COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *WorleyParsons Canada Ltd. v. David Nairn and Associates,* 2013 BCCA 513

Date: 20131121
Docket: CA040659

Between:

WorleyParsons Canada Ltd., doing business as Westmar and Westmar Consultants Inc.

Appellant
(Defendant)

And

David Nairn & Associates

Respondent
(Third Party)

And

The Campbell River Indian Band

Plaintiff

Corrected Judgment: The text of the judgment was corrected at paragraphs 14 and 27 where changes were made on December 2, 2013.

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice MacKenzie
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, January 31, 2013 (*The Campbell River Indian Band v. WorleyParsons Canada Ltd.*, 2013 BCSC 140, Vancouver No. S093612)

Oral Reasons for Judgment

Counsel for the Appellant: S.M. Vorbrodt

Counsel for the Respondent: T. Goepel
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Place and Date of Hearing: Vancouver, British Columbia
November 18, 2013

Place and Date of Judgment: Vancouver, British Columbia
November 21, 2013

Summary:

The plaintiff built a cruise ship terminal in Campbell River, but failed to attract large cruise ships to it. It claims the defendant was negligent in its design of the docking facilities. The defendant contends that the failure of the terminal is a function of the unattractiveness of Campbell River as a port of call and of inadequate promotion of the facility by the plaintiff.

The defendant issued a third party notice seeking contribution and indemnity from DNA, alleging DNA was negligent in failing to advise the plaintiff that Campbell River was an uneconomic place to build a cruise ship terminal and in failing to adequately promote the terminal in the cruise ship industry.

DNA successfully applied to strike the third party notice and the defendant appeals. Held: Appeal dismissed. The third party notice did not disclose a reasonable claim. For the most part, the claims in the third party notice were not in respect of indivisible damages contributed to by the negligence of the defendant and third party. To the extent that any of the damages were indivisible, they were in respect of mitigation, and were properly pleaded directly against the plaintiff.

[1] **GROBERMAN J.A.**: This is an appeal by WorleyParsons Canada Ltd. from an order of a Supreme Court judge in chambers striking its third party notice against David Nairn & Associates.

Allegations in the Pleadings

[2] The litigation arises out of the construction and operation of a cruise ship terminal in Campbell River by the Campbell River Indian Band (the "Band"). As the pleadings are repetitive and, in some cases, prolix, I will summarize their key aspects rather than quoting from them at length.

[3] In 2004, the Band retained Westmar Consultants Ltd, (now amalgamated into WorleyParsons Canada Ltd., both of which I will refer to as "Westmar") to provide professional engineering services. Westmar designed the docking facility for the terminal and managed the construction of the docking structures. The Band alleges that the docking facility was negligently designed in four respects:

a) The pontoon is not robust enough for the local wave and current conditions, resulting in the need to deactivate it and store it in the winter, and making it vulnerable to damage from unusual storm events. All of these factors increase maintenance and repair costs, and shorten the life of the pontoon;

b) The pontoon is not large enough to accommodate a dual gangway loading configuration, which is favoured for larger cruise ships;

c) The design ought to have included an additional berthing dolphin, the absence of which results in some cruise ship captains considering moorage at the terminal to be unsafe; and

d) The configuration of the docking facilities makes docking larger ships at the terminal technically difficult.

[4] For the most part, Westmar denies that the design was deficient in any respect though it admits that the pontoon, as originally designed and constructed, was not sufficiently robust for local wave and current conditions.

[5] The Band alleges that as a result of the negligent design of the docking facility, the terminal is unattractive to cruise ship operators. It says that no large cruise ships have docked there and that the operational reputation of the terminal in the cruise ship industry has suffered.

[6] The Band claims that as a result of the negligent design, it has lost profits that it should have been able to realize, including income from terminal operations and income from other Band ventures that would have benefitted from the ships and passengers using the terminal facility.

[7] The Band also claims damages in respect of the increased costs incurred to modify, maintain, and repair the docking facility, including damages for the diminished anticipated lifespan of the pontoon.

[8] Finally, it claims that by relying on Westmar's representations that its design was an adequate one, it forewent opportunities to obtain further government and other funding that could have allowed it to build a more suitable facility.

[9] Westmar denies that the terminal's inability to attract large cruise ships is a result of deficiencies in the docking facility design. Rather, it says that, for a variety of reasons, Campbell River is simply a poor site for a cruise ship terminal. Strong currents, tides and high winds make Discovery Passage difficult to navigate. Campbell River's geographical location does not make it a convenient port of call on

an Alaska cruise itinerary. Further, the onshore attractions in Campbell River are said to be insufficient to lure cruise companies to make it a port of call.

[10] Westmar also says that the Band's failure to adequately promote and market the cruise ship terminal and Campbell River has contributed to the absence of large cruise ships.

[11] These various factors are raised in the statement of defence. Although the parties have described them as being raised as "defences" to the action, they are, for the most part, merely factors that might assist in assessing the economic potential of the cruise ship terminal, and therefore in assessing the degree to which any deficiencies in the dock design contribute to the terminal's disappointing economic performance and prospects.

[12] The defendant brought third party proceedings against David Nairn & Associates (which I will refer to as "DNA"), a firm retained by the Band to provide certain professional services. It seeks contribution and indemnity from DNA on the basis that DNA was negligent (or breached contractual obligations to the plaintiff) in failing to do each of the following:

a) Evaluate the suitability and acceptability of Campbell River as a port of call for large cruise ships;
b) Determine whether a First Nations themed cruise ship portal would benefit the Band economically;
c) Secure funding from governments and funding agencies for the terminal; and
d) Identify and promote potential cultural tourism opportunities.

The Application to Strike the Third Party Notice

[13] DNA applied to strike the third party notice. The chambers judge granted the application. She found that all of the allegations made against DNA in the third party notice were allegations that Westmar was entitled to make directly against the Band in defending the action. There was therefore no need to bring a third party notice for contribution or indemnity.

[14] In *McNaughton v. Baker* (1988) 25 B.C.L.R. (2d) 17 (C.A.), a case decided under the former Rules of Court, McLachlin J.A. (as she then was) discussed the bases on which third party notices can be struck at 21-22:

> When is it appropriate that a third party notice be struck out? First, it can be struck out on the basis that the claim does not fall within one of the categories listed under [the predecessor of Supreme Court Civil Rule 3-5(1)], for example, that it is neither a claim for contribution or indemnity nor connected with the original action. That ground is not applicable here; the claim is for contribution and indemnity and is intimately related to the original action.
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> Second, a third party notice can be struck out on the same basis that a statement of claim may be struck out under [the predecessor of Supreme Court Civil Rule 9-5(1)] - that it discloses no reasonable cause of action, or is frivolous and vexatious, may prejudice or embarrass the hearing of the appeal, or is otherwise an abuse of the process of the court.

[15] The basic framework discussed in *McNaughton v. Baker* has been carried through to the current *Supreme Court Civil Rules*. Those Rules contain two provisions allowing an application to strike out a third party claim – Rule 3-5(8), which simply allows for applications to strike third party notices, and Rule 9-5(1)(a), which allows the court to strike out any pleading (including a third party notice) that discloses no reasonable claim.

[16] The third party notice in the case before us, like the one in *McNaughton v. Baker*, claims contribution and indemnity. On its face, it falls within Supreme Court Civil Rule 3-5(1)(a):

> 3-5(1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
>
> > (a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action.

[17] As the claim comes within the scope of Rule 3-5(1), the question on this application to strike (whether under Rule 3-5(8) or Rule 9-5(1)(a)) was whether the third party notice disclosed a reasonable claim. It is now well-established that the test to be applied is that of whether it is "plain and obvious" that the claim cannot

succeed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.

Is there Indivisible Loss or Damage?

[18] The right to contribution and indemnity in this case is alleged to arise under s. 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333:

> 4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
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> (2) [I]f 2 or more persons are found at fault
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> > (a) they are jointly and severally liable to the person suffering the damage or loss, and
> >
> > (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

[19] In order for s. 4 to apply, two or more persons must be responsible for causing an *indivisible* loss to a plaintiff. Where two or more persons cause *distinct* injuries or losses to a plaintiff, each person is liable to the plaintiff only in respect of the loss that that person caused (see *Athey v. Leonati*, [1996] 3 S.C.R. 458). Where distinct damages or losses arise, then, no right to contribution or indemnity arises under the *Negligence Act*.

[20] The first question in the case before us, therefore, is whether the losses or damages that are alleged to have been caused by the third party are indivisible from the losses said to have been caused by the defendant.

[21] In my view, the main losses said to have been caused by Westmar and by DNA are distinct rather than indivisible. DNA is said to have caused loss primarily as a result of its failure to advise the Band that Campbell River was not a suitable place for a cruise ship terminal. If that claim were made out, DNA would be responsible to the plaintiff for economic losses occasioned as a result of locating the terminal in an inappropriate location.

[22] The claim against the defendant is for a different loss. It pre-supposes that the terminal was to be constructed in Campbell River, and alleges that the Band has lost revenue due to the negligent design of the docking facility. Thus, the claim against the defendant is only for the difference between revenues that could have been achieved *in Campbell River* if the docking facility had been properly designed, and the revenues that are now being realized.

[23] As the main claim against the defendant is for damages that are distinct from the damages alleged to have been contributed to by the third party, there is no basis for a contribution or indemnity claim under s. 4 of the *Negligence Act*. It is plain and obvious that such a claim has no prospect of success.

[24] Most of the other damages that the plaintiff alleges were caused by the defendant are equally distinct from the damages allegedly caused by DNA. DNA is not alleged to have in any way contributed to losses suffered as a result of modifications, maintenance or repair costs to the docking facility.

[25] The claim that Westmar's representations that its design was an adequate one led to the Band foregoing opportunities to obtain funding that would have allowed it to build a more suitable facility is also a claim for damages that are distinct from any of the damages alleged to have been occasioned by the negligence of DNA.

[26] There is, however, a single aspect of this case where it might be argued that in some sense the defendant and DNA share responsibility for indivisible damages. The plaintiff alleges that the deficiencies in the docking facility have resulted in damage to the terminal's reputation within the cruise ship industry. To the extent that DNA has taken on responsibility for promoting the terminal to the cruise ship industry, it might be argued that it has a duty to attempt to rehabilitate the terminal's reputation. In essence, it might be said that DNA had a duty to mitigate the damages allegedly caused by Westmar. We must consider, therefore, whether there is any prospect of a third party claim directed at the duty to mitigate succeeding.

Is the Alleged Negligence Attributable to the Plaintiff?

[27] As a general rule, a third party action will not be available where the duties upon which it is based belong primarily to the plaintiff. In *Adams v. Thompson, Berwick, Pratt & Partners* (1987), 15 B.C.L.R. (2d) 51 (C.A.) at 54 and-55, McLachlin J.A. (as she then was) speaking for a unanimous court, described the principle in these terms:

> The authorities establish that where a plaintiff contracts with two separate parties, such as a contractor and an engineer, and later sues one of them, the one sued cannot claim contribution or indemnity from the other on the ground that the other failed to properly execute his duties, where the substance of the third party claim can be raised against the plaintiff by way of defence.
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> …
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> [A] third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defence. Where the only negligence alleged against the third party is attributable to the plaintiff, there is no need for third party proceedings since the defendant has his full remedy against the plaintiff. On the other hand, where the pleadings and the alleged facts raise the possibility of a claim against the third party for which the plaintiff may not be responsible, the third party claim should be allowed to stand.

[28] These principles have recently been reiterated by this Court in *Laider Holdings Ltd. v. Lindt & Sprungli (Canada) Ltd.*, 2012 BCCA 22.

[29] In *Adams*, the court went on to describe situations in which a third party claim is unavailable. The first is the situation where the proposed third party was acting as the plaintiff's agent. At 56, it said:

> Generally speaking, all acts falling within the scope of an agency between the proposed third party and the plaintiff fall into the category of acts for which the plaintiff is responsible and hence are not the proper subject to third party claims… .

[30] The Chambers judge found that DNA was, at all times, acting as an agent for the plaintiff, and that it was therefore plain and obvious that the third party notice disclosed no reasonable claim. There is much to be said for that position. Virtually all of the allegations against DNA are in respect of actions that it has undertaken (or, arguably should have undertaken) on behalf of the plaintiff. At least in some sense of

the word, they arise out of situations in which DNA has been acting as an "agent" for the plaintiff.

[31] On this appeal, the defendant takes issue with the agency analysis. It says that certain formal indicia of agency are necessary for the principle in *Adams* to apply.

[32] While the argument is an interesting one, I do not find it necessary to deal with it on this appeal. As I have indicated, virtually all of the matters raised by the third party notice against DNA relate to damages or losses that are distinct from those allegedly caused by the defendant. No claim for contribution or indemnity can be brought in respect of those matters. The only exception is a possible claim against DNA for its failure to mitigate the damages allegedly caused by Westmar.

[33] I need not address the agency issue in respect of that claim, because it is clear that the duty to mitigate falls on the plaintiff, and that a defendant cannot issue a third party notice in respect of the duty to mitigate. Again, the issue was discussed in *Adams* at 56:

> Another situation where a third party claim cannot be raised because the obligation is essentially that of the plaintiff is where the claim is one that the proposed third party should have advised or assisted the plaintiff to mitigate his damages. In that situation, like the situation of agency, third party proceedings are redundant because the defendant can obtain any relief to which he may be entitled by reduction of the plaintiff's claim if he makes out the defence of failure to mitigate.

[34] In the result, I am satisfied that the chambers judge made no error in striking out the third party notice. I would dismiss the appeal.

[35] **A. MACKENZIE J.A.**: I agree.

[36] **STROMBERG-STEIN J.A.**: I agree.

[37] **GROBERMAN J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Groberman"