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Construction Litigation: How a Negligence Claim can Fail if Parties Allocate Risk by Contract

A summary of *Centurion Apartment Properties Limited Partnership v Loco Investments Inc*, 2022 BCSC 2273

Introduction

In settling the terms of a contract, parties often address how liability will be handled in the event of a loss, whether through limitation of liability clauses, indemnity clauses, or otherwise. In some cases, parties may also wish to seek redress outside of the terms of the contract through claims of negligence. As discussed below, however, such a claim may not always be successful.

Centurion Apartment Properties Limited Partnership v Loco Investemnts Inc[1] *("Centurion")*

Facts

The plaintiff, Danbrook Inc., at that time named 1113407 B.C. Ltd. ("**111**"), owned land in Langford, B.C. (the "**Lands**"). 111 was a subsidiary of Loco Investments Inc. ("**Loco**") and held the Lands as bare trustee for Loco's benefit.[2]

DB Services of Victoria Inc. ("**DB Services**") entered into a contract with Sorensen Trilogy Engineering Ltd. ("**Trilogy**") under which Trilogy would provide structural engineering services in connection with the design and construction of a high-rise apartment on the Lands (the "**Trilogy Contract**").[3]

The Trilogy Contract had a provision that restricted Trilogy's liability to loss and damage directly attributable to its negligence, and in the event of a claim, its maximum liability would be limited to the amount of fees paid to Trilogy for its services[4] (the "**Limitation of Liability Clause**"). The Limitation of Liability Clause did not make reference to Trilogy's principals or employees.[5]

Later, 111 entered into a standard form CCDC14 "Design-Build Stipulated Price Contract" with DB Services for the design and construction of the apartment on the Lands (the "**DB Services Contract**"). DB Services was required, under the DB Services Contract, to obtain professional liability insurance.[6]

Once construction was complete, Centurion LP purchased the Lands and the apartment from Loco. Ownership of 111 was transferred to Centurion LP. In the purchase and sale agreement, Loco represented

and warranted that the building would be safe, habitable and ready for occupancy, and it would comply with basic safety standards.[7]

Months later, after some complaints, the regulatory body for engineers in British Columbia, EGBC, determined that the building did not meet certain British Columbia Building Code requirements.[8]

A lawsuit was subsequently filed, in which the court had to determine:

1) whether Trilogy and its principals and employees had a duty of care towards the plaintiffs Centurion LP and Danbrook Inc. (between whom there was no contractual relationship) that could give rise to a claim for the negligent supply of defective building design (the "**Negligence Claim**"); and

2) whether Trilogy and its principals and employees could have their liability limited under the Limitation of Liability Clause.

The Court's Decision on the Negligence Claim

The Negligence Claim was unique in that it was with respect to the negligent supply of defective building design—a "pure economic loss"—but the parties had allocated their risks under various contracts.

The court first reviewed *Winnipeg Condominium Corp No 36 v Bird Construction Co*, [1996] 1 SCR 85, 1996 CanLII 146, ("***Winnipeg Condominium***"), where the Supreme Court of Canada recognized "a new category of recoverability for pure economic loss…. [It] held that a negligent supplier of defective goods or structures in respect of the construction of a building [could be] liable for the expenses incurred by the eventual purchaser of the building (with whom it does not have a contractual relationship) in remedying the defects before any damage or injury occurred. [The court] did so on the basis that duty of care was owed because the defects posed an imminent risk of physical harm to person or property."[9] A duty of care by the defendant towards the plaintiff is a threshold requirement for finding negligence.

The court in *Centurion* then reviewed *1688782 Ontario Inc v Maple Leaf Foods Inc*[10] ("***Maple Leaf***") where the Supreme Court of Canada affirmed[11] and expanded on *Winnipeg Condominium*, emphasizing that sufficient "proximity"—a closeness and directness in the relationship—was required between the parties to establish a duty of care.[12] The court noted that:

1) the "reasonable availability of adequate contractual protection" makes finding a duty of care more difficult,[13] regardless of whether such protections are actually put in place;[14] and

2) where parties have actually implemented contractual protection and allocated risk, courts will be hesitant to interfere with their affairs.[15]

As such, whether a negligence claim for the supply of shoddy goods or structures can be supported requires the consideration of numerous factors; notably, where parties have allocated risk under one or more contract, courts must be cautious in permitting parties to circumvent that contractual allocation by means of a tort claim in negligence.[16]

Returning to the present case, *Centurion*, the court considered how the parties had ordered their relationships by way of contract, and in their view, all the parties had allocated their risk under various terms and conditions in their respective contracts—Danbrook Inc. and DB Services allocated risk under the DB Services Contract (which required DB Services to obtain professional liability insurance), DB Services

and Trilogy allocated risk under the Trilogy Contract, and Centurion LP and Loco allocated risk under a purchase and sale agreement.[17] Additionally, "the plaintiffs had available to them adequate contractual protection within their respective commercial relationships from the risk of loss."[18] The court, therefore, found that any relationship of proximity between the parties was negated by the contractual arrangements in place,[19] and as such, there was no duty of care between any parties.

The Court's Decision on the Limitation of Liability Clause

The court held that the Limitation of Liability Clause in the Trilogy Contract, which limited Trilogy's liability to DB Services to the amount of the fees DB Services paid Trilogy, was enforceable for the benefit of both Trilogy and its principals and employees—there was nothing to indicate unfairness or unconscionability in the contractual relationship,[20] and DB Services would have been aware that Trilogy's services would have been performed by Trilogy's employees and principals.[21]

Conclusion

Where parties have allocated risk of loss in one or more contracts, a court is less likely to find that a duty of care (giving rise to a tort claim in negligence) exists for a purely economic loss such as the supply of defective building designs. Furthermore, a limitation of liability clause that restricts liability of a party to the amount of fees paid to that party can be enforceable as to the party and its employees. Therefore, parties should be careful when allocating risk of loss in their contracts—a tort claim in negligence is not always an alternative to seeking a contractual remedy, particularly when the contract could have addressed the loss. In addition, parties should review limitation of liability clauses carefully to ensure that the amount recoverable in the event of a loss is acceptable.

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Footnotes:

1. 2022 BCSC 2273.
2. See *ibid* at para 8.
3. See *ibid* at para 9.
4. See *ibid* at para 10.
5. See *ibid* at paras 10, 91.
6. See *ibid* at paras 12-16.
7. See *ibid* at para 22.
8. See *ibid* at paras 23-33.
9. *Ibid* at para 55.
10. 2020 SCC 35.
11. See *ibid* at para 45.
12. See *ibid* at paras 59-60.
13. See *ibid* at para 68.
14. See *ibid* at paras 69-70.
15. See *ibid* at para 71.
16. See *ibid* at para 73.
17. See *Centurion*, *supra* note 1 at paras 69-71.
18. *Ibid* at para 72. (emphasis added)
19. See *ibid* at paras 74-75.
20. See *ibid* at para 89.
21. See *ibid* at paras 91-92.

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Kai obtained his Juris Doctor from the Peter A. Allard School of Law at The University of British Columbia and was called to the Bar of British Columbia in May 2022. His law school experience included competing in the 2021 Adam F. Fanaki Competition Law Moot, where he and his moot partner were awarded Best Factum - Appellant, as well as volunteering with Pro Bono Students Canada, for which Kai was co-recipient of the 2021 Honourable Donna J. Martinson Access to Justice Award. Prior to law school, Kai obtained his Bachelor of Applied Science in Mechanical Engineering with Distinction from The University of British Columbia. Thereafter, he spent over three years designing and implementing process improvements for glass fabrication with a focus on laminated glass.

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