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CANADA / JUDGMENT

## Winvan Paving Ltd. v. Gencor Industries, Inc.

2015 BCSC 233

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COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 233 Winvan Paving Ltd. v. Gencor Industries, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Winvan Paving Ltd. v. Gencor Industries, Inc.,

2015 BCSC 233

Date: 20150218

Docket: S130683

Registry: Vancouver

Between:

Winvan Paving Ltd.

Plaintiff

And

Gencor Industries, Inc., Henry Stowe, John Price,

John Doe #1, Lillie Family Heating & Plumbing Ltd.,

Hugh Lillie, John Doe #2, B.C. Safety Authority

Defendants

Corrected Judgment: The text of the judgment

was corrected at paragraph 28 on February 23, 2015

Before: The Honourable Mr. Justice Abrioux

## Reasons for Judgment

### Counsel for Plaintiff/Respondent:

Lori Leung

### Counsel for Defendant/Applicant, Lillie Family Heating & Plumbing Ltd.:

Gordon Buck

### Counsel for the Defendant/Applicant, Gencor Industries Inc.:

Oleh W. Ilnyckyj

A. Toljanich, articulated student

### Counsel for Defendant/Applicant B.C. Safety Authority:

Nigel L. Trevethan

### Place and Date of Hearing:

Vancouver, B.C.

January 15, 2015

### Place and Date of Judgment:

Vancouver, B.C.

February 18, 2015

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## I: INTRODUCTION

- [1] The Gencor defendants ("Gencor"), being Gencor Industries Inc., Henry Stowe ("Stowe") and John Price ("Price"), seek an order pursuant to Rule 21-8(2) of the British Columbia Supreme Court Civil Rules that this proceeding be stayed as against them on the ground that the court ought to decline to exercise jurisdiction.
- [2] They also seek an order pursuant to Rule 9-5(1)(a) or (b) that the plaintiff's claims against the defendants Stowe and Price be struck as disclosing no reasonable claim, or as unnecessary, scandalous, frivolous, or vexatious and that the proceeding be dismissed as against those defendants.
- [3] The Lillie family defendants (the "Lillie Defendants"), that is Lillie Family Heating & Plumbing Ltd. and Hugh Lillie, and the defendant BC Safety Authority (the "BCSA") seek leave to issue third party proceedings against Gencor.
- [4] These applications arise as a result of orders made at a case planning conference on October 8, 2014.
- [5] For the reasons that follow:
- Gencor's application for a stay of proceedings is dismissed;
  - Gencor's application that the proceedings against Stowe and Price be struck is adjourned generally with liberty to have it reset after particulars have been provided by the plaintiff, Winvan Paving Ltd. ("Winvan"), as set out below; and
  - Leave is granted to the Lillie Defendants and the BCSA to file third party notices against Gencor in the form appended to their respective notices of application.

## II: BACKGROUND

- [6] Winvan and Gencor entered into a contract on October 28, 2010, which provided for the purchase and sale of an asphalt plant and associated equipment (the "Contract").
- [7] Gencor is a U.S. corporation with its head office and manufacturing plant in Orlando, Florida.
- [8] The Contract was drafted by Gencor. There were two parties, being Gencor and Winvan. Material terms included standard terms and conditions of sale. In particular, clause 19 provides:

LAW CONTROLLING. This instrument and all questions concerning the performance of the parties hereunder shall be controlled by the laws of the State of Florida and jurisdiction of any dispute shall be in Orange County, Florida.

- [9] Clause 18 provides, in part, that the Contract shall "be considered executed in Orange County, Florida."

- [10] Winvan alleges that it suffered damages as a result of an explosion at its New Westminster asphalt plant on March 3, 2011. The claims advanced against Gencor are for breach of contract, negligence, negligent misrepresentation, and breaches of the Sale of Goods Act, R.S.B.C. 1996, c. 410. The claim advanced against Stowe and Price is for negligent misrepresentation.
- [11] The plaintiff conducted an internal investigation into the cause of the explosion.
- [12] Approximately one month after the explosion, Winvan's president advised his counterpart at Gencor that Gencor was not responsible for the explosion that occurred.
- [13] Gencor was not told anything different until the commencement of this litigation on January 29, 2013, almost two years after the explosion.
- [14] The notice of civil claim was filed on January 29, 2013. Gencor was served approximately nine months later, on or about November 5, 2013. It filed its response to civil claim on December 24, 2013. Under "Part 3: Legal Basis" at paras. 5-6, Gencor alleges negligence or breach of contract on the part of the plaintiff, the Lillie Defendants, and the BCSA as a defence to the plaintiff's claims.
- [15] In their responses to civil claim filed October 13, 2013 and March 7, 2014, respectively, the Lillie Defendants and the BCSA raise the alleged negligence or breach of contract of the plaintiff and the other defendants, including Gencor, as a defence to the plaintiff's claims.
- [16] The notice of civil claim was amended on January 13, 2014.
- [17] Gencor's insurer had retained Todd Martin of Martin Inspection Services to investigate and draft a report on the cause of the explosion. The report is dated April 19, 2011 and concluded that none of the major contributing factors to the explosion implicated Gencor. Rather, it raised acts and omissions of the Lillie Defendants and the BCSA as contributory factors.
- [18] The report was provided to all parties after the commencement of this proceeding.
- [19] Stowe and Price were, at all material times, employees of Gencor.
- [20] Price is a service manager for Gencor and resides in Orlando, Florida.
- [21] At all material times, Stowe was employed by Gencor as a help desk service technician and resided in Sanford, Florida. He no longer works at Gencor.
- [22] At no time did either Stowe or Price travel to British Columbia in relation to the Contract, nor at any time prior to the commencement of this litigation did any party, including the plaintiff, suggest that Stowe or Price contributed to the loss.
- [23] Gencor says there are "weak" references to remote "troubleshooting" on the day of the explosion with respect to Stowe and Price in Winvan's affidavit evidence on this application.

- [24] No other information, facts, or evidence regarding their pre-accident involvement with Winvan or the Contract have been disclosed by the plaintiff.
- [25] It is not alleged that Gencor had a contract with any of the parties other than Winvan.
- [26] In their proposed third party notices against Gencor, both the Lillie Defendants and the BCSA seek contribution and indemnity against Gencor. The proposed third party notice of the BCSA also raises an additional claim being that Gencor breached independent duties it owed to the BCSA to preserve evidence that could have shed light on the explosion. Specifically, it alleges that Gencor failed to provide access to data stored on a programmable logic controller.

### III: THE APPLICATION FOR THE COURT TO DECLINE JURISDICTION

#### A: The Issues

- [27] Several issues arise with this aspect of Gencor's application:
- (a) does the British Columbia Supreme Court have, or can it assume, jurisdiction? This is jurisdiction simpliciter, which Gencor concedes;
  - (b) should this Court take or decline jurisdiction? This involves an exercise of the Court's discretion. In that regard,

Rule 21-8(2) provides:

- (2) Whether or not a party referred to in subrule (1) applies or makes an allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.
- (c) is forum selection or forum non-conveniens the appropriate test on this application?;
- (d) if it is forum selection, has the plaintiff established "strong cause" such that the choice of forum clause should not be enforced?; or
- (e) if it is forum non-conveniens, has Gencor, being the applicant, established that British Columbia is not the convenient forum? This engages an analysis of the effect of section 11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 (the "CJPTA") which codifies the forum non conveniens doctrine and provides:

11 (1) After considering the interests of the parties to a proceeding and the

ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

11 (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
- (b) the law to be applied to issues in the proceeding,
- (c) the desirability of avoiding multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and
- (f) the fair and efficient working of the Canadian legal system as a whole.

## B: The Legal Principles

[28] In *Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, the Court of Appeal at para. 34, citing *Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137 at para. 12 sets out the steps to be followed in the analysis as to whether a court should decline jurisdiction based on a forum selection clause:

- The Province must have territorial competence over the matter;
- The party relying on the forum selection clause must then establish that the clause is valid, clear, enforceable, and that it applies to the cause of action before the court;
- Once that is established, the party opposing the forum selection clause must show "strong cause" as to why the court should not enforce the forum selection clause; and
- If the party opposing the forum selection clause has not shown strong cause, the court should still consider, according to the application before it, whether it is appropriate to transfer the proceeding to another jurisdiction pursuant to the CJPTA.

See also *Douez v. Facebook, Inc.*, 2014 BCSC 953 at para 31.

[29] The Court of Appeal in *Preymann* followed *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, where the Supreme Court of Canada held that great weight should be given to the parties' contractual choice of the appropriate forum. The exercise of the court's discretion not to enforce the forum selection clause is governed by the "strong cause" test, first stated in *The Eleftheria* (1969), 2 All E.R. 641. In *Pompey Industrie*, the Court held:

[20] This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the "strong cause" test provides sufficient leeway for judges to take improper

motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.

- [30] In *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351, leave to appeal to S.C.C. refused, 33790 (November 25, 2010), Juriansz J.A. summarized the principles as follows:
- [24] A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.
- [31] The common law applies in determining whether there is strong cause for the court not to give effect to a forum selection clause contained in an agreement.
- [32] The Court of Appeal in *Sarabia v. Oceanic Mindoro (The)*, [1997] 26 B.C.L.R. (3d) 143 at 153 (C.A.) said, "It is commonly understood that Canadian courts will respect contracting parties' choice of forum to resolve disputes arising from their contractual relationship unless there is strong cause to override the agreement." The factors to be considered in determining whether "strong cause" exists include:
- (a) whether the contract is unenforceable;
  - (b) whether the court in the elected forum does not accept jurisdiction or is otherwise unable to deal with the claim;
  - (c) whether the claim or circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause;
  - (d) whether enforcing the clause would frustrate public policy;
  - (e) in what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of litigation as between the British Columbia court and the foreign court;
  - (f) whether the law of the foreign jurisdiction applies and, if so, whether it differs from British Columbia law in any material respects;
  - (g) with what country either party is connected, and how closely;

- (h) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages;
- (i) whether the plaintiff would be prejudiced by having to sue in the foreign court;
- (j) whether there has been inordinate delay in bringing a motion to decline jurisdiction;
- (k) whether there are multiple defendants, and the exclusive jurisdiction clause applies for the benefit of only some of them; and
- (l) the claims among the various parties (only some of whom are subject to the foreign selection clause) are so intertwined that it is impossible to adjudicate the issues between the parties subject to the clause without also dealing with the issues as between the other parties.

See also *Expedition Helicopters* at paras. 16, 22; *Sarabia* at 153, citing *The Eleftheria* at 645; *Straus v. Decaire*, [2007] O.J. No. 1660 at paras. 26-27 (S.C.J.), aff'd 2007 ONCA 854; *Frey v. Bell Mobility Inc.* (sub nom *Microcell Communications Inc. v. Frey*), 2011 SKCA 136 at para. 118, leave to appeal to S.C.C. refused, 34618 (June 28, 2012); *Hans v. Volvo Trucks North America Inc.*, 2010 BCSC 1700 at para. 54.

- [33] There is a similarity between the factors that are to be taken into account on an application for a stay of proceedings based on a forum selection clause and one based on forum non-conveniens principles. A material difference, however, is which party bears the burden of proof, that is the one asserting strong cause or the one applying for a stay of proceedings based on forum non-conveniens principles.
- [34] From a practical perspective, however, which party bears the burden of proof may well not be significant in many of these types of cases. In any event, I do not consider it important in this one. While stated in an entirely different context, what was said by Satanove J. (now Kloegman J.) in *Fraser Park Estates Ltd. v. Lang Mitchener Lawrence & Shaw*, [1999] B.C.J. No. 150, 1999 CanLII 6630 at para. 68 (S.C.) applies here:
- [68] Deciding who carries the burden of proving something only becomes crucial if there is insufficient evidence on a point or an even balancing of evidence for and against a particular contention.

## C: The Parties' Positions

- [35] Gencor submits that the forum selection clause in the contract at issue is valid, clear, enforceable, and applicable to the cause of action before the court.

- [36] It relies on Bastarache J.'s statement in *Pompey Industrie* at para. 20, being that the "strong cause" test "rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause." Mr. Justice Bastarache also noted that the parties' agreement is to be given effect "in all but exceptional circumstances."
- [37] While acknowledging that there are multiple defendants in this case, several not being parties to the Contract, Gencor submits that this factor is not sufficient to displace the selection of Florida by the plaintiff and Gencor as the appropriate forum to settle their dispute.
- [38] Gencor also points to what it alleges as being an extremely weak case against it.
- [39] The plaintiff, the BCSA, and the Lillie Defendants advance common positions. They submit that whether The Eleftheria selection of forum factors are applied or those based on the principles of forum non-conveniens, the result should be the same. The court should exercise its discretion in refusing to grant a stay of proceedings since British Columbia is the appropriate forum for the issues in this dispute.
- [40] I shall refer below to specific factors raised by the application respondents.

## D: Discussion

- [41] I agree with the position of the respondents. Whether the issues on this application are approached from the perspective of forum selection or forum non-conveniens, the result is the same. In the exercise of discretion, the overriding preference is for all matters relating to the explosion of March 3, 2011 to be heard together in British Columbia as opposed to there being separate actions in this Province and in Florida which would be the inevitable consequence of Gencor's application for a stay of proceedings being granted.
- [42] The following factors from The Eleftheria are of significance in this case:
- (a) the plaintiff carries on business only in British Columbia, as do the BCSA and the Lillie Defendants. Gencor, by contrast, carries on business throughout the world, including British Columbia;
  - (b) most of the key witnesses known to date reside in British Columbia;
  - (c) there are multiple defendants and the forum selection clause applies to only one of them; and
  - (d) there will be proceedings in British Columbia involving all of the parties even if a stay of proceedings were to be ordered in this action.
- [43] Relevant factors on the forum non-conveniens test include the fact that a real and substantial connection exists between British Columbia and the factual matrix forming the foundation of the plaintiff's claims. This includes that:

- (a) the Contract in relation to the performance of on-site installation and start-up services by at least two representatives from Gencor, was performed physically in New Westminster, BC;
  - (b) those services were rendered by Gencor, a business that offers both goods and professional advice to companies operating in BC;
  - (c) the Gencor representative, Stowe, apparently provided some troubleshooting assistance to Winvan on the date of the explosion; and
  - (d) the explosion took place in New Westminster on lands and premises owned and operated by a business that conducts business and its daily affairs in this Province.
- [44] There are many examples of forum selection clauses being found unenforceable in actions involving multiple defendants who are not all parties to the agreement in question. See *Hans v. Volvo*, *Straus v. Decaire*, and *Bell Mobility*.
- [45] The only authority to which I was referred where a stay of proceedings was granted in a forum selection situation involving non-party defendants is *Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.*, 2012 SCC 9. Counsel advised me they have been unable to locate other authority with such a result. I have also not found any.
- [46] In *Momentous.ca*, the Ontario Court of Appeal and then the Supreme Court of Canada upheld the motion judge's dismissal of the entire case against all of the defendants based on the enforcement of a forum selection clause, even though two defendants were not parties to the agreement. It was held that the plaintiff's claims against the defendants not privy to the agreement could have been severed, but for the way the claim was pleaded.
- [47] That is not the case here. Only one defendant, that is Gencor, seeks a stay of the British Columbia proceeding. Furthermore, the BCSA and the Lillie Defendants seek leave to issue third party proceedings against Gencor. Should that be denied, they intend to commence separate proceedings against Gencor in British Columbia.
- [48] There is also the factor that Gencor, the BCSA, and the Lillie Defendants raise the alleged negligence and/or breach of contract of the plaintiff and their co-defendants in the responses they have filed to the plaintiff's notice of civil claim.
- [49] Accordingly, whether or not Gencor is successful on this application there will be proceedings involving it, the BCSA, and the Lillie Defendants in this Province relating to the explosion of March 2011. The Lillie Defendants and the BCSA can advance their claims in British Columbia for contribution and indemnity and the BCSA can advance its additional claim relating to Gencor's alleged failure to preserve evidence irrespective of whether a stay of proceedings is granted. It is fair to say that "[t]hey are independent actions which stand upon their own feet": *Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd. (sub nom British Columbia Marine Shipbuilders Ltd. v. F.M. Yorke & Son Ltd.)*, [1981] 1 S.C.R. 363 at 379.

- [50] Patchwork litigation is also to be avoided. See *Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192 at paras. 90-91, leave to appeal to S.C.C. refused, 33740 (June 17, 2010).
- [51] Gencor also relies on *B.A. Blacktop Ltd. v. Gencor Industries, Inc.*, 2008 BCSC 231, where the identical clause in issue on this application was successfully invoked by it on a similar application. However, unlike the present situation, there were only two parties in that proceeding both of whom were signatories to the agreement containing the forum selection clause.
- [52] Several of the factors to which I have referred would also lead to the conclusion that British Columbia is the convenient forum if the issue were considered within the framework of section 11 of the CJPTA.
- [53] In so far as it is Gencor's submission that the case against it is extremely weak, it has avenues to have that issue determined summarily should it choose to do so. There is also the separate claim advanced by the BCSA against Gencor which is not dependant on the strength of Winvan's claims against Gencor.
- [54] Accordingly, when I apply the legal principles and factors to which I have referred to the circumstances before me, the application for a stay of proceedings is dismissed.

#### IV: ISSUANCE OF THIRD PARTY PROCEEDINGS AGAINST GENCOR

- [55] The test is the same under Rule 3-5(1) as under Rule 9-5. The proposed third party must establish that the pleadings disclose no cause of action. The court is permitted to reject proposed claims only if the action is "bound to fail" or there is no bona fide triable issue.
- [56] The court is required to assume that all pleaded facts are true: *Hunt v. Carey Canada Inc.* (sub nom *Hunt v. T & N plc*), [1990] 2 S.C.R. 959 at 979; *Dhillon v. Coape*, 2004 BCSC 1208 at para. 18.
- [57] In determining whether or not to exercise its discretion to grant leave the court may consider the following:
- (i) prejudice to the parties which must be weighed relatively and must affect the ability to respond to the proposed claim;
  - (ii) expiration of a limitation period;
  - (iii) the merits of the proposed action;
  - (iv) any delay in the proceedings; and
  - (v) the timeliness of the application.

See *Clayton Systems 2001 Ltd. v. Quizno's Canada Corp.*, 2003 BCSC 1573 at para. 9; *Wadsworth v. McLeod*, 2004 BCSC 1824 at paras. 22-23; *Gordon v. Krieg*, 2011 BCSC 1248 at paras. 42, 44.

- [58] An important consideration is whether it is "just and convenient" in all the circumstances of the case to grant leave to file the third party notice: *Symes v. Knooihuizen*, [1998] B.C.J. No. 611, 1998 CanLII 2231 at paras. 38-39; *Clayton Systems 2001 Ltd.* at paras. 9, 14.
- [59] 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. See *Adams v. Thompson* (1987), 15 B.C.L.R. (2d) 51 at 54 (C.A.); *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2012 BCCA 22 at para. 1.
- [60] Gencor's principal objection to third party proceedings being brought against it is the position that the action in its entirety should be stayed.
- [61] In that I have not acceded to that argument, I grant leave to the BCSC and the Lillie Defendants to file the proposed third party claims against Gencor. They are not bound to fail and there is no prejudice to Gencor. Were the applications not granted, the BCSC and the Lillie Defendants would simply commence separate proceedings. This should be avoided. The action has not been set down for trial and the only examination for discovery that has occurred to date is one conducted by the plaintiff of a representative of the BCSC.

## V: THE APPLICATION TO STRIKE THE CLAIMS AGAINST STOWE AND PRICE

- [62] Gencor seeks to strike the claims against Stowe and Price pursuant to Rule 9-5(1)(a) or (b) of the British Columbia Supreme Court Civil Rules as disclosing no reasonable claim, or as unnecessary, scandalous, frivolous, or vexatious.
- [63] The legal principles are accurately summarized in Gencor's written argument.
- [64] For a claim to be struck under Rule 9-5(1)(a), it must be "plain and obvious" that no reasonable cause of action has been pleaded: *Ridge-Meadows Realty Ltd. v. 670206 B.C. Ltd.*, 2013 BCSC 637 at para. 9, citing *Hunt v. Carey* at 980.
- [65] In *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92, Madam Justice Saunders set out the standard for striking a claim under the previous version of Rule 9-5(1)(a):
- [37] In considering whether a reasonable claim is alleged under Rule 19(24)(a), the court considers the case on the basis the facts alleged are true. That is, this enquiry does not engage any of the evidence adduced by the parties, and the case is taken at its highest for the plaintiff: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
- [66] In *Micka v. Oliver & District Community Economic Development Society*, 2008 BCSC 1623, the court stated:
- [10] The issue is not whether the plaintiff has failed to identify the specific causes of action or tort claims advanced. Rather, the Court is to examine the statement of claim to see whether the material facts set out would, if proved, complete all the constituent elements of causes of action known in law: [citations omitted].

[67] Material facts are "those facts necessary for the purpose of formulating a complete cause of action": Canadian Bar Assn. at para. 59.

[68] In *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc. (sub nom Strata Plan VIS3578 v. Canan Investment Group Ltd.)*, 2010 BCCA 329, Madam Justice Neilson summarized the law with respect to personal liability of corporate officers, directors, and employees as follows:

[63] In *London Drugs [Ltd. v. Kuehne & Nagel International Ltd.]*, [1992] 3 S.C.R. 299 Iacobucci J., writing for the majority, stated at 407-08:

... There is no general rule in Canada to the effect that an employee acting in the course of his or her employment and performing the "very essence" of his or her employer's contractual obligations with a customer does not owe a duty of care, whether one labels it "independent" or otherwise, to the employer's customer.

[69] Furthermore:

[66] The fact that a director, officer or employee was acting within the course of employment and the corporation is vicariously liable for his negligence does not preclude a claim in negligence against the employee personally. However, in my view, the *London Drugs* principle requires that claim against the individual must be based on the breach of a duty of care that would support an action against the individual personally. The material facts that support that personal claim in tort must be specifically pleaded to establish a possible cause of action under R. 15(5)(a)(iii).

[70] I agree with Gencor that the amended notice of civil claim contains, at most, a generic plea vis a vis Stowe and Price in that it is alleged that all the defendants owed duties of care to the plaintiff, the defendants breached these duties and were negligent, and the plaintiff suffered loss, damage, and expense as a result.

[71] The amended notice of civil claim fails to set out material facts sufficient to establish personal breaches of duty and negligence on the part of either Stowe or Price that would support a cause of action against them personally.

[72] The issue then becomes whether Gencor should be granted the relief it seeks with respect to Stowe and Price, that is dismissal of the claim against them, or if the plaintiff should be provided with the opportunity to remedy what is clearly, in my view, a defective pleading in so far as these defendants are concerned.

[73] I have concluded that the draconian relief sought by Gencor should not be granted at this point in time. As I have noted, the action has not yet been set for trial and no examinations for discovery have been conducted of or on behalf of the Gencor defendants. Rather, I order that by March 2, 2015 the plaintiff shall provide written particulars of its claim against Stowe and Price which shall include those material facts sufficient to establish personal breaches of duty and negligence on the part of either Stowe or Price that would support a cause of

action against them personally. Without limiting the foregoing, the plaintiff is to provide particulars of the alleged misrepresentations made by Stowe and Price including:

- which representation was made by either or both, Stowe and Price;
- how the representation was made;
- how the representation was untrue, inaccurate, or misleading; and
- to whom the representation was made.

See Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District, 2013 BCSC 2324 at paras. 13, 31.

[74] Gencor is at liberty to reset the application to strike the claims against Stowe and Price after March 2, 2015. I will seize myself of that application which can be set for hearing for one hour at 9:00 a.m. at a date convenient to the parties and which accords with my rota.

#### VI: CONCLUSION

[75] The applications are disposed of as set out in paragraph 5 of these reasons for judgment.

[76] The plaintiff, the BCSA, and the Lillie Defendants are awarded their costs of responding to the stay of proceedings application at Scale B those costs not payable forthwith.

[77] I make a similar order in favour of the BCSA and the Lillie Defendants in respect to their applications seeking leave to issue the third party proceedings against Gencor.

[78] There will be no order as to costs at this time with respect to Gencor's application to strike the claims as against Stowe and Price. This can be revisited by Gencor and the plaintiff in the event the application proceeds after particulars have been provided.

Abrioux J.

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