-settling defendants because the claim against them has been limited to exclude the portion of the loss that corresponds to the extinguished potential claim for contribution.
- [20] The Negligence Act, R.S.B.C. 1996, c. 333 provides for the apportionment of fault between multiple wrongdoers who caused the plaintiff's loss. Fault in this context means the wrongdoer's blameworthiness; that is to say, the degree to which the party's conduct departed from the requisite standard of care: *Randhawa v. Evans*, 2020 BCCA 292 at paras. 22-23.
- [21] Section 4(2) of the Negligence Act addresses two separate and distinct principles: a plaintiff's right to recover the whole of its loss from any one of two or more wrongdoers on the basis of joint and several liability; and the wrongdoers' right to contribution and indemnity against each other.
- [22] Where two or more persons are found at fault for the plaintiff's loss, they are jointly and severally liable to the plaintiff: Negligence Act, s. 4(2)(a). The plaintiff has a right of recovery against any one, or any combination, of the persons at fault for the full amount of the loss. As between themselves, the wrongdoers are liable to contribute and indemnify each other "in the degree to which they are respectively found to have been at fault": Negligence Act, s. 4(2)(b). The only exception is when the plaintiff's fault is a cause of the loss. In that case, s. 1(1) of Negligence Act provides that the other persons who caused the loss are only severally liable (that is, liable in proportion to the degree to which each of them was at fault), such that there is no basis for third party claims for contribution or indemnity: *Orange Julius v. Surrey*, 2000 BCCA 467 at paras. 75-81.
- [23] Again, pursuant to s. 4(2)(b) of the Negligence Act, where a defendant pays a plaintiff more than is commensurate with its share of fault, that defendant has a claim of contribution against other wrongdoers but only to the extent of the others' respective proportionate shares of the fault. The objective of that independent right of contribution "is to ensure that any damages established by the plaintiff will be shared equitably among concurrent

tortfeasors according to their degree of fault": The Owners, Strata Plan LMS 1751 v. Scott Management Ltd., 2010 BCCA 192 at para. 57.

- [24] However, there are circumstances in which a wrongdoer's right to contribution from a co-wrongdoer will be ineffectual, such as where the co-wrongdoer is impecunious. In cases involving more than two wrongdoers, one of which is impecunious, a wrongdoer that has paid more than its proportionate share is unable to claim contribution against another solvent wrongdoer for a proportionate part of the share of the impecunious wrongdoer because that other solvent wrongdoer's liability to contribute is limited by s. 4(2)(b) to the degree to which it is at fault.
- [25] Put simply, no wrongdoer who has paid more than its proportionate share of the plaintiff's loss can compel another wrongdoer to contribute more than that other wrongdoer's proportionate share. This means that, irrespective of any settlement, if the plaintiff recovers the whole of its loss from one of several wrongdoers and one of the other wrongdoers is insolvent, the paying wrongdoer will bear the insolvent wrongdoer's share and will not be able to spread responsibility for that share among the other wrongdoers.
- [26] Post-tort actions by a plaintiff that extinguish its claim against one tortfeasor, such as granting them a release as part of a settlement, do not compromise the right of concurrent tortfeasors to claim contribution from the released party: *Tucker v. Asleson*, 1991 CanLII 8258 (B.C.S.C.), *aff'd in part* 1993 CanLII 2782 (B.C.C.A.) [Asleson].
- [27] In *Asleson*, an infant passenger was injured when the vehicle she was in crashed into a semi-trailer on an icy highway. The infant sued her parents (the owner and driver of the vehicle), the other driver for driving too fast for the weather conditions, and the Crown for failing to keep the road free from ice. The plaintiff settled with her parents. The settlement released her parents from liability. The plaintiff continued with her claim against the other two defendants. At trial, the plaintiff's mother, the other driver, and the Crown were each found one-third at fault. The other driver and the Crown argued that the release of the parents severed the joint liability imposed by s. 4 of the Negligence Act (the 1979 predecessor to the modern Negligence Act) such that the plaintiff could only claim against each of them the portion of the judgment that corresponded with their respective degrees of fault. Finch J., as he then was, disagreed, concluding at para. 179 that:

[T]he plaintiff's settlement with the Tuckers and their insurer C.H.A.C. does not sever the joint and several liability imposed by s. 4 of the Negligence Act upon all defendants. The agreement of settlement and release between the plaintiff and the defendants Tucker does not affect the present defendants['] rights to claim contribution and indemnity from the Tuckers. And the present defendants remain jointly and severally liable for all of the loss the plaintiff has suffered, subject to any agreement which they have made themselves.

[Emphasis added.]

- [28] On appeal, Southin J.A., writing for the majority, agreed with Finch J.'s interpretation and application of s. 4 of the 1979 Negligence Act, although she did overturn his finding as to one of the defendant's liability. "The right of contribution and indemnity among several concurrent tortfeasors", Southin J.A. stated, "is independent of what the injured person does if, in fact, damage or loss has been caused by the fault of two or more" (para. 116).
- [29] Nevertheless, a plaintiff can prevent a defendant from seeking contribution from another party by circumscribing the pleadings to only seek damages attributable to the defendant's fault. For example, in *Taylor v. Canada (Attorney General)*, 2009 ONCA 487 [Taylor], the plaintiff sought damages for injuries resulting from the surgical installation of an implant in her jaw. The defendant, Health Canada, attempted to initiate third party claims for contribution against the dental surgeon who installed the implant and the hospital where the surgery took place. However, the plaintiff's amended pleadings only sought to recover "those damages that are attributable to [Health Canada's] proportionate degree of fault" (at para. 2). Writing for the Court, Laskin J.A. held that Health Canada could not make a third party claim for contribution because the plaintiff was only seeking damages that were attributable to Health Canada: see Taylor, at paras. 20-22.
- [30] Similarly, a plaintiff can prevent a defendant from seeking contribution or indemnity from a particular party by expressly waiving any right to recover any portion of the loss ultimately attributed to that party's fault. This is what happened in the BC Ferry case.
- [31] In BC Ferry, the plaintiffs commenced an action in negligence against the defendant manufacturers of asbestos products, claiming damages said to have been caused to several ferries over a 20-year period. The defendants issued third party claims against several entities who were contractors, sub-contractors, installers, and architects on the construction, remodelling, and refitting of the ferries. The plaintiffs subsequently entered into settlement agreements with several of the third parties in which the plaintiffs agreed not to seek to recover from the defendants any portion of the loss which may be attributed to the fault of the third parties.
- [32] The third parties in BC Ferry brought summary trial applications seeking, among other things, dismissal of the third party claims for contribution and indemnity on the ground that, with the plaintiffs' right to recover against the defendants confined as noted above, there was no basis in law for the contribution claims. Counsel advised the Court that the plaintiffs expressly waived any right to recover from the defendants any portion of the loss which the court may attribute to the fault of any settling third party. Justice Braidwood agreed with the third parties and dismissed the claims against them for contribution and indemnity. In doing so, he reasoned: "[i]t is not the contract itself which deprives the defendant of claiming against the third party (obviously the defendant is not a party to that contract) but the fact that the plaintiff only seeks from the defendant that part of its loss which the defendant caused" (as quoted by the Court of Appeal in BC Ferry, at para. 13).

- [33] Although Justice Braidwood wrote that the plaintiffs had limited the claim to "that part of its loss which the defendant caused", it is apparent from the reasons for judgment of the Court of Appeal that in fact the plaintiffs waived any right to recover from the defendants "any portion of the losses which a court may attribute to the fault of the third parties" (BC Ferry, at paras. 1(a) and 8).
- [34] The defendants appealed arguing that s. 4 of the Negligence Act gave them an independent right to claim contribution and indemnity from concurrent tortfeasors, and that no act of the plaintiff could deprive them of that right. Wood J. A., for the Court, found it "unnecessary to resort to all of the law agitated in support of this proposition which, standing alone, is unassailable" (para. 14) because the confinement of the claim, as reflected in the waiver, eliminated the basis upon which the right to contribution or indemnity could be exercised. He added that, to avoid any uncertainty, the waiver should be expressly reflected in an amendment to the plaintiffs' pleadings. Subject to that amendment being made, this aspect of the appeal was dismissed.
- [35] Accordingly, BC Ferry is authority for the proposition that a third party claim will be summarily dismissed as bound to fail where the plaintiff has expressly waived, in its pleadings, any right to recover from the defendants any portion of the loss which the court may attribute to the fault of the settling third party. It is not authority for the proposition urged on me by Greyback and its supporters; that a partial settlement has the effect of extinguishing the joint liability of non-settling parties for the portion of the loss attributed to them as a group or, in other words, limiting each non-settling defendant's liability to its several extent, such that no third party claim for contribution against even non-settling parties can survive.
- [36] As already mentioned, New Town asserts that the effect of all BC Ferry settlements is to extinguish the joint liability of non-settling parties for the portion of the loss attributed to them as a group. New Town says this was the conclusion of this Court in Huang, the Court of Appeal in BC Ferry, and the Supreme Court of Canada in Sable Offshore Energy. New Town acknowledges that in Conarroe v. Tallack, 2020 BCSC 626 at para. 144, it was held that "liability remains joint between the remaining defendants following a BC Ferries settlement". However, it submits that Conarroe should not be followed because it includes no reasons for that conclusion, and because Huang, BC Ferry, and Sable Offshore Energy "are binding authority" for the opposite proposition.
- [37] While I agree with the conclusion in Conarroe on this point, that case is of limited assistance because of the absence of reasons. The focus in Conarroe was on a different issue (the deductibility of the undisclosed settlement amount from the plaintiff's damage award at trial) and it appears there may not have been any disagreement in the parties' submissions concerning the effect of the settlement on the joint liability of the remaining defendants. This is the likely explanation for the absence of reasons for the conclusion that liability remains joint between the remaining defendants following a BC Ferry settlement.

[38] I return then to New Town's assertion that Huang, BC Ferry, and Sable Offshore Energy are authority for the proposition that partial settlements extinguish the joint liability of the non-settling parties. I do not agree. None of the cases that New Town cites stand for the proposition it asserts and, as explained above, Asleson stands for the opposite.

[39] I have already explained the principle that may be drawn from BC Ferry; a third party claim will be summarily dismissed as bound to fail where the plaintiff has expressly waived, in its pleadings, any right to recover from the defendants any portion of the loss which the court may attribute to the fault of the settling third party. As Lord Halsbury L.C. observed in *Quinn v. Leatham*, [1901] A.C. 495 at 506 (H.L.):

[E]very judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.... [A] case is only an authority for what it actually decides.

BC Ferry simply does not decide that a partial settlement extinguishes the joint liability of the non-settling parties.

[40] Huang, too, did not decide that a BC Ferry settlement extinguishes joint liability among the non-settling defendants. That was not in issue in the case. In Huang, the plaintiff admitted she was contributorily negligent. Accordingly, pursuant to s. 1 of the Negligence Act, the liability of the defendants was several. Any portion of Huang that addresses the liability of remaining defendants following a BC Ferry settlement, in the absence of contributory negligence, is obiter dicta. Moreover, the very passage from Huang that is relied upon here does not support the proposition asserted:

[322] Pursuant to ss. 1 and 4 of the of the Negligence Act, R.S.B.C. 1996, c. 333, the liability of multiple tortfeasors is several if a plaintiff is contributorily negligent and joint and several if the plaintiff is not: *Henry v. British Columbia*, 2016 BCSC 1038, aff'd 2017 BCCA 420. As the defendants noted, this is so whether all tortfeasors are sued as defendants or not: *Leischner v. West Kootenay Power & Light Co.* (1986), 1986 CanLII 889 (BC CA), 24 DLR (4th) 641 (B.C.C.A.) at 174. Similarly, under a BC Ferries agreement, a plaintiff settles with one or some but not all of the defendants and agrees to sever joint and several liability among the settling and non-settling defendants. The plaintiff is only entitled to recover against the non-settling defendants the portion of damages attributable to the fault apportioned to them by the trial judge.

[Emphasis added.]

- [41] It is plain that the words "agrees to sever joint and several liability among the settling and non-settling defendants" refer to the severance of joint liability as between the non-settling defendants, as a group, and the settling defendants, as a group, not as among the remaining defendants. That is the only explanation for the distinction between settling and non-settling defendants. The fault being apportioned to "them" is the fault of the non-settling defendants as a group.
- [42] Similarly, Sable Offshore Energy did not decide that a BC Ferry settlement (in that case referred to as a "Pierringer agreement" after the 1963 Wisconsin case of *Pierringer v. Hoyer*, 124 N.W.2d 106) extinguishes joint liability among the non-settling defendants. The issue in Sable was whether the amounts of settlements reached between the plaintiff and some defendants should be disclosed to the other defendants, pre-trial, or whether the amounts were protected by settlement privilege. As in Huang, any comments about the liability of remaining defendants following a Pierringer agreement were incidental to the decision. Moreover, as in Huang, the passages relied on by Greyback and its supporters do not support the proposition asserted, particularly when read in the context of the decision as a whole.
- [43] New Town emphasizes certain words in paras. 25-26 of the decision, where Justice Abella wrote, for the Court:
- [25] The non-settling defendants have in fact received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. Moreover, Sable agreed that at the end of the trial, once liability had been determined, it would disclose to the trial judge the amounts it settled for. As a result, should the non-settling defendants establish a right of set-off in this case, their liability for damages will be adjusted downward if necessary to avoid overcompensating the plaintiff.
- [26] As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants.

[Emphasis added.]

- [44] It appears that Justice Abella was referring to the extinguishment of joint liability as between the non-settling and settling defendants, not as among the non-settling defendants themselves. There is no other apparent explanation for referring separately to the distinct groups of defendants. Any doubt about that is removed when her earlier comments about the effect of Pierringer agreements are considered. At para. 6 she wrote:

- [6] a Pierringer Agreement allows one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other.

[Emphasis added.]

- [45] To return to Greyback's fairness argument, as illustrated by the following hypothetical, it is apparent that the contribution rights of the non-settling defendants are not prejudiced by a BC Ferry settlement:
- a) In scenario 1, P initiates a claim against D1, D2, D3, and D4. There is no settlement reached with any of the defendants. There is no contributory negligence. The plaintiff succeeds. D1, D2, and D3 are all apportioned 20% fault, while D4 is found to be 40% at fault. D4 is insolvent. D1 has deep pockets and assets from which the plaintiff can easily recover. The plaintiff recovers 100% from D1. Pursuant to s. 4(2)(b) of the Negligence Act, D1 can seek contribution of 20% from D2 and 20% from D3. The best outcome for D1, if it maximizes its recovery from both D2 and D3, is to be left paying 60%, even though it was found only 20% at fault. In other words, D1 cannot force D2 and D3 to shoulder any of D4's share. The worst outcome for D1, if it is unable to recover from D2 and D3 because, for example, both are judgment proof, is to be left paying 100% of the plaintiff's loss.
 - b) Scenario 2 is the same as scenario 1 except that before trial, the plaintiff enters into a BC Ferry settlement with D2, and consequentially limits its claim against D1, D3, and D4 to the portion of its loss that is not ultimately attributed to the fault of D2. Again, D1, D2, and D3 are all ultimately apportioned 20% fault, while D4 is found to be 40% at fault. As a result of the limitation of the claim, the most the plaintiff can recover from D1 is 80%. Pursuant to s. 4(2)(b) of the Negligence Act, D1 can seek contribution of 20% from D3. The best outcome for D1 is the same as in scenario 1; if it maximizes its recovery from D3, it will be left paying 60%, even though it was found only 20% at fault. The worst outcome for D1, if it is unable to recover from D3 for some reason, is to be left paying 80% of the plaintiff's loss, which is better than the worst case in scenario 1.
- [46] Again, it is inherent in a BC Ferry settlement that the plaintiff waives its right to recover from the non-settling wrongdoers any portion of the loss which is ultimately attributed to the fault of the settling party. This eliminates the basis upon which any right to contribution or indemnity could be enforced against the settling party. A BC Ferry settlement has no inherent effect on the ability of the non-settling parties to assert claims of contribution and indemnity as against other non-settling parties.

Can Greyback enforce the Settlement Agreements even though it is not a party to them?

- [47] As I understood the argument, Greyback says that even if BC Ferry settlements do not, as a matter of law, extinguish the joint liability of the non-settling defendants, the specific terms of the Settlement Agreements in this case had that effect. It then submits that it is entitled to rely upon those terms despite the fact that it was not a party to those agreements. As already noted, it relies on the principled exception to privity of contract described in *London Drugs and Fraser River Pile and Dredge Ltd.*
- [48] I disagree. Greyback is a stranger to the Settlement Agreements and it has not established any exception to the application of the doctrine of privity. Therefore, it cannot rely on the Settlement Agreements.
- [49] The doctrine of privity mandates that "a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it: *London Drugs*, per Justice Iacobucci for the majority, at 415-416.
- [50] Historically, there were only two exceptions to the doctrine of privity--agency and trust: *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228 at 237-240. In the 1990s, in *London Drugs and Fraser River Pile & Dredge Ltd.*, the Supreme Court of Canada recognized a third narrow, but principled exception to privity which allows a person who is not a party to a contract to rely on a benefit conferred by it. The application of the exception applies if two conditions are met. First, the parties to the contract must have intended to extend the benefit in question to the person seeking to rely on it. Second, the activities performed by the person seeking to rely on the contractual provision must come within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties.
- [51] The test is not met in this case. There is no indication in either the Kodiak Agreement or the Livingwood Agreement that the parties intended to extend any benefit to Greyback. Specifically, there is nothing that suggests the Plaintiff intended to insulate other non-settling wrongdoers from claims for contribution or indemnity. Neither the Livingwood Agreement nor the Kodiak Agreement makes any reference to Greyback specifically or to other non-settling parties as a group against whom the remaining defendants might assert a claim for contribution or indemnity. The only relevant benefit extended in the Settlement Agreements was to the Settling Parties. As discussed in the next section of these reasons, the Settlement Agreements provided the Settling Parties with a release of liability, an indemnity, and a covenant that the Plaintiff would amend its pleadings to remove the Settling Parties and circumscribe its claim to preclude any claim over against them.

Do the Settlement Agreements, properly construed, extinguish the potential joint liability of the non-settling parties?

[52] Again, as I understood the argument, Greyback says that even if BC Ferry settlements do not, as a matter of law, extinguish the joint liability of the non-settling defendants, the specific terms of the Settlement Agreements in this case had that effect. Greyback bases this assertion on a portion of one sentence in each of the Settlement Agreements that provides that the Plaintiff will limit its claim "to the several extent of liability of the Remaining Defendants".

[53] The principles of contractual interpretation are well-known. They include the following:

- a) the aim of contractual interpretation is to ascertain the objective intentions of the parties (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 55 [*Sattva*]);
- b) the contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of contracting (*Sattva*, at para. 47);
- c) words in isolation do not have an immutable or absolute meaning, as they often take their meaning from the context (*Sattva*, at paras. 47-48);
- d) while the surrounding circumstances are relied upon in the interpretive process, they cannot be used to deviate from the actual words used (*Sattva*, at para. 57);
- e) the purpose of the agreement and the nature of the relationship established by the agreement must be considered (*Sattva*, at para. 48); and
- f) what is required is a practical, common-sense approach not dominated by technical rules of construction (*Sattva*, at para. 47).

With these principles in mind, I turn to the proper interpretation of the material provisions of the Settlement Agreements.

[54] Greyback emphasizes a portion of section 8 of the Livingwood Agreement and a portion of section 6 of the Kodiak Agreement, which provide as follows:

[s.8] In addition, if the Plaintiffs continue to pursue the Claims against the Remaining Defendants, they will limit their claim for recovery to the several extent of liability of the Remaining Defendants, and will not seek to recover against the Remaining Defendants or any other person or corporation, any portion of its losses which it claimed or could have claimed from the Settling Defendants or Elbury in the Action which a Court may attribute to the fault, tort, negligence, and/or breach of any equitable, common law or statutory duty of the Settling Defendants or Elbury.

[s.6] If the plaintiffs continue to pursue the Claims against the Remaining defendants, they will limit their claim for recovery to the several extent of liability of the Remaining Defendants, and will not seek to recover against the Remaining Defendants or any other person or corporation, any portion of its losses which it claimed or could have claimed from the Settling Defendant in the Action which a Court may attribute to the fault, tort, negligence, and/or breach of any equitable, common law or statutory duty of the Settling Defendant.

[Emphasis added.]

- [55] Greyback quoted the underlined portions of the above clauses in its Notice of Application but omitted the balance of each. It also omitted all reference to other provisions in each of the Settlement Agreements that make plain that Greyback's submission concerning the interpretation of the Settlement Agreements is incorrect. The portions Greyback omitted expressly provide that the Plaintiff will limit its claim against the remaining defendants so as not to seek to recover "any portion of its losses which it claimed or could have claimed from [the Settling Parties] which a Court may attribute to the fault of [the Settling Parties]" (s. 8 Livingwood Agreement and s. 6 Kodiak Agreement) and that it will amend its pleadings to expressly waive "any and all right to recover any portion of the Plaintiff's loss that may be attributable to the fault of [the Settling Parties]" (s. 9(b)(ii) Livingwood Agreement and s. 7(b)(ii) Kodiak Agreement).
- [56] Greyback's failure to acknowledge this language in the Settlement Agreements is galling given its submission at paragraph 63 of its Notice of Application that if the Plaintiff "wanted to agree not to recover any portion of the loss attributable to the fault of the Settling Defendants from other tortfeasors, it was imperative on them to include that language in the [Settlement Agreements]". As set out above, that language is expressly included in the Settlement Agreements.
- [57] When section 8 of the Livingwood Agreement and section 6 of the Kodiak Agreement are read in their entirety and in the context of each Settlement Agreement as a whole, it is very apparent that the phrase "limit their claim for recovery to the several extent of liability of the Remaining Defendants" refers to the severance of joint liability as between the non-settling defendants, as a group, and the settling defendants, as a group.
- [58] The specific language Greyback relies upon, "limit their claim for recovery to the several extent of liability of the Remaining Defendants", on its own suggests an intention to limit the claim to the liability of the Remaining Defendants as a group because the term "Remaining Defendants" is defined in section 5 of the Kodiak Agreement and section 6 of the Livingwood Agreement collectively. If the parties had intended to extinguish the joint liability of the non-settling defendants for the loss ultimately attributed to their fault, it would have been easy to draft clear language to that effect.
- [59] When the words Greyback relies upon are read in the context of the whole of the clauses in which they are found, it is obvious that the parties did not intend the Plaintiff to limit its claim against each remaining defendant to the portion of the loss ultimately attributed to

the fault of that remaining defendant. As already noted, the clauses in question go on to expressly provide that the Plaintiff will limit its claim against the remaining defendants so as not to seek to recover "any portion of its losses which it claimed or could have claimed from [the Settling Parties] which a Court may attribute to the fault of [the Settling Parties]" (s. 8 Livingwood Agreement and s. 8 Kodiak Agreement). If the earlier language in each of the clauses in question limited the claim against each remaining defendant to the portion of the loss ultimately attributed to the fault of that remaining defendant, the latter portion of the clauses would be superfluous.

- [60] The fallacy of Greyback's submission is underscored by the subsequent provisions in the Settlement Agreements which expressly require the Plaintiff to amend its pleadings to expressly waive "any and all right to recover any portion of the Plaintiff's loss that may be attributable to the fault of [the Settling Parties]" (s. 9(b)(ii) Livingwood Agreement and s. 7(b)(ii) Kodiak Agreement). As already discussed, a BC Ferry settlement affects non-settling parties to the extent that it results in an amendment to the plaintiff's pleadings. There is nothing in the Settlement Agreements that suggests the Plaintiff was to amend its pleadings to limit its claim in any way other than to waive its right to recover loss attributable to the fault of the Settling Parties.
- [61] Finally, the obvious objective of the Settlement Agreements was to extricate the Settling Parties from the litigation in exchange for a payment of money, while permitting the Plaintiff to continue the action against the remaining defendants. This was achieved by providing the Settling Parties with a release of liability, an indemnity, and a covenant that the Plaintiff would amend its pleadings to remove the Settling Parties and circumscribe its claim to preclude any claim over against them. Construing the Plaintiff's obligation to limit its claim to extend to eliminating the Plaintiff's right to joint recovery from the remaining defendants for loss attributed to them as a group would be commercially absurd since it would represent a significant detriment to the Plaintiff and would not confer any corresponding benefit on the Settling Parties.
- [62] For these reasons, the Settlement Agreements do not extinguish the joint liability of the non-settling defendants for any portion of the Plaintiff's loss that is ultimately attributed to the fault of the non-settling defendants as a group.

Conclusion

- [63] The application is dismissed.
- [64] The Plaintiff was wholly successful and seeks costs in any event of the cause.
- [65] Where a party succeeds on an interlocutory application brought in relation to a discrete issue that will not be revisited at trial, the court may award that party the costs of the application in any event of the cause: *Dyer v. Dyer*, 2016 BCSC 1115 at para. 49. This application concerned such a discrete issue. The Plaintiff shall have its costs in any event of the cause as against Greyback, the applicant, and New Town, which not only supported the

application but advanced an unsuccessful position concerning the effect of a BC Ferry settlement that went beyond even that advanced by Greyback.

"Warren J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/19/2020BCSC1954.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/the-owners-strata-plan-kas3204-v-navigator-development-corporation-2020>

Prepared on 28 October 2026 · Esheria