CITATION: 2025 NBKB 026

Docket: FC-8-2023

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

671617 NB LTD.

Plaintiff,

-and-

722951 NB INC., and INTACT INSURANCE COMPANY

Defendants.

DECISION

Date of Hearing:	January 16, 2025
Date of Decision:	February 5, 2025
Subject Matter:	**Amendment of Pleadings**
Before:	Justice Terrence J. Morrison
At:	Fredericton, New Brunswick
Appearances:	Michael B. Murphy, K.C. for the Plaintiff, 671617 NB Ltd.
	Emmy M. Chiasson, for the Defendant, 722951 NB Inc.
	Benoit G. Arsenault, for the Defendant, Intact Insurance Company.

DECISION

Morrison, J.

I. INTRODUCTION

[1] On May 11, 2022, a fire occurred at a commercial building located at 546 King Street, Fredericton, New Brunswick. The plaintiff corporation was the owner of the building. The defendant, 722951 NB Inc. ("Brewbakers") was a tenant of the building and operated a restaurant on the premises. The defendant, Intact Insurance Company ("Intact") issued a commercial insurance policy to Brewbakers (the "Policy"). Pursuant to the lease between the plaintiff and Brewbakers, the plaintiff was named as an additional insured on the insurance Policy. The within action arises out of competing claims for the proceeds of the Policy following damage to certain contents and equipment.

[2] The sole shareholder of the corporate plaintiff is Andrew Dawson. Mr. Dawson claims that he has suffered mental distress as a consequence of Intact's handling of the fire loss claim. In particular, Mr. Dawson claims that Intact failed to indemnify the plaintiff in a timely manner and acted in bad faith, resulting in financial losses to Mr. Dawson and accompanying mental distress. Mr. Dawson is seeking damages against Intact for that mental distress.

[3] This matter came before the Court by way of motions and cross-motions between the plaintiff and Intact. The motions raised numerous issues, all of which were resolved save one. The outstanding motion is one brought by the plaintiff, seeking leave to amend its Notice of Action

With Statement of Claim Attached to add Mr. Dawson as a plaintiff, to advance a claim for damages for mental distress against Intact pursuant to Rule 27.10(2)(c).

II. POSITIONS OF THE PARTIES

A. *Mr. Dawson's Position*

[4] Mr. Dawson submits that he has a cause of action in contract against Intact despite the fact that it is the corporate plaintiff, not Mr. Dawson personally, who is a party to the Policy. He submits that damages for mental distress were in the reasonable contemplation of the parties at the time the Policy was issued because "peace of mind" was an object of the policy and it was foreseeable that Mr. Dawson would suffer personally from mental distress upon breach of the Policy as he was the sole director, shareholder and/or operating mind of the corporate plaintiff.

[5] Counsel for Mr. Dawson then relies upon s. 4(1) and 4(3.1) of the *Law Reform Act*, R.S.N.B. 2011 c. 184 ("*LRA*"), to argue that Mr. Dawson personally has a cause of action notwithstanding that he personally is not a party to the Policy. Sections 4(1) and 4(3.1) of the *LRA* provide as follows:

> **Privity of contract**
>
> 4(1) Unless the contract provides otherwise, a person who is not a party to a contract but who is identified by or under the contract as being intended to receive some performance or forbearance under it may enforce that performance or forbearance by a claim for damages or otherwise.
>
> […]

> 4(3.1) For the purposes of subsection (1), a person who is identified by or under a contract as being intended to receive some performance or forbearance under it includes:
>
> > (a) a person who is intended to receive the performance or forbearance only in certain circumstances, if those circumstances occur, and
> >
> > (b) a person who is not named in the contract but is a member of a class of persons intended to receive the performance or forbearance.

[6] Mr. Dawson submits that he is identified by or under the Policy as being the intended beneficiary of the psychological benefit of the Policy, being "peace of mind". Further, that he is a member of a class of persons entitled to receive the benefit or performance of the benefit of the Policy, being the sole director, officer, shareholder and/or operating mind of the corporate plaintiff.

[7] Mr. Dawson's counsel further submits that Intact would not suffer any prejudice which cannot be compensated for by costs or an adjournment. Further, Mr. Dawson submits that the proposed amendment does not raise a claim that would be statute-barred. Mr. Dawson submits that the Court should exercise its discretion in favour of granting leave to the plaintiff to amend its pleadings to add Mr. Dawson as a plaintiff and his claim for damages for mental distress against Intact.

B. *Intact's Position*

[8] Intact opposes the motion to add Mr. Dawson as a plaintiff. For purposes of this motion, Intact takes no issue with whether or not the proposed amendment would be statute-barred

and concedes that there may be a basis for a limitation defence. The evidentiary record on this Motion is not sufficient to determine the issue and it should be left to the trial judge for determination.

[9] The sole basis of Intact's objection is that Mr. Dawson does not have a cause of action against Intact. Intact submits that the alleged breaches in this matter concern breaches of the Policy in dealing with the claim of the corporate plaintiff. Intact submits that the damages alleged by Mr. Dawson would flow from the damage caused to the corporate plaintiff. Mr. Dawson's alleged damages are therefore purely consequential. Intact submits that while harm to a corporation might result in indirect harm to shareholders, this does not give a shareholder a cause of action.

[10] In support of its position, Intact refers to the principles laid down in *Foss v. Harbottle*, (1843), 67 ER 189, and affirmed in *Hercules Managements Ltd. v. Ernst and Young*, 1997 CanLII 345, that only corporations can sue for harm done to them and shareholders have no right of action for such wrongs.

II. ANALYSIS AND DECISION

[11] This is a motion by the plaintiff to amend its Statement of Claim to add Mr. Dawson as a plaintiff and to advance a claim by him for damages for mental distress against Intact for breach of the Policy. At the outset, I wish to point out that the plaintiff did not submit a draft amended pleading, either as an attachment to its Notice of Motion or as an exhibit to the affidavits

filed in support of the Motion. This is the first time in my experience as a judge that the proposed amendment was not put before the Court. In its absence, it is very difficult for the Court to consider the precise nature of the amendment sought and apply the appropriate analysis. Having said that, Intact did not object on the basis that the proposed amendment does not form part of the Record. Accordingly, I will conduct the analysis based on what the plaintiff represents to the Court what the proposed amendment will be.

[12] The rule governing amendment of pleadings is Rule 27.10 of the *Rules of Court*:

> 27.10 **Amendment of Pleadings**
>
> *General Power of Court*
>
> (1) Unless prejudice will result which cannot be compensated for by costs or an adjournment, the court may, at any stage of an action, grant leave to amend any pleading on such terms as may be just and all such amendments shall be made which are necessary for the purpose of determining the real questions in issue.
>
> *When Amendments May Be Made*
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> (2) A party may amend his pleading
>
> (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action,
>
> (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent, or
>
> (c) with leave of the court.
>
> *How Amendments Made*
>
> (3) A party who amends a pleading shall file with the clerk a copy of the amended pleading with the changes therein underlined where possible.
>
> […]

[13] The Court of Appeal has interpreted Rule 27.10 in numerous decisions. The law in this regard was succinctly summarized by Walsh, J in *ALGO Enterprises and NBP Enterprises v. REPAP New Brunswick Inc.*, 2013 NBQB 176, at paras. 18-20:

> 18 A leading case in the modern era is *Triathlon Leasing Inc. v. Juniberry Corp.*, (1995) 1995 CanLII 6225 (NB CA), 157 N.B.R. (2d) 217 (C.A.). The Court of Appeal's interpretation of Rule 27.10 is found in the following passage:
>
> > These are rules of procedure as opposed to the substantive law which defines substantial legal rights and claims. The rules are the vehicle that enables rights to be delivered and claims to be enforced. As such, a Court should interpret and apply the rules to ensure to the greatest extent possible, that there is a determination of the substantive law unless the application of the rules would result in serious prejudice or injustice. Accordingly, amendments to pleadings are generally allowed. ... As a general principle, therefore, the rules of procedure should not be used to prevent the delivery of rights; nor should they be used to preclude the enforcement of claims which are derived from the substantive law. (*Emphasis added*) (at para. 30)
>
> 19 This interpretation reflects that earlier found in *Moore v. State Farm Fire & Casualty Company*:
>
> > While leave to amend is a discretionary right, the practice is for the court to allow adjustments to pleadings whenever it can be done without injustice to the other side and where it is necessary to determine the issues between the parties. Generally speaking, an amendment should be allowed, however, negligent or careless may have been the first omission and however late the proposed amendment, if it can be done without injustice to the other side; and there is no injustice to the other side, if it can be compensated by costs. (*Emphasis added*) ((1982) 1982 CanLII 4194 (NB CA), 42 N.B.R. (2d) 667 (C.A.) at para. 10)
>
> 20 Despite the discretionary expression of Rule 27.10, the extent to which a court is bound to grant an amendment is underscored by Drapeau J.A. (as he then was) in *Ouellet v. Bechard*:
>
> > The test set out in current case law focuses on the prejudice caused to the opposite party... Any amendment to pleadings must be allowed unless it would cause prejudice to the other party that cannot be adequately compensated by costs and, where warranted, by setting appropriate conditions, including adjournment. Even where

> a motion to amend raises a new issue, it must be granted unless it would result in prejudice that cannot be remedied. (*Emphasis added*) ((1999) 1999 CanLII 32419 (NB CA), 210 N.B.R. (2d) 246 (C.A.) at para. 5)

[Emphasis in original]

[14] In certain circumstances, an amendment may be denied. For example, where the amended pleading raises a cause of action that is statute-barred then the proposed amendment should be denied (*Levesque v. New Brunswick*, 2011 NBCA 48, at paras. 3 and 78).

[15] In the present case, the plaintiff argues that the amendment would not create a cause of action which would be barred by the *Limitation of Actions Act*, SNB 2009, c.L-8.5. Intact takes no issue with that assertion. In his oral submissions, Intact's counsel acknowledged that the facts are such that it is arguable that Mr. Dawson's proposed claim is not statute-barred. Intact does not oppose the amendment on the basis of a limitation defence.

[16] Besides the limitation defence, another circumstance where an amendment may not be permitted is if it would "bring into the mix a clearly irrelevant fact or inapplicable statutory provision" (*Enbridge Gas New Brunswick Inc. v. Modern Construction (1983) Ltd.*, 2003 NBCA 78. That is not the case here.

[17] An amendment can also be denied where it will cause prejudice that cannot be compensated for by costs or an adjournment. Again, Intact does not allege that it will be prejudiced if the amendment is permitted.

[18] Intact's opposition to the proposed amendment is based solely on the argument that the amendment does not disclose a reasonable cause of action. In short, Intact's argument is that Mr. Dawson does not have a cause of action because s. 4 of the *LRA* has no application and therefore, as a stranger to the contract, Mr. Dawson cannot enforce his claim against Intact for alleged breaches of the policy. Intact submits that even if Mr. Dawson can bring himself within s. 4 of the *LRA*, he has no cause of action based on the rule in *Foss. v. Harbottle*.

[19] The test for determining whether a pleading discloses a cause of action is that which is applied in motions to strike under Rule 23.01(b). That test is whether it is "plain and obvious" that the pleading does not disclose a reasonable cause of action. The test is articulated in *Sewell v. ING Insurance Company of Canada*, 2007 NBCA 42, at para. 26:

> 26 The principles that inform the determination of a defendant's motion to strike under Rule 23.01(1)(b) are well settled and can be summarized as follows: (1) **the only question for judicial resolution is whether it is plain and obvious that the Statement of Claim fails to disclose the essential elements of a cause of action tenable at law. That conclusion should be reached only in the clearest of cases;** (2) correlatively, absent exceptional circumstances, the court must accept as proved all facts asserted in the Statement of Claim and abstain from looking beyond the pleading itself and any documents referred to therein (see *Hogan v. Doiron et al.* (2001), 243 N.B.R. (2d) 263, [2001] N.B.J. No. 382 (QL), 2001 NBCA 97, para. 38 and *Boisvert v. LeBlanc* (2005), 294 N.B.R. (2d) 325, [2005] N.B.J. No. 561 (QL), 2005 NBCA 115, para. 21). **To expand the exercise beyond those limits would operate to morph the motion under Rule 23.01(1)(b) into an application for summary judgment** under Rule 22, the appropriate vehicle to determine prior to trial whether there is factual merit to a claim; (3) the Statement of Claim is to be read generously to accommodate drafting deficiencies; and (4) where a generous reading of its provisions fails to breath life into a pleading, all suitable amendments should be allowed (see Rule 27.10(1) and *LeDrew et al. v. Conception Bay South (Town)* (2003), 231 Nfld. & P.E.I.R. 61, [2003] N.J. No. 276 (QL), 2003 NLCA 56). Those principles reflect the Legislature's injunction that the Rules be "liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits": Rule 1.03. [Emphasis added]

[20] In *Enbridge Gas New Brunswick Inc. v. Modern Construction (1983) Ltd.*, *supra*, at para. 21, our Court of Appeal stated clearly that the "plain and obvious" test is to be applied where a motion to amend pleadings is challenged on the ground that the proposed amendment does not disclose a cause of action.

[21] In my view, it is at least arguable that Mr. Dawson is the intended beneficiary of the psychological benefit conferred by the Policy such as to bring him within the ambit of s. 4 of the *LRA*. It is therefore not "plain and obvious" that the proposed amendment does not disclose a reasonable cause of action.

[22] I turn now to Intact's argument that the proposed amendment cannot succeed because it offends the rule in *Foss v. Harbottle*. That is, that Mr. Dawson, as a shareholder of the corporate plaintiff, cannot recover for harms done to the corporation. In my view, this issue should not be determined in the context of this motion.

[23] First, this is a motion to amend pleadings. The Court must be careful not to permit a motion to amend to morph into a motion for summary judgment (*Sewell v. ING Insurance Company of Canada*, *supra*, at para. 26; *Advantage Realty Ltd. v. Flewwelling*, 2016 NBQB 63, at para. 13). In my view, to embark on an examination of the circumstances of this case in light of the rule in *Foss v. Harbottle* would do precisely that.

[24] Second, the issue with respect to the rule in *Foss v. Harbottle* was first raised by Intact in its Responding Brief on this Motion. Accordingly, counsel for the plaintiff had no notice of the issue and no meaningful opportunity to either address it at the outset or respond.

[25] In my view, the amendment should be allowed. Intact can then plead in response and raise the issues it raised here with respect to whether there is a reasonable cause of action. The issues would then be properly joined and Intact could, if it wished, then bring a motion for summary judgment. In that way, the matter would be squarely before the Court with a fullsome factual record and detailed arguments from counsel.

[26] The motion is granted. The plaintiff will file and serve its amended Statement of Claim within 30 days. Given that no proposed amendment accompanied the plaintiff's motion to amend, the defendants may bring the matter back to this Court on short notice if they believe the amended pleading goes beyond that which the plaintiff represented in the course of this motion. The plaintiff is entitled to costs, which I fix at $1,500.00. Each of the defendants is responsible for 50% of that amount, or $750.00 each.

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Terrence J. Morrison
Justice of the Court of King's Bench