

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Grant Thornton LLP v. Interior Equities Corp.*,
2025 BCCA 299

Date: 20250827
Docket: CA50270

Between:

Grant Thornton LLP

Appellant/
Respondent on Cross Appeal
(Third Party)

And

Interior Equities Corp. and KF Capital Ltd.

Respondents/
Respondents on Cross Appeal
(Plaintiffs)

And

Cadence At The Lake Management Ltd.

Respondent/
Respondent on Cross Appeal
(Defendant)

And

Denise McMullen and Burnet, Duckworth & Palmer LLP

Respondents/
Appellants on Cross Appeal
(Third Parties)

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated November 4, 2024 (*Interior Equities Corp. v. Cadence At The Lake Management Ltd.*, 2024 BCSC 2012, Kelowna Docket S133590).

Counsel for the Appellant, Grant Thornton
LLP: S.R. Andersen

Counsel for the Respondent, Cadence At
The Lake Management Ltd.: C.T. Hart

Counsel for the Respondents, Denise
McMullen, and Burnet, Duckworth & Palmer
LLP: J. Parker
C. Chen

Place and Date of Hearing: Vancouver, British Columbia
April 11, 2025

Place and Date of Judgment, with Written
Reasons to follow: Vancouver, British Columbia
April 11, 2025

Place and Date of Written Reasons: Vancouver, British Columbia
August 27, 2025

Written Reasons of the Court:

Summary:

Appeal from an order dismissing an application to strike a third party notice. Two limited partners in a real estate development sued the general partner, alleging that the general partner amended their partnership agreement in a manner that reduced the limited partners' entitlement to certain cash distributions. The general partner initiated third-party proceedings against the lawyers that drafted the partnership agreement and the amendment. The lawyers issued a third party notice against the appellant, the general partner's financial advisor, seeking contribution and indemnity under the Negligence Act. The appellant applied to strike the lawyer's third party notice against it as unnecessary, contending the lawyers could plead any wrong by the accountant as a defence against the general partner directly. The judge dismissed the application to strike.

Held: Appeal dismissed. The judge made no error in finding that it is not plain and obvious that the general partner had an obligation to ensure that the accountants achieved the objects of the partnership; nor did he err in finding that it is not plain and obvious that there is an agency relationship between the appellant and the general partner. Whether a professional is in an agency relationship with a client turns on whether the professional has the actual or apparent authority to bind the client so as to affect their legal position.

Reasons for Judgment of the Court:

[1] At the end of the hearing, we dismissed the appeal with reasons to follow. These are our reasons for that decision.

Background

[2] In proceedings in the court below, the appellant Grant Thornton LLP applied to strike a third party notice that had been issued against it by the respondent law firm, Burnet, Duckworth & Palmer LLP, and one of the firm's lawyers, the respondent Denise McMullen (collectively, the "Lawyers"). The chambers judge dismissed the application. Grant Thornton appeals.

[3] We note parenthetically that the Lawyers brought a cross-appeal seeking certain declarations in the event that Grant Thornton's appeal were to be allowed. In light of the dismissal of the appeal, the cross-appeal was not heard.

[4] In order to explain the basis for our decision, it is, as is so often the case when dealing with third party notices, necessary to do a fairly deep dive into the

circumstances of the case. In so doing, we draw heavily on the chambers judge's helpful summary of the underlying case.

[5] The key combatants in the underlying litigation are the general partner and the limited partners in a real estate development in Lake Country, which lies to the north of Kelowna, British Columbia. Two of the limited partners, Interior Equities Corp. and KF Capital Ltd., sued the general partner, Cadence at the Lake Management Ltd. ("CLM"), claiming that CLM took certain steps that caused prejudice to their position.

[6] The limited partnership agreement entered into in 2007 (the "Partnership Agreement") gave CLM some ability to make amendments to the Partnership Agreement if, in the opinion of its counsel, such an amendment was necessary to correct or clarify any defects or inconsistencies. In or about 2019, CLM caused certain amendments to be made to the Partnership Agreement (the "2019 Amendment"). The limited partners claim the 2019 Amendment had the effect of reducing their entitlements to certain cash distributions in breach of the parties' agreement.

[7] The Lawyers drafted both the Partnership Agreement and the 2019 Amendment. Faced with legal proceedings brought by the limited partners, CLM initiated third-party proceedings against the Lawyers. CLM disputes the limited partners' claims, but says that if those claims succeed, the Lawyers bear responsibility for failing to prepare the Partnership Agreement or the 2019 Amendment, or both, in accordance with CLM's instructions and the Lawyers' professional obligations.

[8] The relevant portions of CLM's third party notice against the Lawyers is set out here:

28. As a professional lawyer and law firm, the Third Parties, and each of them, owed a duty of care to CLM as a client to exercise reasonable care, skill, diligence and competency as a lawyer and law firm in providing legal services to CLM.

29. Further, or in the alternative, it was an implied term of CLM's contract with the Third Parties, that the Third Parties, and each of them, would exercise all reasonable care, skill, diligence, and competency as a lawyer and law firm while providing legal services to the Claiming Party.
30. CLM has allocated the Net Income and cash distributions under the Partnership Agreement based on CLM's belief that the Partnership Agreement reflected the Net Income Understanding and the Cash Distribution Intentions.
- ...
32. If the Plaintiffs' allegations are correct (i.e. that the allocation of Net Income and the allocation of cash distributions are not in accordance with the Partnership Agreement), then the Lawyer (or, alternatively, another lawyer at the Law Firm) failed to draft the Partnership Agreement in accordance with the Cash Distribution intentions and in accordance with the Net Income Understanding.

[Emphasis added.]

[9] Grant Thornton were CLM's accountants and financial advisors. They provided advice to CLM in relation to both the Partnership Agreement and the 2019 Amendment. Faced with CLM's claims against them, the Lawyers issued their own third party notice to Grant Thornton, seeking contribution and indemnity pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 33 [*Negligence Act*]. The Lawyers' claim against Grant Thornton is set out in their response to CLM's third party notice:

7. At all material times, Grant Thornton LLP ("Grant Thornton") acted as financial advisor and accountant for CLM and the principals of CLM in respect of the Lakes Partnership and previous limited partnerships involved in real estate development. At the time of the drafting of the Partnership Agreement, the Lawyers and CLM relied upon Grant Thornton to take all necessary steps required for its engagement with CLM, including confirming that the financial projections for the Lakes Partnership and the terms of the draft Partnership Agreement reflected the intentions of CLM with respect to cash distributions and income allocation. Grant Thornton was provided with the draft Partnership Agreement prior to its execution and did not request any changes to the cash distribution and income allocation provisions of the agreement or otherwise advise the Lawyers or CLM that there were discrepancies between the draft Partnership Agreement and the intentions of CLM in respect of cash distribution and income allocation.
- ...
9. In reply to paragraphs 24-25 of the Notice, Grant Thornton advised CLM in or around 2019 that the terms of the Partnership Agreement did not reflect the intentions of CLM in respect of cash distribution and

income allocation and recommended amendments to the Partnership Agreement. Based on Grant Thornton’s advice, CLM instructed the Lawyers to draft the amendments. Grant Thornton reviewed the draft amendments prior to their execution and approved them.

...

12. In further answer to the whole of the Notice, if CLM suffered loss or damage as alleged, all of which is specifically denied, then such loss or damage was caused or contributed by the fault of CLM and Grant Thornton, and each of them, and the Lawyers plead and rely upon the provisions of the *Negligence Act*, RSBC 1996, c 333 and amendments thereto (the “*Negligence Act*”).

[Emphasis added.]

The Hearing Below

[10] Grant Thornton applied under Rule 9-5(1)(a) and (b), and Rule 3-5(8) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, seeking to strike out the Lawyers’ third party notice as unnecessary:

3-5 (8) At any time, on application, the court may set aside a third party notice.

...

9-5(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,

[11] Grant Thornton argued that the third party notice against it was unnecessary because any wrong the Lawyers seek to attribute to it can be pleaded as a defence against CLM directly, relying on *Adams v. Thompson, Berwick, Pratt & Partners*, 39 D.L.R. (4th) 314, 1987 CanLII 2590 (B.C.C.A.) [*Adams*]; and *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2012 BCCA 22 [*Laidar*].

[12] Although CLM is the defendant in the underlying action, for the purposes of applying the governing authorities, CLM should be viewed as the plaintiff, the third-party Lawyers as the defendant, and Grant Thornton as the party against whom a claim for contribution and indemnity pursuant to s. 4 of *Negligence Act* is being asserted under a third party notice.

[13] The judge began by quoting from Madam Justice Newbury's decision in *Laidar*:

[1] This appeal involves a rule that straddles the line between substantive law – the law of contribution between tortfeasors, codified in the *Negligence Act* – and procedure – the court rules governing third party notices. The rule has been considered several times and is well settled in this province. It was described by McLachlin J.A. (as she then was) on behalf of this court in *Adams v. Thompson, Berwick, Pratt & Partners* (1987) 15 B.C.L.R. (2d) 51 as follows:

It thus may be stated with confidence, in my view, that 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.

(I will refer to this as the first branch of the *Adams* rule.) The Court continued:

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. [At 55.]

(I will refer to this as the second branch of the rule, although it might also be considered an exception to the first branch.)

[Emphasis added.]

[14] The judge next quoted para. 10 of *Laidar*, where this Court explained the distinction between claims under sections 1 and 4 of the *Negligence Act*, saying:

[10] ...[McLachlin, J.A.] explained the distinction between claims for contribution and indemnity between co-defendants under s. 4 of the *Negligence Act*, and the reduction of damages recoverable by a plaintiff who has contributed to his own loss, under s. 1:

The same result arises if one views the matter on the basis of the *Negligence Act* and the *Supreme Court Rules*. Where the third party claim can be raised by way of defence, the substance of the matter is that the plaintiff is at fault. That being the case, s. 1 of the *Negligence Act*, which deals with the situation where fault is alleged, against the plaintiff, is applicable. Section 1 makes no provision for contribution or indemnity between co-defendants. By contrast, s. 4 of the *Negligence Act*, which deals with cases where the plaintiff is not at fault, provides for contribution and indemnity between those found at fault in causing the plaintiff's loss.

Under Supreme Court Rule 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. [At 55-6; emphasis added in the *Laidar* decision.]

[Emphasis in original.]

[15] The judge noted that *Laidar* and *Adams* identify two situations in which a plaintiff will be responsible for the conduct of a proposed third party, making a third party claim unnecessary: (1) where the proposed third party's conduct falls within the scope of an agency relationship between the third party and the plaintiff, and (2) where the claim is that the third party should have advised or assisted the plaintiff to mitigate his damages: at para. 24, quoting *Laidar* at para. 11 and *Adams* at 56.

[16] The judge rejected Grant Thornton's argument that the first situation applied, observing that in many circumstances professionals providing advice to clients will not be acting in an agency relationship:

[36] Certainly, there are numerous instances when a lawyer or accountant will be acting as their client's agent, such as when they are involved in communications with third parties. However, if a client seeks and obtains advice from a lawyer with regard to a particular situation or circumstance, it does not necessarily follow that the lawyer ever assumes the role of agent for the client. The same would also apply to a client obtaining advice from an accountant.

...

[38] The essence of agency is the binding of the principal by the agent. It is difficult to see how Grant Thornton could be considered to have bound CLM in its dealings with the Lawyers any more so than the Lawyers could bind CLM in their dealings with Grant Thornton. It is also difficult to see how Grant Thornton could have bound CLM by providing advice to CLM in its capacity as CLM's financial advisor and accountant. The professionals were all members of the same orchestra, each contributing their own unique skills or sounds towards a single harmonious production.

[Emphasis added].

[17] The judge accordingly concluded that it was not plain and obvious that the Lawyers could raise their claims concerning Grant Thornton as a defence and dismissed the application to strike.

On Appeal

[18] The appellant contends the chambers judge erred in allowing the third party notice to stand by:

- a) assessing the claim based on facts that were not pleaded in the third party notice; and
- b) failing to recognize that the Lawyers' claims against Grant Thornton were obligations belonging to CLM, which the Lawyers can raise directly against CLM, thereby making a third party notice unnecessary.

[19] The appellant submits that the judge's decision is reviewable on a correctness standard given that they relied on Rule 9-5(1)(a)—no reasonable claim or defence—which is a question of law. However, the primary thrust of the appeal rests on whether the third party notice was unnecessary, an application rooted in Rule 9-5(1)(b). That involves a discretionary decision reviewable on a deferential standard, unless it is clear that insufficient weight has been given to relevant considerations, the decision involves a palpable and overriding error, or it appears that the decision may result in injustice: *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at paras. 14–15.

[20] To the extent that the appellant raises an extricable question of law (such as whether the judge misstated the law of agency), that question is reviewable on the standard of correctness.

[21] We turn now to the first ground of appeal.

1. Considering facts that were not pleaded in the claim

[22] The chambers judge described the Lawyers' claim as one founded on CLM's retention of both the Lawyers and Grant Thornton to work "collectively, and for a common purpose" to prepare the financial distribution and allocation provisions in issue in the underlying litigation: at paras. 37–39. The appellant submits the judge erred in reading the pleadings in this way, contending he did so based on his own

understanding of how lawyers and accountants work together, rather than on the pleading itself. Grant Thornton says that, properly construed, the Lawyers pleaded only that Grant Thornton failed to protect CLM's interests; the pleadings do not state that there was a collaborative relationship between Grant Thornton and the Lawyers, and do not allege that Grant Thornton owed a duty directly to the Lawyers. The Lawyers agree they do not plead a duty owed by Grant Thornton to them. But they say they have in their pleading relied on the collaborative nature of their work with Grant Thornton in advising CLM.

[23] We see no error in the judge's characterization of the pleaded allegations as encompassing a claim that Grant Thornton and the Lawyers were working together as members of the "same orchestra" to ensure that the draft documents reflected CLM's instructions. That characterization was supported by the evidence and submissions before him, which demonstrated:

- a) CLM, Grant Thornton, and the Lawyers had worked collaboratively dating back to the mid-1990s to develop a structure for a number of limited partnerships engaged in real estate development, including the Cadence Project;
- b) Grant Thornton had requested that the key contractual clause in dispute be added to the Partnership Agreement; and
- c) Grant Thornton advised the Lawyers in 2019 that the clause needed to be amended.

The pleadings contain the following claims, which support the judge's characterization:

- a) In regard to the Partnership Agreement, the Lawyers allege that Grant Thornton's engagement with CLM required it to "[confirm] that the final projections for the [limited partnership] and the terms of the draft Partnership Agreement reflected the intentions of CLM with respect to cash distributions

and income allocation” and say further that both CLM and the Lawyers relied upon Grant Thornton for this confirmation;

b) Grant Thornton provided its confirmation when it “did not request any changes to the cash distribution and income allocation provisions of the agreement” prior to execution; and

c) Grant Thornton recommended the amendment to CLM, and Grant Thornton approved the language of the 2019 Amendment before it was executed.

[24] Pleadings are to be read generously; the court is to consider the pleadings as they stand and as they might reasonably be amended: *Jiashan County Agri-Commerce Joint Small-Sum Co. Ltd. v. Cao*, 2025 BCCA 141 at para. 24. We see no error in the judge’s reading of the Lawyers’ pleadings and would not accede to this ground of appeal.

2. The Lawyers rely on obligations belonging to CLM that can be raised as a defence

[25] The appellant relied on two arguments in support of its submission that the Lawyers’ claims could be raised as a defence against CLM directly, making a third party notice unnecessary.

[26] First, they say that a client has an obligation to ensure that its instructions are followed when it engages professional advisors. Thus, if Grant Thornton did not follow CLM’s instructions in structuring the financial distribution and allocation for the limited partnership, that fault lies at the feet of CLM. Accordingly, they say the Lawyers can simply claim that CLM was contributorily negligent, relying on s. 1 of the *Negligence Act* to avoid any damages against them attributable to Grant Thornton’s errors or omissions.

[27] In our view this argument can be dealt with summarily. On an application to strike a pleading, it must be plain and obvious that the claim against the third party can be made against the plaintiff directly. We cannot agree that there is an

established principle of law that a client has in all cases an obligation to ensure its instructions have been followed when it engages professional advisors. Indeed, that strikes us as an extraordinary proposition, particularly in the context of this case. Clients engage lawyers and accountants because they have expertise that the client does not possess. It is difficult to understand how, having relied on professional advisors to structure a deal and then to document it, it could fall to the client to ensure that the professionals have in fact achieved what they were asked to effect.

[28] The appellant’s second and primary argument on this ground of appeal is that the judge erred in his understanding of agency, and in particular failed to recognize that professional advisors such as lawyers and accountants are always agents for their clients who, as principals, are liable for their agents’ conduct. Applying that principle to the present case, Grant Thornton says that CLM is responsible for any errors and omissions of Grant Thornton, and the Lawyers can raise those complaints as a defence against CLM without the need for a third party notice.

[29] We cannot agree that the judge erred in his understanding of agency. The word “agent” is often used in common parlance to describe someone who acts on behalf of another. However, as the judge recognized, agency in law is a relationship that exists between two persons when one can represent the other in such a way as to be able to affect the principal’s legal position “in respect of strangers to the relationship by the making of contracts or the disposition of property”: Professor Fridman, *The Law of Agency*, (5th ed. 1983); *R. v. Kelly*, [1992] 2 S.C.R. 170. Broadly speaking, there are two ways in which an agency relationship may be created: first, by the grant of actual authority and second, through the grant of apparent authority. However, in either case, the foundational element of a true principal and agent relationship is the power of the agent to affect the legal position of the principal by entering into contracts with third parties that bind the principal: Fridman’s *Law of Agency* (4th ed.) at 8, 9, 12–14; *Mac’s Convenience Stores Inc. v. Basyal*, 2025 BCCA 284 at para. 28.

[30] The judge had before him an application to strike. He had to be satisfied that it was plain and obvious there was an agency relationship between Grant Thornton and CLM, making a third party notice unnecessary. On the facts before him, he determined that he could not make that finding. We see no error in that assessment.

[31] We note, as did the judge below, that there are circumstances in which a lawyer or an accountant can be in an agency relationship with a client. Whether such a relationship exists requires a contextual analysis. The appellant relied on a number of cases in which professional advisors were found to be agents of the plaintiff, thereby making a third party notice unnecessary. However, each case will turn on its own facts. For that reason, we do not intend to address all of the cases raised by the appellant. We will address *Cowichan Tribes v. Canada (Attorney General)*, 2007 BCSC 1915 [*Cowichan*], however, because that is the case on which Grant Thornton principally relied.

[32] In *Cowichan*, Canada filed a third party notice against the lawyer who had acted for the defendant Duncan Mall. The lawyer applied to strike it out. The judge granted the application, concluding there was “a unity of interest” between the lawyer and his client, since the lawyer, in providing his client with legal advice, was acting as its agent. The judge accordingly found that the lawyer’s negligence could be raised as a defence by Canada and it was not therefore the proper subject of a third party notice: *Cowichan* at para. 50.

[33] In arriving at this conclusion, the court in *Cowichan* relied on the following passage from *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, 2 S.C.R. 177 at para. 133 [*Strother*]:

A retainer between lawyer and client is essentially an agency agreement, albeit a special one attracting a duty of loyalty. The lawyer commits to doing certain things for the client. It is to this commitment that the fiduciary duty of loyalty attaches.

However, this passage must be read in context. *Strother* concerned the extent to which a lawyer had breached his fiduciary duty to his client by putting himself in a conflict of interest when he took shares in the client’s competitor. The passage

quoted describes the retainer as an “agency agreement”, a term that suggests the use of “agency” in the colloquial sense of one person acting on behalf of another. The case was not concerned with whether a lawyer providing advice is in an agency relationship with the client so as to make the client vicariously liable for the acts of the lawyer. The passages in *Strother* preceding the lines quoted by the judge in *Cowichan* demonstrate this point:

132 When does a conflict of interest arise? This is the question at the heart of Strother’s appeals. The answer is that a conflict arises when a lawyer puts himself or herself in a position of having irreconcilable duties or interests: *Hilton v. Barker Booth and Eastwood*, [2005] 1 All E.R. 651 (H.L.); *R. v. Neil*, [2002] 3 S.C.R. 631, 2002 SCC 70. It follows that the first question where conflict of interest is alleged is what duty the lawyer owed to the client alleging the conflict. The second question is whether the lawyer owed a duty to another client, or held a personal interest, that conflicted with the first duty.

133 Turning to the first question, how is the fiduciary duty owed to a particular client to be determined? In a case such as this, one looks to the contract between the parties. As La Forest J. put it in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 407:

... many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations; see *Johnson v. Birkett* (1910), 21 O.L.R. 319 (H.C.); *McLeod v. Sweezey*, [1944] S.C.R.111; P. D. Finn, “Contract and the Fiduciary Principle” (1989), 12 *U.N.S.W.L.J.* 76.

A retainer between lawyer and client is essentially an agency agreement, albeit a special one attracting a duty of loyalty. The lawyer commits to doing certain things for the client. It is to this commitment that the fiduciary duty of loyalty attaches.

[Emphasis added.]

[34] Whether the judge in *Cowichan* was correct to find that an agency relationship existed in the circumstances of that case is not before us. It suffices to say that, to the extent *Cowichan* can be taken to stand for the general principle that a lawyer or other professional is always in an agency relationship with their client, it should not be followed.

[35] In summary, we agree with the judge that whether a professional is acting as an agent for a client will depend on the nature of the retainer and the actual or apparent authority granted to that professional. We also agree that, at a minimum, it

is not plain and obvious on the facts of this case that an agency relationship exists, or that the Lawyers will be able to plead Grant Thornton's faults as a defence to CLM's claims against them. It follows that the judge did not err in refusing to strike the third party notice filed by the Lawyers against Grant Thornton.

Conclusion

[36] It is for these reasons that we dismissed the appeal.

"The Honourable Madam Justice Fenlon"

"The Honourable Justice Dickson"

"The Honourable Madam Justice DeWitt-Van Oosten"