CITATION: *Cowal Chalmers Inc. v. The City of Kitchener*, 2026 ONSC 1486
COURT NO: CV-21-00662861-00A1
DATE: 20260311

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: COWAL CHALMERS INC., Plaintiff

AND:

THE CITY OF KITCHENER, Defendant

AND:

STUART CAMERON MURRAY carrying on business under the name and style of MULLUN LAW FIRM and ELMIRA CHIMIROVA, Third Parties

BEFORE: Schabas J.

COUNSEL: *Stuart Murray*, self-represented

Milena Protich, for the Defendant

HEARD: March 6, 2026

REASONS ON MOTION TO STRIKE

Introduction

[1] The Third Party, Stuart Cameron Murray, carrying on business under the name and style of Mullin Law Firm ("Murray"), has brought a motion to strike out the third party claim brought against him by the defendant, The City of Kitchener ("Kitchener"). Put briefly, Murray submits that the claim for contribution and indemnity against him pertains to negligence also asserted by Kitchener in its statement of defence as contributory negligence against the plaintiff, Chalmers Cowal Inc ("Cowal"), for whom Marray acted on a property acquisition.

[2] Murray relies on the principle, established in *Adams v. Thompson, Berwick, Pratt & Partners* (1987), 1987 CanLII 2590 (BC CA), 39 D.L.R. (4th) 314 (B.C.C.A.) ("*Adams*"), that any negligence pleaded against him is attributable to the plaintiff and the third party claim is thereby barred.

[3] The motion is brought pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*. Murray submits that the pleading discloses no reasonable cause of action. No evidence is admissible on such a motion. However, the burden on the moving party is "a stringent one": *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15. A claim can only be struck

"if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action": *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 at para. 17. The claim must be "read generously": *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683 at para. 30. The facts, as pleaded in the claim, must be accepted as true unless they are "manifestly incapable of being proven": *Imperial Tobacco* at para. 22.

Background

[4] On this motion, it is agreed that the relevant pleadings are those found at Exhibits G, I, J and K of the Fresh as Amended Motion Record.

[5] Murray is the sole shareholder of the plaintiff, which purchased a building in Kitchener in 2015. The Mullin Law Firm, a sole proprietorship operated by Murray, acted for Cowal on the purchase. A lawyer employed by Murray, Elmira Chimirova ("Chimirova"), had carriage of the file. Following the purchase, in 2019, Kitchener issued fire inspection orders which Cowal pleads were based on pre-existing conditions at the time it purchased the property. Cowal remedied some of the deficiencies immediately and others were the subject of references and appeals.

[6] Cowal sold the property in April 2021 and commenced this action against Kitchener in May 2021. Cowal pleads that the inspection orders caused damage and impacted its ability to sell the property. Cowal asserts, among other things, that Kitchener was negligent in failing to require the previous owner to perform the fire safety work.

[7] Kitchener has denied any negligence and, among other defences, pleads that Cowal failed to adequately investigate whether the property complied with all applicable laws, including fire safety requirements, before Cowal purchased it. Kitchener also brought a third-party claim against Murray and Chimirova seeking contribution and indemnity on the ground that they were negligent in failing to conduct appropriate and competent searches of the property and of failing to warn Cowal of the risks of deficiencies when purchasing the property. On May 6, 2025, the third-party action against Chimirova was dismissed on consent of all parties.

Analysis

[8] In *Adams*. McLachlin J.A., as she then was, stated the principle on which Murray relies, at para. 15:

> 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. 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.

[9] The rule was more recently discussed in *Hengeveld v. The Personal Insurance Company*, 2019 ONCA 49. The Court noted that where, as in this case, the defendant has pleaded contributory negligence against a plaintiff, the defendant may not "double dip" against a third party for the same contributory negligence of the plaintiff which, if established, will reduce the defendant's liability to the plaintiff. As the Court of Appeal stated in *Hengeveld* at paras. 22 – 25:

> [22] The contribution and indemnity provisions of the *Negligence Act* must be understood in light of the purpose they serve. As a general rule a wrongdoer who caused or contributed to a plaintiff's injury is liable to compensate that plaintiff in full, even if another wrongdoer caused or contributed to the plaintiff's injury: *Athey v. Leonati,* 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, [1996] S.C.J. No. 102, at para. 22. The contribution and indemnity provisions allow a wrongdoer not solely at fault but at risk of being held liable for 100 per cent of the plaintiff's injury to recover indemnity from another wrongdoer to the extent of the latter's relative degree of fault: *Endean v. St. Joseph's General Hospital,* [2019] O.J. No. 1218, 2019 ONCA 181, at para. 48.
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> [23] However, a plaintiff's own contributory negligence will reduce its claim for damages against a defendant. Section 3 of the *Negligence Act* provides:
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> > 3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.
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> [24] Accordingly, under the *Negligence Act*'s contributory negligence provision, a defendant may raise fault or negligence on the part of the plaintiff that caused or contributed to the plaintiff's [page189] damages as a defence. If successful, the plaintiff's claim against the defendant will be reduced according to the plaintiff's relative degree of fault. Under the *Negligence Act*'s contribution and indemnity provisions, a defendant may raise a third party's fault or negligence that caused or contributed to the plaintiff's damages as a third party claim. If successful, the defendant will remain 100 per cent liable to the plaintiff but may obtain indemnity from the third party according to the third party's relative degree of fault.
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> [25] But a defendant may not double dip. Where the fault or neglect which a defendant argues caused or contributed to the plaintiff's injury is fault or neglect that will reduce the plaintiff's claim, there is no risk that a defendant will have to pay 100 per cent of the plaintiff's loss notwithstanding *that* fault or neglect. The basis for a claim under ss.1, 2 and 5 of the *Negligence Act* -- to allow a wrongdoer to obtain indemnity for a payment to the plaintiff that exceeded the wrongdoer's degree of fault -- does not exist in such circumstances because of the direct reduction of the plaintiff's claim.

[10] However, there are two lines of cases that have emerged from this principle, one of which limits its application. This was well-summarized by Kimmel J. in *Cerieco Canada Corp. v. Mizrahi*, 2024 ONSC 7001at paras. 31 – 37:

> [31] Two lines of case law have emerged, both of which have been recognised as good law; see *Hengeveld*, at paras. 30-35 and 41-44. In the first line of cases, the professionals (typically lawyers) have been found to be acting as agents to the plaintiff, and as such the third party claims have been struck. In the second line of cases, the professionals have been found to be acting in some advisory capacity to the plaintiff but not as their agent, and as such the third party claims have been permitted to continue.
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> [32] Under the first line of cases originating with *Adams v. Thompson, Berwick, Pratt & Partners* (1987), 1987 CanLII 2590 (BC CA), 15 B.C.L.R. (2d) 51 (C.A.), a third-party claim is not available against someone acting as an agent to the plaintiff because the defendant can avoid paying more than their share of the damages by raising a contributory negligence defence against the plaintiff under the *Negligence Act* (in Ontario, s. 3). The key question in this first line of cases is whether the actions of the third party can be attributed to the plaintiff. Where the actions of the third party fall entirely within the scope of an agency relationship between the third party and the plaintiff, they will be attributable to the plaintiff and will not provide a basis for a third-party claim as they can be raised as a defence: see *Hengeveld* at para. 31 citing *Adams* at pp. 55-56. Where the plaintiff takes steps to expressly distance themselves from responsibility for, or the consequences of, the actions of the third party, that could militate against the existence of an agency relationship in this context: see: *Davy Estate v. Egan*, 2009 ONCA 763, 97 O.R. (3d) 401, at para. 23 citing *Macchi S.p.A. v. New Solution Extrusion Inc.*, 2008 ONCA 586, at paras. 1-2 ("*Macchi C.A.*"); *Hengeveld* at paras. 36-37, 42.
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> [33] If the plaintiff is held to be contributorily negligent for the actions of the third-party agent, the defendant can only be held liable for its respective portion of the plaintiff's damages. That leaves nothing for them to seek indemnity in respect of and therefore leaves no cause of action for a third-party claim (under ss. 2 and 5 of the Ontario statute): see *Adams*, at pp. 55-56; *Hengeveld*, at paras. 23-25 and 29-32; *Taylor v. Canada (Attorney General)*, 2009 ONCA 487, 95 O.R. (3d) 561, at para. 20.
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> [34] The second line of cases applies to circumstances where the third party is not alleged to be acting as the plaintiff's agent. In such cases, the third party's negligence is not directly attributable to the plaintiff. Therefore, the door is left open for a defendant to bring a third-party claim against them seeking contribution and indemnity where that has been properly pleaded: see *478649 Ontario Ltd. v. Corcoran* (1994), 1994 CanLII 219 (ON CA), 20 O.R. (3d) 28 (C.A.), at p.

35; *Hengeveld*, at paras. 43-44; see also *Cardar Investments Ltd. v. Thorne Riddell* (1989), 1989 CanLII 4183 (ON SC), 71 OR (2d) 29 (Div. Ct.).

[35] The key question in this second line of cases involving professionals engaged by a plaintiff is whether the third party was providing advice to the plaintiff, as opposed to dealing with others on behalf of the plaintiff. The Court of Appeal distinguished *Corcoran* from *Adams* and *Macchi (C.A.)* on this basis, in *Hengeveld* (at para 44):

> In *Corcoran* the plaintiff retained and received advice from two professionals — its lawyer and its realtor. There was no finding of the type of agency situation described in *Adams*, making the lawyer's allegedly negligent conduct attributable to the plaintiff. There was no suggestion that the lawyer acted on behalf of the plaintiff in dealing with others in a manner analogous to filing a prospectus (as in *Adams*), filing a financing statement (as in *Macchi*), or dealing with Personal Insurance about the preservation of evidence (as in this case). Unlike in *Corcoran*, Personal Insurance here has not pointed to any alleged act of negligence which the Hengevelds could say was, although committed by their lawyers, not their responsibility vis-à-vis Personal Insurance. *Corcoran* was distinguished in *Macchi*, an agency situation case, and it is similarly distinguishable here. [*Emphasis Added*]

[36] There is a nuanced exception in the second line of cases that was recognized in both *Adams* (at p. 57) and *Hengeveld* (at pars. 32, 39-40). Where a lawyer acts in an advisory role, not as an agent involved in the creation of the original loss, but gave negligent advice to the plaintiff with respect to mitigating their loss, the proper course is for the defendant to raise the issue as a defence in the main action. Since it is the plaintiff's obligation to mitigate its loss, a failure to mitigate (even if due to negligent advice from a third party) is still attributable to the plaintiff. In such circumstances, where the lawyer's negligence will be accounted for in the aspects of the defence dealing with the plaintiff's duty to mitigate there is, like in the first line of agency cases, no basis for a third-party claim. If the plaintiff has a claim against the professional for bad advice regarding mitigation, that is a separate matter between them.

[37] In summary, where the fault of a third party will necessarily be imputed to the plaintiff and can be accounted for in the apportionment of responsibility to the plaintiff by way of a defence or counterclaim, there is no foundation for a third-party claim. In such circumstances, it can be said in the context of a r. 21 motion that any such Third Party Claims, as they stand or may reasonably be amended, disclose a question that is "doomed to fail": see *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19, [2020] 2 SCR 420, at para. 90, (per Karakatsanis J. dissenting in part, but not this point), cited in *PMC York Properties v. Siudak*, 2022 ONCA 635, 473 DLR (4th) 136, at para. 32.

[11] Put briefly, if the third party defendant professional, which Murray was in this case, was acting as an agent for the plaintiff, then the third party claim should be struck. The agent's actions are taken to be the actions of the plaintiff, as the plaintiff is "responsible at law for the actions and omissions of their agent" and any contributory negligence of the agent is contributory negligence of the plaintiff: *Strosberg et al. v. Lynn et al*., 2024 ONSC 7308 at para. 43. However, if the third party was acting in an advisory capacity to the plaintiff, and not as an agent, then the third party action may proceed, as any negligence by the third party is something that cannot be attributed to the plaintiff as its contributory negligence but, rather, is negligence of a third party, which can reduce the liability of the defendant to the plaintiff.

[12] In the second situation "[t]he plaintiff may be able to say it acted reasonably in retaining the third party to advise it on the terms of the agreement and accordingly should not be responsible for any negligence on the part of its solicitor": *Hengeveld* at para. 43, quoting from *Corcoran* at p. 35 O.R. Often in such circumstances a plaintiff will sue the professional for negligence, which might then result in cross-claims between defendants. That did not happen here, perhaps due to the fact that Murray is the *alter ego* of Cowal and he did not wish to sue himself.

[13] In my view, as pleaded, the third party claim asserts negligence against Murray (and his law firm) acting in his capacity as an advisor to Cowal. There is no pleading that Murray was the agent of Cowal or that Murray and his firm dealt with others in a manner that might give rise to a suggestion of agency such as "dealing with others in a manner analogous to filing a prospectus (as in *Adams*), filing a financing statement (as in *Macchi*), or dealing with Personal Insurance about the preservation of evidence (as in this case)": *Hengeveld* at para. 44. As in *Corcoran*, this is not a claim that can be advanced against the plaintiff, and "[a]s the plaintiff had not sued the solicitors, the only way the defendants could protect their position and avoid being held liable for the entire loss was to claim contribution and indemnity from the solicitors: *Davy Estate v. CIBC World Markets Inc.* (2009), 2009 ONCA 763 at paras. 22 – 23; *Allianz Global Risks US Insurance Company v. Nalco Chemical Company*, 2014 ONSC 4302, at para. 30.

[14] Nor is there any suggestion that Kitchener's third party claim comes within the "nuanced exception" described by Kimmel J. in *Cerieco* at para. 36, where a lawyer's alleged negligence relates to advice about the plaintiff's duty to mitigate a loss that has already occurred. This is an important distinguishing factor between this case, which does not involve a claim of failure to mitigate, and those which do where the claim against the lawyers struck out. As Sharpe J.A. stated in *Davy Estate v. CIBC World Markets Inc*., 2009 ONCA 763 at para. 17:

> …there is a clear distinction to be drawn between a plea of mitigation in defence to the plaintiff's claim and a claim against a third party who was implicated in the initial loss and is thereby jointly and severally liable for the same loss that the plaintiff claims against the defendant. In the latter situation, the fault of the third party does not have the effect of reducing the damages that the plaintiff may claim

> against the named defendant. The defendant and the third party are each liable to the plaintiff for the full amount of the loss.

[15] Later in his judgment, Sharpe J.A. drew a distinction between *Davy*, which dealt with mitigation, and *Corcoran* which dealt with facts similar to this case and where the third party claim was permitted to proceed. Sharpe J.A. stated at para. 22 of *Davy*:

> The decision of this court in *478649 Ontario Ltd. v. Corcoran* (1994), 1994 CanLII 219 (ON CA), 20 O.R. (3d) 28, [1994] O.J. No. 2103 (C.A.), where a third-party claim against the plaintiff's solicitor was allowed, is distinguishable. In *Corcoran*, the plaintiff sued the vendor and a real estate agent for negligent misrepresentations in relation to the purchase of a commercial property. In their third-party claim against the plaintiff's solicitors, the defendant alleged that the solicitors had been negligent in reviewing the agreement of purchase and sale and failing to protect the interests of the plaintiff. That was not a plea in mitigation of damages that the defendants could advance against the plaintiff but rather an allegation that the solicitors were implicated in the very events that gave rise to the loss and were jointly and severally liable to the plaintiff for any loss suffered. As the plaintiff had not sued the solicitors, the only way the defendants could protect their position and avoid being held liable for the entire loss was to claim contribution and indemnity from the solicitors.

[16] The fault alleged against Murray in Kitchener's Amended Third Party Claim is similar to the facts in *Corcoran*. It relates to events that give rise to the plaintiff's loss. If Kitchener is found to be liable for damages to Cowal, Kitchener is entitled to plead that "such damages were caused by the negligence and breach of duty of Murray, his employees, servants and agents, including law clerks, for whose conduct Murray is in law responsible, acting as lawyers for Cowal Chalmers in its purchase of the Property." Particulars of the negligence include failing to perform adequate searches or appropriate due diligence and failing to act on information which was known or ought to have been known to Murray, as well as failing to warn Cowal of the legal consequences and risks associated with acquiring the property.

[17] These are different wrongs than the contributory negligence pleaded in the Statement of Defence and, if proven, may reduce Kitchener's liability to the plaintiff. This is unlike the situation in *Strosberg* where the third party claim against a real estate agent pleaded the same wrongs that were pleaded against the plaintiff as contributory negligence, and which were committed within an agency relationship.

[18] Whether Kitchener can prove negligence by Murray is a matter for trial as, perhaps, is the issue of whether Murray was an agent for Cowal rather than an advisor, although that has not been pleaded. I have also considered the concern that some of the claim against Murray may raise questions about solicitor-client privilege. Sharpe J.A. discussed this in *Davy*, at para. 28, as a factor in not permitting claims against solicitors for failure to mitigate; however, he stated that this policy concern about undermining the solicitor-client

relationship "cannot prevail in cases like *Corcoran* where the defendant has a valid legal claim against solicitor for contribution and indemnity."

[19] In any event, the issue of whether privileged communications need to be adduced, or whether privilege can or should be undermined, are issues for trial. They do not affect the question of whether the claim discloses a cause of action.

Conclusion

[20] In short, it cannot be said that it is "plain and obvious" that the third party does not disclose a reasonable cause of action. The motion is dismissed.

[21] Kitchener shall be awarded its costs of the motion on a partial indemnity scale, as requested, in the amount of $10,237.47, inclusive of HST and disbursements.

Paul B. Schabas J.

Date: March 11, 2026