Court of King's Bench of Alberta

Citation: WBI Home Warranty Ltd v Patel, 2025 ABKB 307

Date: 20250521
Docket: 2401 05527
Registry: Calgary

Between:

WBI Home Warranty Ltd.

Appellant/Plaintiff

- and -

Navinbhai M. Patel,
Harshaben N. Patel and Rekha Tawar

Respondents/Defendants

- and-

Optimistix Management Inc.

Defendant (Not Party to the Appeal)

Reasons for Decision
of the
Honourable Justice Allison G. Kuntz

Introduction

[1] The Appellant, WBI Home Warranty Ltd (**WBI**), appeals the decision of the Honourable Assistant Chief Justice D.B. Higa of the Alberta Court of Justice (the **COJ**) dated April 4, 2024, granting summary dismissal of WBI's claim against the Respondents.

[2] WBI is an agent for Royal & Sun Alliance Insurance Company of Canada (**RSA**), selling home warranty insurance underwritten by RSA to home builders in Alberta in compliance with the *New Home Buyer Protection Act*, SA 2012, c N-3.2 (the ***NHBPA***). WBI, as agent for RSA, sold such insurance to the defendant, Optimistix Management Inc (the **Builder**), pursuant to an agreement dated February 24, 2016 (the **Builder Agreement**).

[3] On the same day, the Builder and the Respondents entered into an Indemnity Agreement dated February 24, 2016 (the **Indemnity Agreement**), pursuant to which they agreed to indemnify RSA from any loss it might suffer as a consequence of the Builder failing to meet its obligations under the Builder Agreement, or the Builder and the Respondents failing to meet their obligations under the Indemnity Agreement.

[4] RSA suffered a loss under the Builder Agreement and WBI, as agent for RSA, sued the Builder and the Respondents for indemnification under the Indemnity Agreement. The Respondents moved for summary judgment arguing that the Indemnity Agreement was a guarantee, and that it was unenforceable because the parties had not complied with section 3 of the *Guarantees Acknowledgment Act*, RSA 2000, c G-11 (the ***GAA***) in its execution.

[5] The COJ agreed with the Respondents. The COJ held that the Respondents' liability under the Indemnity Agreement was contingent upon the Builder defaulting under the Builder Agreement and that because contingent liability is a hallmark of a guarantee, the Indemnity Agreement was a guarantee. Further, the COJ held that the guarantee was unenforceable because the parties had not complied with the *GAA*. WBI appealed, arguing that the COJ erred in fact and law, and that, the Indemnity Agreement was, in fact, and indemnity such that compliance with the *GAA* was unnecessary.

[6] For the reasons that follow, I will allow the appeal.

The Facts

Evidence on the Summary Dismissal Application

[7] The only evidence filed on the summary dismissal application was an affidavit from the Respondent, Navinbhai M. Patel. Mr. Patel attached the Builder Agreement and the Indemnity Agreement as Exhibits to his affidavit and swore that:

a. he was a director of the Builder;

b. he had signed the Builder Agreement in his capacity as a director of the Builder;

c. he signed the Indemnity Agreement in his capacity as a director of the Builder and in his personal capacity;

d. the other two Respondents had signed the Indemnity Agreement in their personal capacities; and

e. none of the Respondents had signed the Indemnity Agreement in accordance with the requirements of the *GAA*.

[8] WBI did not question on the affidavit and conceded that the Indemnity Agreement was not signed in accordance with the *GAA*.

The New Home Buyer Protection Act

[9] Subject to certain exceptions, no person in Alberta can build or sell a new home without home warranty insurance that provides coverage for, among other things, defects in materials and labour: the *NHBPA*, ss 3(1), 3(5), and 3(6).

The Builder Agreement

[10] The Recitals to the Builder Agreement state that the Builder applied to have RSA provide home warranty insurance coverage in respect of new homes constructed by the Builder in Alberta. They state that RSA has the ability to provide such coverage and that in consideration of the terms of the Builder Agreement and the Schedules attached thereto, RSA will provide such coverage. The Indemnity Agreement was attached as a Schedule to the Builder Agreement.

[11] Pursuant to section 4.4 of the Builder Agreement, RSA was required to provide "Owners"[1] of a new home with a "Warranty Policy" upon receiving from the Builder a duly completed and executed "Certificate of Possession Form." Pursuant to section 4.5(a), the Builder agreed to remedy and repair any "Defects" that were subject to a "Claim" by an "Owner" under the Warranty Policy.

[12] Pursuant to section 4.5(d), if the Builder failed to repair a Defect, the Builder would be in default under the Builder Agreement and RSA would be entitled to engage another contractor to repair the Defect. Pursuant to section 4.5(e), RSA was entitled to make the final decision as to whether a complaint constituted a Defect under the Warranty Policy, and if the Builder refused to repair the Defect, RSA could charge back to the Builder any expenses incurred in connection with repairing the Defect.

[13] Section 4.6(a) of the Builder Agreement required the Builder to indemnify and hold RSA harmless pursuant to the terms and conditions of the Indemnity Agreement, which was attached to the Builder Agreement as Schedule A.

[14] Section 4.6(b) stated that RSA may require the Builder's directors, officers, and /or shareholders *et al* to sign the Indemnity Agreement and that the purpose of the indemnity would "be to indemnify and hold RSA harmless in respect of any obligation of the Builder pursuant to the Builder Agreement."

[15] Section 4.6(c) of the Builder Agreement stated the indemnity was limited to indemnification to RSA for any default by the Builder under the Builder Agreement and pursuant to the Warranty Policy, and that in the event of default, RSA would provide the indemnitors with reasonable notice that unless satisfactory repairs were completed in a reasonable time, RSA may take steps to enforce the indemnity.

[16] Section 6.3 of the Builder Agreement is titled Remedies upon Default by Builder. It states that upon occurrence of a default by the Builder under the Builder Agreement, RSA may: (i) de-enroll New Homes enrolled by the Builder that have not reached substantial completion; (ii) suspend the Builder; (iii) terminate the Builder and de-enroll New Homes that have not reached substantial completion; and (iv) take legal proceedings against the Builder. Section 6.3(b) states that RSA's rights under section 6.3 are cumulative and may be exercised together, or independently, of other rights and remedies available to RSA.

[1] Terms not otherwise defined herein have the meaning ascribed in the Builder Agreement.

The Indemnity Agreement

[17] The parties signed the Indemnity Agreement at the same time as they signed the Builder Agreement. In the Indemnity Agreement, the Builder and the Respondents are referred to collectively as the Undersigned.

[18] The Recitals to the Indemnity Agreement state that: (a) the Builder has requested that RSA issue Warranty Policies on its behalf; (b) in order to provide Warranty coverage, RSA requires the Undersigned to each jointly and severally execute the Indemnity Agreement; and (c) each of the Undersigned understand that the Indemnity Agreement is part of the consideration for RSA issuing the Warranty coverage.

[19] Section 1 of the Indemnity Agreement requires the Undersigned to indemnify RSA in circumstances where the Builder fails to remedy or repair a Defect under s 4.5 of the Builder Agreement and RSA is required to engage another contractor to make the repairs. It also requires the Undersigned to indemnify RSA for any material breach of the Builder to perform under the Builder Agreement or by the Undersigned to perform under the Indemnity Agreement. Section 1 reads:

> In the event an Owner makes a Claim against the Builder to remedy or repair a Defect pursuant to section 4.5 of the Builder Agreement (Builder Obligation to Repair) and the Builder fails to remedy or repair such Defect in accordance with the Builder Agreement, and the Warranty Provider is caused to engage another contractor to remedy the Defect, each of Undersigned covenants and agrees to indemnify and hold harmless the Warranty Provider from and against any and all claims, demands, liabilities, damages, losses, costs, charges and expenses of whatever kind or nature, including fees and disbursements of adjusters, consultants and solicitors, which the Warranty Provider shall or may at any time incur in respect of any of the following:
>
> > a. by reason or in consequence of the Builder failing to remedy or repair any Defect pursuant to the Builder Agreement for a Claim made under any Warranty Policy, regardless of whether the Warranty Policies have been issued prior to, simultaneously with or subsequent to the execution of this Agreement; and /or
> >
> > b. by reason or in consequence of any material breach of the Builder to perform any obligation owing by the Builder (i) under any agreement between the Warranty Provider and the Builder; (ii) under any agreement between the Builder and another warranty provider pursuant to which a Warranty Policy was issued and assumed by the Warranty Provider; and
> >
> > c. by reason or in consequence of any material breach of the Undersigned or any of them to observe or perform any of the terms or conditions of this Agreement;
> >
> > ....

[20] Section 4 of the Indemnity Agreement states, in part, that each of the Undersigned agrees that their liability to RSA in respect of the obligations or liabilities of the Builder (in whole or in part), whether under the Indemnity Agreement or otherwise, shall be joint and several.

[21] Section 5 states that RSA is not obliged to exhaust any rights or remedies against the Builder before proceeding to enforce the liabilities or obligations of the indemnitors.

[22] Section 9 states that each of the Undersigned confirms having received independent legal advice and confirms that each have read and understood the terms of the Indemnity Agreement. Each of the Respondents' signatures on the Indemnity Agreement was witnessed.

Decision Under Appeal

[23] The COJ relied on the Alberta Court of Appeal's (the **ABCA**) decision in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.***, 2019 ABCA 49 for the test regarding when summary disposition is appropriate. In accordance with ***Wier-Jones***, the COJ held that the record was sufficient to determine there was no genuine issue for trial and that it was possible to fairly resolve the claim against the Respondents on a summary basis.

[24] I agree with the COJ that this case can be fairly resolved on a summary basis. However, considering the case law upon which I have ultimately based my decision, the record would have benefitted from some additional evidence regarding the surrounding circumstances of the transaction.

[25] Regarding the nature of a guarantee, the COJ relied upon Andrews & Millett, *Law of Guarantees*, 7th Ed (London: Sweet & Maxwell, 2015) at paras 1-004 and 1-005:

> A contract of guarantee, in the true sense, is a contract whereby the surety (or guarantor) promises the creditor to be responsible, in addition to the principal, for the due performance by the principal of his existing or future obligations to the creditor, if the principal fails to perform those obligations.
>
> ...
>
> There is no liability on the guarantor unless and until the principal has failed to perform his obligations...

[26] Regarding the nature of an indemnity, the COJ relied upon the Supreme Court of Canada's (the **SCC**) decision in ***Communities Economic Development Fund v Canadian Pickles Corp***, [1991] 3 SCR 388 [***Canadian Pickles***] at p 413:

> Contracts of guarantee are sometimes distinguished from contracts of indemnity. In a contract of indemnity, the indemnifier assumes a primary obligation to repay the debt and is liable regardless of the liability of the principal debtor...

[27] In that context, the COJ noted the definition of guarantee under section 1 of the *GAA*:

> (a) "guarantee" means a deed or written agreement whereby a person, not being a corporation, enters into an obligation to answer for an act or default or omissions of another...

[28] After reviewing this law, the COJ held: "It is clear that pursuant to [the *GAA*], a guarantee relates to a secondary and contingent liability... ."

[29] The COJ went on to consider the wording in the Indemnity Agreement. The COJ held that the Indemnity Agreement required the Respondents to answer for the Builder's default and not perform its primary obligation. That being the case, the COJ held that the Indemnity Agreement created a contingent liability and was, therefore, a guarantee, and not an indemnity.

[30] The COJ reviewed and distinguished WBI's case law, noting that in each case the indemnitor had assumed a direct responsibility for the liability in question. For example, under a mortgage assumption agreement: ***Standard Trust Company v Steel***, 1991 ABCA 211; under a loan agreement: ***Business Development Bank of Canada v Little***, 2022 ABCA 122; and under an agreement to pay premiums for a surety bond; ***Western Surety Company v Brakop***, 1994 ABCA 143.

[31] Finally, the COJ rejected WBI's argument that in order to be a guarantee, the obligation the guarantor promises to perform must be identical to the obligation that the principal first performs. The COJ found that the definition of guarantee in the *GAA* does not contain such language and instead refers only to "an obligation to answer for an act or default or omission of another..."

Ground of Appeal

[32] The question on appeal is whether the COJ erred in finding that the Indemnity Agreement was a "guarantee" as defined by the *GAA*.

Standard of Review

[33] When the Court is asked to distinguish between an indemnity (or liability) and a guarantee, the standard of review is correctness: ***Business Development Bank of Canada v Little***, 2022 ABCA 122, at para 17; also see ***Baran v Can To Can Inc***, 2021 ABQB 827, at para 5.

The Law

[34] Whether an agreement falls within the definition of "guarantee" in the *GAA* is a question of contract interpretation, and the regular rules of contractual interpretation apply: Kevin McGuinness, ***The Law of Guarantee***, 3rd ed (LexisNexis, 2013) (***Law of Guarantee 2013***) at para 9.1, citing to ***Guarantee Co of North America v Beasse***, [1992] AJ No 323, 7 CLR (2d) 194 at 228 (ABQB) *et al*.

[35] The foundational principles of contractual interpretation were set out by the SCC in ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 [***Sattva***]. In short, the SCC directed that contracts must be read "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": ***Sattva*** at para 47.

[36] The principles in ***Sattva*** apply to the interpretation of individual contracts, and to situations like the one in this case where there are related contracts forming part of an overall transaction which must be considered as a whole: ***Samson Cree Nation v O'Reilly & Associés***, 2014 ABCA 268, para 82.

[37] The COJ correctly relied on the SCC's decision in ***Canadian Pickles*** for the distinction between a guarantee and an indemnity. ***Canadian Pickles*** also speaks to the role of contractual interpretation in distinguishing between a guarantee and an indemnity:

> ... The distinction between contracts of guarantee and of indemnity ought not to be overemphasized. The resolution of a given case will turn on the correct

> interpretation of the contract and of the intention of the parties; attempts to label the contract as one of guarantee or of indemnity may be less than helpful: ***Canadian Pickles***, at pp 413 and 414.

[38] There is other helpful guidance regarding the nature of a guarantee versus an indemnity in the ***Law of Guarantee 2013*** and in Kevin McGuiness, ***The Law of Guarantee*** (Toronto: Carswell, 1986) (***Law of Guarantee 1986***). In particular, McGuiness explains that an obligation to indemnify may resemble a guarantee, and that in certain circumstances an obligation to indemnify can arise upon the default of a principal.

[39] The context for McGuiness' review is the ***Statute of Frauds***, (1677) 29 Car. II. C. 3 [***Statute of Frauds***]. The *Statute of Frauds* is an old English statute requiring certain contracts to be in writing, including contracts of guarantee:

> The *Statute of Frauds* applies in the case of any promise to compensate a person for a loss occasioned by the failure of another person to pay a debt. However, the *Statute* does not apply to a contract which creates a liability in a promisor to indemnify, but which is dependent on the liability of another person...: ***Law of Guarantee 2013***, para 9.23.

[40] The *Statute of Frauds* remains in effect in Alberta, but it has been supplemented by the *GAA*. The *GAA* does not change the nature of a guarantee versus an indemnity, it only mandates a specific process for ensuring that a guarantee is enforceable. Accordingly, McGuiness' review of the nature of a guarantee in the context of the *Statute of Frauds* applies to situations where the *GAA* applies.

[41] At paragraphs 9.22 to 9.23 of the ***Law of Guarantee 2013***, McGuinness explains (citations omitted):

> 9.22 Conceptually, therefore, there is clear distinction between indemnities and guarantees: the former relate to protection against loss or liability; the latter relate to protection against the default in performance of another person. However, this distinction is far from airtight, since a loss may arise because of a default in performance by a third party.
>
> 9.23 ... At the extremes of the spectrum, the distinction between indemnities and guarantees is clear but there are many cases in which the distinction is not sharp. Although these two classes of agreement are often distinguished on the basis of whether the obligation assumed is primary or secondary in nature, that is not the only consideration, because an obligation may be secondary, yet may still be in the nature of an indemnity rather than a guarantee....Where one induces another to enter into a transaction by a promise to indemnify that person against liabilities that may arise out of that transaction, that promise is not a guarantee...

[42] At paragraph 11.6 of the ***Law of Guarantee 1986***, McGuiness explains that where indemnities relate to the default of a third party (i.e. the principal), they are guarantees if the promisor is not connected to the transaction, but are indemnities if the indemnitor is connected to the transaction:

> 11.6 ... In the case of indemnities that do relate to the default in performance of a third party, the major distinction between a guarantee and such a right of indemnity is that, in the case of a guarantee, the promisor has no connection with

> the transaction, except through his promise to pay the loss. If the promisor is not unconnected to the transaction but is involved in it through some larger transaction (and therefore stands to derive some benefit from it), then the contract is one of indemnity...

[43] In drawing these conclusions, McGuiness considered a number of English decisions. For example, at paragraph 11.6 of the ***Law of Guarantee 1986***, McGuiness cites to ***Sutton & Co v Grey***, [1894] 1 QB 285 [***Sutton & Co***] at 287—88, for the principle that where the promisor is connected to the transaction and therefore stands to derive some benefit from it, the contract is one of indemnity. This Honourable Court has relied on ***Sutton & Co*** in a number of decisions.

[44] In ***Kamitomo v Pasula***, [1983] AJ No 703 (ABQB) [***Kamitomo***], this Honourable Court considered whether an oral promise to pay was an indemnity or an unenforceable guarantee for failure to comply with the *Statute of Frauds*.

[45] The plaintiffs in ***Kamitomo*** where the registered owners of certain lands which were subject to a lease between them and the Pasula defendants. The plaintiffs leased the lands to the Pasula defendants on the premise that they would be operating a Macleods' dealership on the property. The terms of the lease were negotiated by Macleods. The Court found that Macleods had made representations to both parties that it would indemnify them for any losses under the lease. The Pasulas defaulted under the lease and the plaintiffs sued to recover the loss from the Pasulas and Macleods. The Pasulas also sought indemnification from Macleods.

[46] The Pasulas argued that the representations made by Macleods created a binding promise which became a collateral contract when the Pasulas relied on it in executing the lease. The Court agreed and cited to the principle of collateral contract laid out in ***J Evans & Son (Portsmouth) Ltd v Andrew Merzario Ltd***, [1976] 2 ALL E R 930 (CAO) at 933:

> Where a person gives a promise, or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold that as binding: ***Kamitomo***, paras 27 and 39.

[47] The Court went on to consider whether the promise Macleods made to the plaintiffs was a promise to answer for the debt of another, and if it was, whether it was unenforceable because it was not in writing as required by the ***Statute of Frauds***. The Court considered the following authorities:

> ***Thomas v Cook***, (1828), 8 B&C 727, where the defendant had made an oral promise to assume debts of a dissolved partnership and the plaintiff agreed to enter into a bond of indemnity to secure payment of those debts. The plaintiff sought to enforce the oral promise. The Court held: This was not a promise to answer for the debt, default or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing...: ***Kamitomo***, paras 44-45;
>
> ***Guild & Co v Conrod***, [1894] 2 QB 855 [***Guild & Co***], where the Court held: In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes a default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified

> against the liability independent of whether a third person makes default or not...: ***Kamitomo***, para 47; and
>
> collectively ***Guild & Co***, ***Beattie v Dinnick*** (1895), 27 OR 285 and ***Harburg India Rubber Comb Company v Martin***, [1902] 1 KB 778 for the rules to apply in determining whether the ***Statute of Frauds*** applies:
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> - A promise made to a person who is a creditor or is about to become a creditor to pay the debt due or to become due from another to the creditor is a guarantee, whether the promise to pay is conditional or unconditional.
> - A promise made to one who is not a creditor that if he incurs liability, the promisor will indemnify him against it, is an indemnity which does not fall within the statute.
> - If the object of an agreement between the plaintiff and the defendant is to induce the plaintiff to assume a liability which does not then exist and is being assumed as a consequence of the agreement, then a promise of the defendant made incidentally thereto to pay the debt of a third person is an indemnity which does not fall within the statute: ***Kamitomo***, para 49.

[48] In addition to the holdings in these decisions, the Court in ***Kamitomo*** considered the "interest" test and the "object test". The interest test was described in ***Sutton & Co*** as follows:

> There the test given is, whether the defendant is interested in the transaction, either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, and [the *Statute of Frauds*] does not apply: ***Kamitomo***, para 54.

[49] The Court in ***Kamitomo*** held that the interest test goes to the object of the contract, and it described the object test as follows: If the object of the agreement between the defendant and the plaintiff is to accrue a benefit to the defendant, then the incidental promise of the defendant made for the purpose of attaining that object to pay the debt of a third person is an indemnity which does not fall within the *Statute of Frauds*: ***Kamitomo***, para 58.

[50] After considering the interest and the object tests, the Court held that Macleods had an interest in the object of the lease because it stood to profit from the Pasulas operating one of its dealerships on the plaintiffs' lands. The Court held that Macleods' promise was incidental to the lease, and that it was, therefore, an indemnity and not a guarantee.

[51] The decision in ***Sutton & Co*** was also considered by this Court in ***Johnston-Stewart v Bernard*** (1998), 236 AR 65 [***Johnston-Stewart***]. In ***Johnston-Stewart***, the plaintiff and the defendant were shareholders in a food company. The company was having cash flow problems and the plaintiff and the defendant agreed that the company could draw down on the plaintiff's personal line of credit. The plaintiff alleged that he and the defendant each agreed to be

personally liable for half of the indebtedness incurred by the company. The defendant argued that his promise was a promise to answer for the default of another and was unenforceable for failure to comply with the *GAA*. The Court agreed that the defendant had promised to answer for the default of another, but did not agree that the promise was unenforceable.

[52] In deciding that the defendant's promise was an enforceable indemnity, the Court relied on the decisions of Master Quinn in ***Bassie v Melnychuk et al***, 1993), 144 AR 288 [***Bassie***] and Bielby J. in ***Bryan & Co v Enico Construction Ltd et al***, (1994), 158 AR 341 [***Bryan & Co***].

[53] In ***Bassie***, the plaintiff and the three individual defendants were shareholders in a company. The plaintiff borrowed money for the company and alleged that the defendants had agreed to indemnify him for the loan if the company did not repay the funds. Master Quinn cited to Anson's ***Law of Contract*** (24th Ed.) at p 78:

> ...there are two exceptional situations where a contract of guarantee was held to fall outside the Statute, even though it was a promise to answer for the debt or default of another. The first of those is where the guarantee was merely incidental to a larger contract and not the sole object of the parties to that transaction: ***Johnston-Stewart***, para 7.

[54] In ***Bryan & Co***, a defendant promised to be personally liable for legal fees incurred on behalf of a corporate defendant if the law firm continued to work on its behalf. The defendant argued that his promise was a guarantee and that it was unenforceable for failure to comply with the *GAA*. The Court disagreed and in reliance on ***Sutton & Co*** and ***Kamitomo***, held that the promise was an enforceable indemnity because, among other reasons, the plaintiff incurred a liability that it would not have done but for the defendant's promise, the defendant stood to derive some benefit from the legal work, and the object of the agreement was to have the law firm keep working on behalf of the company.

[55] In ***Johnston-Stewart***, the Court concluded that like in ***Bassie*** and ***Bryan & Co***, the defendants had an interest in the company obtaining funds to enable it to carry on operations, and the defendants were clearly connected with the loan from the plaintiff to the company. The Court held that the object of the agreement between the plaintiff and the defendants was to induce the plaintiff to assume a liability which did not then exist, and which was being assumed as a consequence of the defendants' agreement to indemnify. The Court held that the defendants' promise was made "incidentally thereto to pay the debt of a third person", and that it was, therefore, an indemnity.

Analysis

[56] As previously stated, the distinction between contracts of indemnity and of guarantee is not always clear and should not be overemphasized. Whether a contract is a guarantee, or an indemnity will depend on the correct interpretation of the contract, including the surrounding circumstances and the intention of the parties: ***Canadian Pickles***, pp 413 to 414.

Surrounding Circumstances

[57] It is clear from the *NHBPA* and the Recitals to the agreements that the Builder needed home warranty insurance if it wanted to build and sell new homes in Alberta. RSA was authorized to sell such insurance in Alberta. The Builder asked RSA to provide it with insurance.

RSA agreed, subject to the Builder and the Respondents agreeing to indemnify it for any loss it might suffer as a result.

[58] Mr. Patel was a director of the Builder. Mr. Patel signed the Builder Agreement on behalf of the Builder. Mr. Patel signed the Indemnity Agreement on behalf of the Builder and in his personal capacity. Given the Builder Agreement states that RSA may require the Builder's "directors, officers and / or shareholders..." to sign the Indemnity Agreement, it is fair to conclude that the other two Respondents were, like Mr. Patel, directors, officers and /or shareholders of the Builder.

[59] As directors, officers, and /or shareholders of the Builder, each of the Respondents stood to benefit from the Builder being able to secure home warranty insurance so that it could conduct business in Alberta.

[60] The surrounding circumstances in this case reflect the scenarios described in McGuiness, and the facts and decision in ***Kamitomo***, ***Sutton & Co***, ***Johnston-Stewart***, ***Bassie***, and ***Bryan & Co***, among others, where an indemnity was confirmed.

[61] The object of the transaction was the Builder Agreement. The Builder and the Respondents needed RSA to enter into the Builder Agreement so that the Builder could build and sell new homes in compliance with the *NHBPA*. The Respondents stood to gain from the Builder Agreement because it was necessary to keep their company, the Builder, in business. The Respondents induced RSA to enter into the Builder Agreement and assume a potential liability to Owners by promising to indemnify RSA under the Indemnity Agreement. In accordance with the principles of law and case law I have reviewed, these facts describe an indemnity.

The Agreements

[62] I also find that the obligations under the Builder Agreement are separate and distinct from those under the Indemnity Agreement.

[63] The Builder Agreement requires the Builder to remedy or repair Defects that are subject to a valid Claim by an Owner under a Warranty Policy. The Warranty Policy is between the Owner and RSA. If the Builder fails to make a required repair under the Builder Agreement, the Builder is in default and RSA steps in to facilitate the repair. RSA answers for the Builder's default because it owes an obligation to the Owner under the Warranty Policy. RSA takes on the risk that the *NHBPA* was meant to address, namely, Owners being left without recourse against a builder.

[64] In my view, this structure is inconsistent with the idea that the Indemnity Agreement is a guarantee. The Builder Agreement creates it own set of obligations between the Builder and RSA in response to legislation that requires Owners to be protected. The Respondents did not agree to answer for the Builder's default in that context and could not because it would mean the Owner was not insured as required by the *NHBPA*.

[65] What the Respondents agreed to was a separate and distinct obligation, and that was to indemnify RSA for costs it might incur as a result of taking on the risk under the Warranty Policy, namely the costs of repairing a defect. I appreciate that RSA would not incur costs but for the Builder's default, however, in the overall context of the Builder Agreement that is not enough for me to find that the Respondents guaranteed the Builder's performance under the Builder Agreement. The failure to repair is the default, and the costs arising from that is a separate event in respect of which the Respondents agreed to indemnify RSA.

[66] The definition of an indemnity as stated in ***Argo Caribbean Group Ltd v Lewis***, [1976] 2 Lloyd's Rep. 289 (CA) [***Argo***] and applied in ***Canadian General Insurance Co v Dube Ready-Mix***, [1984] NBJ 50, 52 NBR (2d) 66 at para 8 applies here: there are only two parties to an indemnity and if it is a promise to indemnify a debtor it is owed to the debtor only, and not because he has failed to perform his obligation, but because he has performed it.

[67] The two parties to the indemnity in this case are RSA and the Undersigned, which includes the Respondents. The Respondents owe a debt to RSA, not because RSA failed to fulfill its obligation, but because it fulfilled its obligations. That is an indemnity.

[68] In reaching my conclusion, I have also specifically considered the following terms of the Builder Agreement and the Indemnity Agreement.

[69] Section 4.6 of the Builder Agreement lays out clearly that the Respondents may be called to indemnify RSA in exchange for RSA providing insurance to the Builder. The indemnification clause defines the purpose of the indemnity broadly as being to "hold RSA harmless in respect of any obligation of the Builder pursuant to this Builder Agreement", which is not the language of a guarantee.

[70] The Builder Agreement states that RSA's remedies against the Builder are cumulative and may be exercised together or independently of other rights and remedies available to RSA (s. 6.3). In other words, RSA may seek recovery from the Respondents under the Indemnity Agreement without first exhausting its rights against the Builder under the Builder Agreement. This language reflects joint and several liability under an indemnity, and not a guarantee.

[71] Finally, the Indemnity Agreement reflects joint and several liability in the recitals and mandates it in section 4. The Indemnity Agreement also makes it clear that RSA is not obliged to pursue the Builder for costs prior to pursuing the Respondents. These terms are characteristic of an indemnity.

[72] I appreciate that the Indemnity Agreement also refers to the Builder's default under the Builder Agreement, but I agree with RSA that is just the background to the obligation to indemnify and for the reasons I have already explained I find that the obligations under the Builder Agreement are separate and distinct from the Respondents obligation to indemnify RSA for the cost of repairs under the Indemnity Agreement.

Conclusion

[73] The appeal is allowed.

[74] If the parties are unable to agree on costs, they have leave to submit cost submissions not exceeding three pages within 30 days of this decision.

Heard on the 4th day of October, 2024.
Dated at the City of Calgary, Alberta this 21st day of May, 2025.

Allison G. Kuntz
J.C.K.B.A.

Appearances:

Trent Kulchar
for the Appellant

R. Bryan Kidder
for the Respondents