

No. C871178

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)

)

NESBITT THOMSON DEACON INC.)

REASONS FOR JUDGMENT

formerly known as Nesbitt)

Thomson Bongard, Inc.)

)

PLAINTIFF)

)

OF THE HONOURABLE

)

AND:)

)

THEODORE ROBERT EVERETT)

)

MR. JUSTICE SCARTH

DEFENDANT)

)

AND:)

)

NATIONAL TRUST COMPANY LIMITED)

EDWARD F. KELLOF and)

JILLIAN D. EWEN)

)

THIRD PARTIES)

Paul R. Miller, Esq.

Counsel for plaintiff

Frank G. Potts, Esq.

Counsel for defendant

Paul T. McGivern, Esq.

Counsel for third

parties National Trust

Company Limited and

Edward F. Kellof

No one appearing for
the third party,
Jillian D. Ewen

Date and place of hearing:

March 7, 1990 at
Vancouver, B.C.

Although stated in the notice of motion to be an application on behalf of the third parties National Trust Company Limited and Edward F. Kellof "for an Order pursuant to Rule 18(a) (sic) of the Rules of Court that the Defendant's claim against the Third Parties be dismissed with costs", the application before me is in essence an application to set aside the third party notice issued by the defendant Theodore Robert Everett against National Trust and Kellof on the ground it discloses no cause of action.

On the hearing of the motion the defendant Everett was given short leave to amend his third party notice conditionally upon obtaining the consent of the third party, Jillian D. Ewen, who did not appear and was not represented by counsel on the hearing. The application to set aside the third party notice was argued on the basis of the amended pleading.

The factual background to the application before me may be derived from the reasons for judgment of Mr. Justice Locke, delivered June 13, 1989, on the appeal by the plaintiff Nesbitt Thomson Deacon Inc. from an order dismissing the action herein on the ground the claim was barred by reason of issue estoppel. Mr. Justice Locke's reasons are reported in 37 B.C.L.R. (2d) 341, at p. 345 et seq., and begin with the following recital of the facts:

This appeal concerns the application of the doctrine of res judicata in the case of a consent order. In action No. C840112 commenced 4th January 1984 Jillian Ewan ("Ewan"), the owner of an investment portfolio, sued stockbrokers Nesbitt Thomson Bongard Inc. ("Nesbitt"), its servant/agent T.R. Everett, trustee of the portfolio, National Trust Company Limited ("National Trust") and its servant E.F. Kellof, alleging negligence and breach of fiduciary duty in changing and "churning" the investments in the portfolio.

All the defendants defended. Counsel appeared for Nesbitt, National Trust and Everett. After one day's evidence on trial before Madam Justice Southin all of the defendants except Everett reached a compromise, returned to the courtroom and the plaintiff's counsel said:

I would like to advise the court that counsel... have agreed...that the matter be dismissed without costs so far as National Trust and Nesbitt Thomson and the individual Kellof are concerned. Further, the plaintiff did discontinue against Mr. Everett without costs...

Everett's counsel joined in approving the order which read:

THIS COURT ORDERS that the herein action be and the same is hereby dismissed as against the Defendants, National Trust Company Limited, Nesbitt Thomson Bongard Inc. and Edward Kellof, by consent, without costs to any party.

The compromise included a payment of \$92,500. which with Nesbitt's agreed legal costs of \$15,342.44 totalled \$107,842.44. Nesbitt claimed against its insurer, the Guarantee Trust Company of North America in Ontario. The insurer declined to pay on the ground that its fidelity policy insured only against fraud or dishonesty and none had been demonstrated. On 23rd September 1986 Nesbitt sued in Ontario alleging that it had received a legal opinion that Everett's conduct

was dishonest and it was therefore within the policy. The insurer defended and issued a third party notice to Everett. We were advised that this action is now in abeyance, pending the result of the present proceedings.

On 6th March 1987 Nesbitt commenced this action against Everett and it alleged in almost identical terms the acts and defaults originally alleged by Ewan against itself. It claimed under its contract of employment with its implied indemnity that in the course of administering Ewan's account Everett had engaged upon a scheme which was not only negligent but fraudulent, and it pleaded that:

...before the completion of the trial the plaintiff settled the aforesaid action on its own behalf and on behalf of the defendant Everett pursuant to which the plaintiff paid \$92,500.00 to Jillian Ewan...

Everett defended and issued a third party notice to National Trust, Kellof and Ewan.

On 1st December 1987 Everett brought an application under R. 18A, the Rules of Court, and under R.19(24) (abuse of process), alleging that a public record showed Ewan's claim against Nesbitt had been dismissed and this conclusively established that Nesbitt had never been under any liability to Ewan and correspondingly could not claim to be indemnified from Everett; the matter was concluded by an estoppel of record...

The Judge before whom that application was heard held that because a judgment of the Court had dismissed the claim of Ewan against Nesbitt Thomson, there was no basis for a claim by Nesbitt Thomson for indemnity or contribution from its employee Everett, and accordingly dismissed the action.

On the appeal by Nesbitt Thomson from that order, the Court of Appeal allowed the appeal and set aside the order dismissing the action. The Court held the doctrines of res judicata and issue estoppel did not bar Nesbitt Thomson's action against Everett to recover from him the \$107,842.44 paid to settle the claim of Ewan.

Everett, as indicated above, has issued third party proceedings against National Trust, Kellof and Ewan. National Trust and Kellof now seek to have the third party notice to them set aside.

Everett's claim against National Trust and Kellof for contribution and indemnity is founded in negligence, and is based on the assertions National Trust and Kellof were: (a) in breach of a duty of care owed by them to Ewan; (b) in breach of a duty of care owed by them to the plaintiff Nesbitt Thomson and the defendant Everett.

Everett's claim for contribution and indemnity, and the arguments relating to the application to strike out his third party claim, must be considered in the context of certain facts alleged in the pleadings and contained in the affidavits filed in connection with this motion. These facts are as follows:

Prior to 1981, Mrs. Ewan had an investment management account with National Trust, in connection with which National Trust agreed to provide certain investment advice to her. In 1981 she changed that account to what is called an "Agency Account", under which there was no contractual obligation on the part of National Trust to provide investment advice to Mrs. Ewan. At the same time, Mrs. Ewan appointed National Trust as her agent to administer her trust funds, a responsibility undertaken by its employee, Mr. Edward F. Kellof, in June 1982.

During the summer of that year, Mrs. Ewan notified National Trust and Mr. Kellof that Mr. Everett, then an employee of the plaintiff Nesbitt Thomson, would be acting as her stockbroker. Under date of August 6, 1982, she

authorized National Trust and Kellof to act on Everett's instructions "regarding investment decisions in my Agency account and to process all contracts received from Nesbitt Thomson", and agreed "to take full responsibility for any investment decisions made by Mr. Ted Everett."

The allegation of the plaintiff Nesbitt Thomson in this action, and of Mrs. Ewen, the plaintiff in the earlier action (No. C840112), is that Mr. Everett, in the course of administering Mrs. Ewen's account with Nesbitt Thomson, embarked upon a fraudulent and negligent scheme as the result of which the account substantially decreased in value. This led to Mrs. Ewen's suit against Nesbitt Thomson and its employee Everett, and National Trust and its employee, Kellof. That action, as indicated above, was settled upon payment by Nesbitt Thomson of \$92,500.00 to Mrs. Ewen.

Nesbitt Thomson now sues Everett to recover the money paid on the settlement.

Everett's claim against National Trust and Kellof for contribution and indemnity is set out in his amended statement of defence and amended third party notice, and is based upon the assertion that those third parties were negligent and in breach of their fiduciary duty to Mrs. Ewen, on the one hand, and to Nesbitt Thomson and Everett, on the other hand.

Paragraphs 11 and 12 of Everett's amended statement of defence are as follows:

11. Further, or in the alternative, the Defendant Everett says that if Ewen suffered a loss, which is not admitted but denied, such loss was caused solely by the negligence and breach of fiduciary duty of National and/or Kellof, particulars of which negligence are as follows:

(a) failing to exercise due diligence in the management of Ewen's trust account and failing to use ordinary care, skill, and prudence in the conduct of Ewen's financial affairs;

(b) failing to consult regularly with Ewen as to the nature and investments authorized by National and/or Kellof on behalf of Ewen;

(c) authorizing all such trades as were made by Everett in Ewen's stock portfolio without ensuring that Ewen had a full knowledge and appreciation of the nature of such transactions;

(d) failing to advise Ewen in a timely manner of all reports, accounts and statements rendered by Everett to National and/or Kellof as to the nature, volume and frequency of changes in Ewen's stock portfolio;

(e) failing to properly convey Ewen's instructions to the Defendant, Everett and failing to advise Everett in a timely fashion or at all that Ewen did not consent to the transaction aforesaid.

12. Further, or in the alternative, the Defendant Everett says that if Ewen suffered a loss, which is not admitted but denied, and if such loss was not occasioned solely by the breach of fiduciary duty and negligence of National and/or Kellof, which is not conceded, then the Defendant Everett repeats and relies upon the allegations of fact in paragraph 11(a) through (e) herein, and says that Ewen's loss was occasioned in part by the said negligence and/or breach of fiduciary duty by National and/or Kellof and the Defendant Everett pleads and relies upon the provisions of the Negligence Act, R.S.B.C. and amendments thereto;

Paragraphs 3, 4 and 5 of Everett's amended third party notice are as follows:

3. The Defendant, Everett, says that if the Third Parties, National and Kellof, were not the agents of Ewan or alternatively lacked ostensible authority to act for Ewan, then the said Third Parties owed a duty of care to the Plaintiff herein, Nesbitt Thomson Deacon Inc. (hereafter "Nesbitt") and to the Defendant, Everett.

4. The Defendant, Everett says that National and Kellof were in breach of such duty of care and were negligent in that they:

a.failed to advise Everett that they had no authority to authorize share purchases and transfers;

b.failed to report all transactions in the Ewan account to Ewan on a regular basis or at all;

c.failed to advise Everett that they had not reported all such transactions to Ewan;

d.failed to advise Everett that Ewan had not authorized all or any such transactions.

5. The Defendant, Everett, says that by reason of the aforesaid matters he is entitled to contribution and/or indemnity from the Third Parties, National and Kellof.

On behalf of National Trust and Kellof it is submitted that there are only two possible bases upon which Everett can successfully claim indemnity from them:

(a)a claim for indemnity under the Negligence Act, R.S.B.C. 1979, c. 298;

(b)a claim in tort for breach of duty of care owed by National Trust and/or Kellof to Everett.

Everett, it is argued, cannot succeed on either basis and, accordingly, the third party notice should be struck out.

With respect to the claim for indemnity under the Negligence Act, it is said only two sections of that Act are relevant to the issue here: s.1, which applies to the situation where the plaintiff is partially at fault, and s.4, which applies to the situation where the plaintiff is not at fault but suffers damage or loss as the result of the fault of two or more persons.

These sections read as follows:

1. Where by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault, except that

(a)if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

(b)nothing in this section shall operate so as to render a person liable for damage or loss to which his fault has not contributed.

4. Where damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault, and except as provided in section 5 where 2 or more persons are found at fault they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of a contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

It is argued that s.1 applies to the situation here because the person who initially suffered the damage - Mrs. Ewen - was responsible for any acts of negligence committed by National Trust or Kellof and was therefore "partially at fault". This is so, it is said, because National Trust and Kellof were at all times acting as Mrs. Ewen's agent in their dealings with Everett and, consequently, their acts of negligence must be attributed to their principal, Mrs. Ewen. As stated in Adams et al v. Thompson, Berwick, Pratt & Partners (1987), 15 B.C.L.R. (2d) 51 (C.A.), at p. 56 (per McLachlin J.A. per curiam):

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 (sic: "of") third party claims.

It is argued that the relief sought by Everett is for contribution and indemnity, and, under s.1 of the Negligence Act, a claim for contribution and indemnity is precluded. See Adams, supra, at p. 56:

Under Supreme Court R. 22, a third party claim may be brought for "contribution or indemnity". That remedy is available only where s.4 of the Negligence Act is applicable. It is not available where the claim is for fault for which the plaintiff is responsible.

National Trust and Kellof next submit s.4 of the Negligence Act is not available to Everett in the circumstances here because Ewen, in settling her action against National Trust and Kellof, pursuant to which an order dismissing the action as against them (and Nesbitt Thomson) was made by the Court, debarred herself from recovering any funds from Nesbitt Thomson with respect to the alleged fault of National Trust or Kellof. Accordingly, it is argued, the amount paid by Nesbitt Thomson to Mrs. Ewen by way of settlement represented moneys paid with respect to her loss or damage caused solely by the fault of Nesbitt Thomson or, perhaps more accurately, the alleged fault of Everett for which Nesbitt Thomson was vicariously liable, and not with respect to loss or damage to which the fault of National Trust or Kellof contributed. In this situation, it is submitted, no claim by Nesbitt Thomson against National Trust or Kellof for contribution to the amount paid by Nesbitt Thomson to Mrs. Ewen by way of damages for the loss suffered by Ewen could lie under s.4 of the Negligence Act. (Vide WestCoast Transmission Company Limited v. Interprovincial Steel and Pipe Corporation Ltd. et al (1985), 60 B.C.L.R. 368 (S.C.); Sylte et al v. Jackson Bros. Logging Co. (1988) 27 B.C.L.R. (2d) 357 (S.C.)). Nor could a claim for contribution under s.4 be made by Everett, it is contended, because his position in the present action brought against him by Nesbitt Thomson, insofar as his claim against the third parties is concerned, cannot be better than it was in the earlier action brought against him by Mrs. Ewen. Thus, it is submitted, s.4 of the Negligence Act cannot avail Mr. Everett.

On behalf of Mr. Everett it is submitted this action differs from the original action by Mrs. Ewen because here Nesbitt Thomson is plaintiff. This, it is said, distinguishes Westcoast Transmission and the other cases relied upon by National Trust and Kellof as authority for the proposition that where the liability of each defendant to the plaintiff is several and not joint, each defendant is liable only to the extent he is personally at fault and therefore cannot claim contribution from another defendant.

Moreover, it is argued, the fact Mrs. Ewen settled her claim against National Trust and Kellof should not debar Everett from seeking contribution from them in a separate action brought against him by Nesbitt Thomson, particularly where an issue is raised as to whether National Trust and Kellof were in breach of a duty of care owed to Nesbitt Thomson and Everett, as a result of which breach Mrs. Ewen suffered the loss in respect of which Nesbitt Thomson paid the settlement proceeds to her.

It is submitted on behalf of Mr. Everett that unless the Court concludes Mrs. Ewen accepted responsibility for all acts done by National Trust and Kellof, which it should not do on the basis of the material presently before the Court, there exists the possibility that National Trust and Kellof did owe an independent obligation to Nesbitt Thomson and Everett, and that Mrs. Ewen was not responsible for their breaches of duty of care by virtue of the Agency Agreement. As stated by McLachlin J.A. in Adams, supra, at p. 56:

...it must be recognized that a person acting as agent to the plaintiff may undertake duties toward co-contractors and others outside the scope of his agency. To put it another way, the plaintiff's agent may, as a consequence of his relations with other contractors on the project, assume duties toward persons other than the plaintiff, for breach of which the plaintiff would not be vicariously liable.

It is argued that here Everett alleges a duty lay upon Kellof to inform him that he, Kellof, and National Trust, were no longer giving Mrs. Ewen advice with respect to her investments.

Kellof's failure to do so led Everett to believe the transactions he entered into on Mrs. Ewen's behalf were being approved by National Trust, Kellof and Mrs. Ewen, when, in fact, no action, including stopping the transactions, was taken by National Trust or Kellof with respect to Everett's reports on the transactions other than to pay the broker's account from the moneys held for Mrs. Ewen. At bottom, Everett blames Kellof's breach of duty to him for the loss suffered by Mrs. Ewen.

In deciding whether to set aside a third party notice the Court must determine whether there is a possibility of success or not. As stated by McLachlin J. in Westcoast Transmission, supra, at p. 376:

...any claim which can be construed as having the smallest possibility of success must be allowed to proceed to trial. On the other hand, parties should not be compelled to defend claims which have no hope of success on the established authorities.

This reflects the Court's concern that a defendant ought, on the one hand, to have his 'day in Court' insofar as his claim against a third party is concerned, whilst on the other hand, ensuring, so far as possible, that a third party is not put to needless expense in defending a groundless claim against him.

On the application to set aside a third party notice, the Court is not required to decide whether the evidence placed before the Court on the motion supports the defendant's claim. The question is whether, on the assumption all the facts pleaded are true, a cause of action is disclosed: McNaughton v. Baker (1988), 25 B.C.L.R. (2d) 17 (C.A.), at p. 23 (per McLachlin J.A.) per curiam). This is of significance here because Everett, both in his amended statement of defence (paragraph 9) and his examination for discovery (question 389), has acknowledged National Trust acted as Mrs. Ewen's agent. In alleging a breach of duty of care by National Trust and Kellof to him and Nesbitt Thomson, however, Everett argues there is the possibility they acted outside the scope of their agency with Mrs. Ewen and assumed an independent obligation to him and his employer Nesbitt Thomson. The facts pleaded in his amended third party notice raise that issue.

It seems to me plain that the allegations in the third party notice made against National Trust and Kellof and relating to that independent obligation are in essence an assertion that it was the "fault" of National Trust and Kellof which caused or contributed to Mrs. Ewen's loss.

In Cassidy v. Ministry of Health, [1951] 2 K.B. 344 (C.A.), Denning L.J. (as he then was) at p. 363, stated:

I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services.

National Trust and Kellof rely on that statement of principle in support of their submission that "where a defendant is in breach of his obligation to the plaintiff pursuant to his contract with the plaintiff, he cannot claim against another defendant or third party on the ground that that defendant or third party is likewise in breach of his contract with the (plaintiff)."

In my judgment that is not the basis of Everett's third party claim. Notwithstanding the fact Nesbitt Thomson paid the settlement proceeds to Mrs. Ewen only in respect of Everett's alleged breaches of duty, Everett's claim against National Trust and Kellof is in respect of their alleged breaches of duty to him as the result of which he (and Nesbitt Thomson) caused Mrs. Ewen's loss.

To paraphrase the words of McEachern C.J.S.C. (now C.J.B.C.) in Quintette Coal Ltd. v. Bow Valley Resource Services Ltd. (1986), 19 C.L.R. 153 (S.C.B.C.) at p. 171: The defendant Everett may be able to make an arguable case for the existence of a duty of care owed by the third parties National Trust and Kellof to him.

In my judgment Everett has raised the possibility of a claim against the third parties for which Mrs. Ewen may not be responsible. The claims against the third parties should be allowed to stand.

In the result the application to set aside the third party notice is dismissed with costs.

Vancouver, B.C.

August 30, 1990