

COURT OF APPEAL FOR ONTARIO

CITATION: Fehr v. Gribilas, 2023 ONCA 686

DATE: 20231020

DOCKET: C70459

van Rensburg, Paciocco, and Thorburn JJ.A.

BETWEEN

William Fehr Sr. and Dorothey Fehr

Plaintiffs

(Appellants/Respondents by way of cross-appeal)

and

Paul Gribilas and Burns Hubley LLP

Defendants

(Respondents/Appellants by way of cross-appeal)

and

J+W Foods Inc., William Fehr Jr., and Steven Trougakos

Third Parties

(Respondent)

Christine G. Carter, for the appellants/respondents by way of cross appeal

Earl A. Cherniak and Spencer Jones, for the respondent/appellant by way of cross appeal Burns Hubley LLP

Michael R. Kestenberg and Aaron Hershtal, for the respondent/appellant by way of cross-appeal Paul Gribilas

Jonathan Rosenstein, for the respondent J+W Foods Inc.

Heard: April 25, 2023

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated January 12, 2022, with reasons reported at 2022 ONSC 275 and from the costs order, dated February 25, 2022, with reasons reported at 2022 ONSC 1296.

van Rensburg J.A.:

A. INTRODUCTION

[1] This appeal concerns the effect of a no-claims-over provision contained in a full and final mutual release on subsequent proceedings commenced by parties to the release.

[2] The appellants appeal the order of the motions judge permanently staying their professional negligence action on the basis that the action, which they had commenced in contravention of their obligations under a no-claims-over provision, was an abuse of process. They seek an order restoring the action.

[3] The defendant respondents Paul Gribilas (“Paul”) and Burns Hubley LLP (in respect of services provided by Peter Gribilas (“Peter”)) cross-appeal, arguing that, if the appellants’ appeal is allowed, the motions judge erred in finding that there were remaining genuine issues requiring a trial in the professional negligence action. They seek an order dismissing the action on its merits.

[4] For the reasons that follow I would dismiss the appeal. Since the action is permanently stayed, it is unnecessary to address the issues in the cross-appeal, which I would dismiss as moot.

B. FACTS

[5] The motions judge's reasons provide a comprehensive review of the evidence that was before the court at first instance and a detailed chronology of the dealings between the parties, identifying where the parties' respective accounts differ. The following brief summary of the facts relevant to the appeal will suffice here.

[6] The appellants are the parents of William Fehr Jr. ("William Jr."), who, in 2002 started a business, J+W Foods Inc., ("J+W Foods") with two partners, Steven Trougakos ("Steven") and John Trougakos ("John").

[7] In 2004, the appellants became directors and officers of J+W Foods, replacing William Jr. and John, and they claim that, at that time, they purchased John's interest in the company for \$6,000. The appellants contend that they were involved in the business for several years, and that it became profitable. On October 31, 2008, they resigned as directors and officers, and they claim that they never relinquished their ownership interest in J+W Foods, which is now worth millions of dollars.

[8] In 2009, Paul, as lawyer for J+W Foods, prepared backdated resignations which the appellants signed, and corporate records that indicated that the owners of the company were William Jr. and Steven. He sent a reporting letter to J+W Foods confirming the resignations of the appellants, and the appointments of

Steven and William Jr. as officers and directors, together with their allocation of 100 common shares each.

[9] The following year, the appellants made a \$100,000 loan to the J+W Foods business, secured by a promissory note signed by William Jr. and Steven.

Collection of the Loan, the Settlement and the Release

[10] In 2018, the appellants retained their current lawyer to collect on the loan. Ms. Carter sent a letter dated May 28, 2018 to William Jr. demanding payment of the loan plus interest. The letter also referred to “outstanding issues with respect to a share transfer and resignation and appointment of corporate directors”, and claimed partial reimbursement for the cost of certain items.

[11] Paul, confirming that he had been retained by J+W Foods, William Jr. and Steven, responded by letter dated September 7, 2018, that was sent by email to the appellants’ lawyer in November 2018. He indicated that there was a desire to resolve the matter amicably, and he sought further information about the loan, the reimbursement claims, and the particular corporate issues referred to in the demand letter.

[12] Ms. Carter sent Paul an email message on December 4, 2018 offering to accept the all-inclusive sum of \$120,000, failing which a claim would be issued seeking repayment of the loan “and transfer of the shares back to [the appellants]”.

The email stated, “in the event that the offer is accepted, a full and final release of all issues will be provided”.

[13] Paul responded with an offer to settle dated December 13, 2018 (referred to in the motions judge’s reasons as “minutes of settlement”), which provided for the payment of \$120,000 in two instalments “in full and final settlement of all matters between the parties, including, but not limited to, all issues that were raised in the letter of May 28, 2018, [Paul Gribilas’ email] dated September 7, 2018 and [his] e-mail (with attachments) dated October 16, 2018”. The offer to settle provided that the settlement encompassed “all of [the appellants’] claims, including their claim to a purported interest in the corporate shareholdings of [J+W Foods]”, and required that the parties enter into a mutual full and final release, including Steven, William Jr. and William Jr.’s wife Tasia Fehr (“Tasia”) as parties to the release.

[14] Ms. Carter responded on December 18, 2018 to confirm that the matter had settled and indicating that she would draft a mutual release.

[15] On April 12, 2019, the appellants, William Jr., Steven, Tasia and J+W Foods signed a full and final mutual release (the “Release”). All of the parties to the Release released one another from:

...all manner of actions, causes of action, suits, debts, dues, accounts, bonds, covenants, contract, complaints, claims and demands for damages, monies, losses, indemnity, costs, interest in loss, or injuries howsoever arising which hereto may have been or may hereafter be sustained by the Releasers, or any of them as a

consequence of a loan advanced by Dorothey Fehr and William Fehr Sr., any claim to an interest in the corporate shareholdings of J+W Foods Inc. by William Fehr Sr. and Dorothey Fehr and all claims for outstanding invoices by J+W Foods Inc., any claim for use of the Honda Civic, any claims for outstanding invoices of Little Guys Food Supplies Inc., any claim for use and/or mileage of a truck, any claim for payment of spice jars or computer software, (hereinafter the "Matter") and any and all issues arising from the Matter and any and all actions, causes of action, claims or demands of whatsoever nature, whether in contract or in tort or arising as a result of a fiduciary duty or by virtue of any statute or upon or by reason of any damage, loss or injury arising out of the Matter. [Emphasis added.]

[16] The Release contained a no-claims-over provision as follows:

AND FOR THE SAID CONSIDERATION it is agreed and understood that the Releasors will not make or continue any claim or take any proceedings against any other person or corporation who might claim, in any manner or forum, contribution or indemnity in common law or in equity, or under the provisions of any statute or regulation, including the *Negligence Act* and the amendments thereto and/or under any successor legislation thereto, and/or under the *Rules of Civil Procedure*, from the Releasees discharged by this Full and Final Release, in connection with the Matter.

IT IS AGREED AND UNDERSTOOD that if any Releasor does commence or continue such an action, or take or continue with such proceedings, and the Releasees, or any of them, are added to such proceeding in any manner whatsoever, whether justified in law or not, the offending Releasor(s) will immediately discontinue the proceedings and/or claims or have the Releasees removed from such actions, and the offending Releasors will be jointly and severally liable to the affected Releasee(s) for the legal costs incurred in any such proceeding, on a full indemnity scale. This Mutual Full and Final Release shall also operate conclusively as an

estoppel in the event of any claim, action, complaint or proceeding which might be brought in the future by any of the Releasors with respect to the matters covered by this Full and Final Release. This Mutual Full and Final Release may be pleaded in the event any such claim, action, complaint or proceeding is brought, as a complete defence and reply, and may be relied upon in any proceeding to dismiss the claim, action, complaint or proceeding on a summary basis and no objection will be raised by the Releasors in any subsequent action that the other parties in the subsequent action were not privy to formation of this Release.

The Professional Negligence Action and the Third Party Proceedings

[17] On March 3, 2020 the appellants commenced the professional negligence action against Peter and Paul. The statement of claim alleges that, in the course of collecting on the loan, they discovered that they were no longer listed as shareholders in J+W Food's corporate books. The appellants plead that Paul and Peter, who were J+W's corporate lawyer and accountant, owed them a duty separate and distinct from the duty owed to the company, to ensure that the books and records of the corporation were updated appropriately and to ensure that they were not improperly divested of their shares without compensation or consideration. The appellants plead that Paul and Peter breached that duty by failing to update the books and records of J+W Foods, and that they suffered damages as a result. They also claim negligent misrepresentation: that they relied on assurances provided by Paul and Peter that all was in order.

[18] The appellants claim a declaration they are entitled to 1/3 of the shares in J+W Foods or in the alternative damages of \$1 million as compensation for the loss or divestiture of their shares in J+W Foods. The statement of claim was amended on December 20, 2021, to substitute for Peter his accounting firm, Burns Hubley LLP.

[19] On September 29, 2020, Paul delivered a statement of defence, in which he pleads that to his knowledge the appellants never had an equity interest in J+W Foods, that he acted solely on behalf of J+W Foods in March 2009 when he met with the appellants, William Jr., Tasia, Steven and John to update the company's corporate documents, and that it was made clear at that time that the appellants were not and never were shareholders of J+W Foods. The statement of defence denies that Paul was retained by the appellants or owed them any duty and denies the alleged representations. The statement of defence pleads the Release pursuant to which the appellants explicitly acknowledged they had no further interest in the shares of J+W Foods.

[20] On September 30, 2020, Paul's third party claim was issued, claiming contribution and indemnity for any amount awarded against him in the main action against J+W Foods, William Jr. and Steven. The third party claim alleges that Paul relied on the third party defendants to provide information with respect to the shareholdings of J+W Foods, and claims misrepresentation by the third parties, if the appellants had in fact acquired an ownership interest. A notice of intent to

defend the third party action was filed on behalf of J+W Foods. The other defendants to the third party action have not defended the proceeding or the main action.

[21] Peter initially delivered two statements of defence in February 2021, one for the period when he practiced with Burns Hubley LLP and one for the period after he joined KPMG LLP. There is also a statement of defence from Burns Hubley LLP that was delivered on February 25, 2022, after the motions were heard and determined. All of the statements of defence in respect of Peter's alleged negligence deny that Peter had been engaged by the appellants to act on the transfer of shares to or from the appellants, or to update or maintain J+W Foods' corporate records, and they plead reliance on the Release and on Paul's statement of defence. Peter and Burns Hubley LLP had not delivered a third party claim by the time the motions were before the motions judge. Burns Hubley's third party claim was issued on February 25, 2022.¹

¹ Although, by the time the motions were argued before the motions judge the statement of claim had been amended to substitute Burns Hubley LLP for Peter, the Burns Hubley statement of defence and third party claim were dated the day the motions judge's costs reasons were released. The motions judge proceeded on the assumption that Peter (or Burns Hubley) would be asserting a third party claim like Paul's third party claim, against J+F Foods, William Jr. and Steven. By the time the appeal was argued it was accepted that the proper defendant to the professional negligence action in respect of Peter's alleged negligence (and respondent to the appeal) was Burns Hubley.

The Motions

[22] Three motions were before the motions judge. Paul and Peter moved for summary judgment dismissing the main action. Although they addressed the claims against them, asserting among other things, that they had not been retained to protect the appellants' interests as shareholders in J+W Foods and that they had no knowledge of the appellants' ownership interest, they also relied specifically on the no-claims-over clause in the Release. J+W Foods as third party brought a motion to stay or dismiss the main action based on the no-claims-over provision.

[23] Paul and Peter filed affidavits in support of their summary judgment motions, while Steven provided a very brief affidavit in support of J+W Food's motion to stay the proceedings. Dorothey Fehr provided an affidavit. There was no evidence from William Fehr Sr., William Jr. or John, and there were no cross-examinations. The motions judge was critical of the evidence filed by the parties and he observed that, but for the matter of the Release, about which there were no genuine issues requiring a trial, he would have dismissed the summary judgment motions and the third party's motion, and sent the main and third party actions on to trial.

[24] The motions judge noted that the central issue in the motions was whether Paul, Peter and J+W Foods could rely on the no-claims-over provision in the Release to obtain a stay or dismissal of the action. He concluded that, while there were many triable issues in the action and the third party proceedings, he could

determine the complete factual story and truth about the Release in respect of which there were no substantial credibility or reliability questions, and that it was therefore appropriate, fair and just to decide the issues summarily.

[25] The motions judge concluded that the respondents were entitled to the benefit of the no-claims-over provision in the Release, and he stayed the action permanently as an abuse of process.

[26] The motions judge relied on the leading Ontario case, *Sinclair-Cockburn Insurance Brokers Ltd. v. Richards* (2002), 61 O.R. (3d) 105 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 450, in which this court upheld a decision staying an action on the basis of a no-claims-over provision at the behest of a third party beneficiary of a release. He also relied on the analysis in the decision at first instance of Mesbur J., reported at [2001] O.J. No. 3487 (S.C.).

[27] In *Sinclair-Cockburn*, Richards, an insurance broker, had issued a performance bond through Canadian General Insurance for Wiggins Mechanical Contractors, despite knowing that the contractor was not bondable. The insurer, after honouring the bond, settled with Wiggins Mechanical and Richards' employer Sinclair-Cockburn. The settlement agreement contained a no-claims-over clause by which Sinclair-Cockburn promised not to make any claim against any other person who might claim contribution from Wiggins Mechanical. Sinclair-Cockburn then commenced an action against Richards, suing for the amounts it had paid in

the settlement, as well as losses from other transactions Richards had brokered. Richards defended the claim, counterclaimed, and brought third party proceedings against Wiggins Mechanical for contribution and indemnity. Although Richards did not bring a motion herself, Wiggins Mechanical was successful in obtaining a stay of most of the claims in the main action, as well as the third party claim.

[28] In the present case, the motions judge concluded that the principle in *Sinclair-Cockburn* applied: it would be an abuse of process to permit the appellants' action to proceed against the defendant respondents after the appellants had signed the Release containing a no-claims-over clause. He noted that, under the no-claims-over clause in the Release, the appellants agreed not to sue a person who could advance a claim against J+W Foods. They had nevertheless sued Peter and Paul, who in turn had sued (or in the case of Peter intended to sue) J+W Foods in third party proceedings. The motions judge noted that the prospect of suing Peter and Paul was in the minds of the appellants when they signed the Release, but they did not bargain for an exception to the no-claims-over provision, and the run-up correspondence to the settlement made it clear that J+W Foods, William Jr. and Steven sought an end to the appellants' having any ownership interest or claim against them directly or indirectly. The motions judge stated at para. 102:

...The release was meant to end the litigation and any claim to an interest in J+W Foods Inc. The Fehrs suing Paul and Peter Gribilas was re-litigation of a settled

dispute. It was an abuse of process. The court has the abuse of [process] jurisdiction to stay or dismiss the Fehrs' claim against the Gribilas brothers in the main action, which in turn makes the brothers' third party proceedings against J+W Foods Inc. moot.

[29] The motions judge, relying on a line of cases cited in *Ieradi v. Gordin*, 2007 CanLII 48637 (Ont. S.C.), accepted that there were two preconditions for a litigant who is a "stranger" or third party to a release to claim the protection of a no-claims-over clause. First, the litigant must have been sued with respect to the subject matter of the release, and second the litigant must have a viable claim over to trigger the protection of the no-claims-over provision. The motions judge concluded that both conditions were met in this case. The action dealt with the appellants' shareholding interest in J+W Foods, which was a subject matter of the Release, and, whether or not Paul's third party claim would be successful, it asserted a viable claim for contribution and indemnity against the third parties: that he relied on the third parties in respect of his information about the shareholdings of J+W Foods.

C. ISSUES

[30] The appellants raise the following issues in their appeal: (1) Did the motions judge err in imposing a stay of the main action in the absence of a motion for a stay by the defendant respondents or a specific claim for a stay under s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA")? (2) Did the motions judge err in concluding that the defendant respondents had a viable claim over to the

professional negligence action, sufficient to trigger the protection of the no-claims-over provision?

D. DISCUSSION

[31] As I will explain, I see no reason to interfere with the motions judge's decision to permanently stay the main action. The action having been stayed, it follows that the third party claim was also properly stayed.

Issue One: There was no procedural defect that prevented the motions judge from staying the main action.

[32] The appellants contend that, in the absence of a motion by the defendant respondents for a stay of proceedings, the motions judge did not have the authority to stay the main action. The defendant respondents did not specifically rely on s. 106 of the *CJA* or otherwise seek a stay of the professional negligence action. Instead, they sought its dismissal. The appellants argue that there was an onus on the moving parties to provide proper notice of the relief they were seeking, and they failed to do so. It was not sufficient that there was a stay motion by the third party J+W Foods. They assert that the defendant respondents should have moved for a stay, and not to dismiss the main action in a summary judgment motion, and that because of this procedural defect, the order staying the main action should be set aside.

[33] This argument can be addressed briefly. The motions judge had the authority to determine whether the action was an abuse of process and to permanently stay or dismiss the action for that reason. An action can be dismissed as an abuse of process, under the inherent jurisdiction of the court, including to prevent re-litigation of the same issue: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37. Typically a motion will be brought under r. 21.01(3)(d), however a dismissal for abuse of process can be sought in a summary judgment motion: see e.g., *Winter v. Sherman Estate*, 2018 ONCA 703, 42 E.T.R. (4th) 181, leave to appeal refused, [2019] S.C.C.A. No. 438, at paras. 7-8.

[34] The appellants were not taken by surprise by the procedure adopted in this case. The effect of the no-claims-over provision of the Release on the main action was raised squarely as an issue in all of the moving parties' materials.

[35] The third party J+W Foods moved for an order staying or dismissing the main action, based on the no-claims-over provision in the Release, and filed a factum seeking such relief on the basis of *Sinclair-Cockburn*. And while the defendant respondents did not request a stay, there is no question that they were seeking to have the main action dismissed both on the basis of the merits of the action and in reliance on the no-claims-over provision in the Release. Paul pleaded the Release, and the appellants' acknowledgment that they had no further interest in the shares of J+W Foods in his statement of defence. In their notices of motion

both defendant respondents specifically referred to the no-claims-over clause in the Release, and in their factums in the court below they addressed the effect of the Release as barring any claim against them, and argued that the professional negligence action was an abuse of process.

[36] Finally, the appellants' factum at first instance makes it clear that they understood and had the opportunity to fully respond to the submission that the no-claims-over provision in the Release justified a stay or dismissal of the main action. Indeed, most of their factum is devoted to this issue.

[37] As such, I would not give effect to this ground of appeal. Irrespective of the failure to plead s. 106 of the *CJA* specifically, and of the defendant respondents' request for dismissal of the professional negligence action rather than a stay, whether the main action constituted an abuse of process and should not be permitted to proceed because of the terms of the Release was squarely and properly before the motions judge.

Issue Two: The motions judge did not err in staying the main action.

[38] The appellants contend that the motions judge erred in staying the main action rather than simply staying the third party proceedings. Before considering their main submissions on this ground of appeal, I will address a submission made by the appellants' counsel in oral argument on the appeal: that, because there is no appeal of that part of the motions judge's order staying the third party action,

the circumstances have changed. They contend that it is no longer necessary for the main action to be stayed because the dismissal of the third party action means that there is no possibility of a viable third party claim. The appellants' counsel also took the position that J+W Foods had no standing to appear in the appeal because of the ongoing stay of the third party proceedings.

[39] This argument can be addressed briefly. Although no one has joined issue on the question whether the third party action should have been dismissed, if the appellant is successful in setting aside the motions judge's order, such that the main action will continue, then without question the defendant respondents would be entitled to have the entire action restored, including the third party proceedings. The motions that were before the motions judge all sought a stay or dismissal of the main action and not the third party proceedings. The motions judge stayed both. After staying the main action, he stayed the third party action which he described as moot. The defendant respondents assert that if the appellants succeed in setting aside the stay of the main action, it would follow that the stay of the third party proceedings would also be lifted. I agree, and would not give effect to the appellants' preliminary argument on this issue.

[40] I turn to the appellants' main argument on the appeal: that the motions judge erred in law in characterizing the third party claim as legally viable, when, as a matter of law, it was not open to the defendant respondents to seek to hold the third parties responsible for their professional negligence.

[41] The appellants rely on three Ontario cases where professional negligence actions against lawyers were allowed to proceed in whole or in part notwithstanding that the plaintiffs had signed releases containing no-claims-over provisions. They assert that these cases are authority that a lawyer will never have a viable claim over against their client in respect of their own negligence. Even if the third party claim is dismissed, the main action should be permitted to proceed. As I will explain, each of these cases turned on its own facts. There is no general rule here that assists the appellant.

[42] In *Owen v. Zosky* (2000), 14 C.P.C. (5th) 50 (Ont. C.A.), the plaintiff had sued her dentist for negligence, discharging her lawyer and then settling the action, with a release protecting the dentist and any third party who might claim contribution or indemnity from him under s. 1 of the *Negligence Act*. The plaintiff then commenced an action against two defendants: a second dentist who had been involved in her care, and her former lawyer, alleging that he was negligent in failing to sue the second dentist. Both commenced third party proceedings against the first dentist who had been released by the plaintiff. This court noted that the third party claim by the lawyer was “questionable on its face”, as the first dentist was clearly not responsible for the lawyer’s negligence. This is not a statement that a third party claim can never succeed in a professional negligence action; rather, the lawyer could not claim over against the first dentist, for contribution and indemnity in respect of his alleged negligence in failing to sue the second dentist.

[43] Nor does the Divisional Court decision in *Searle v. McCabe*, 2011 ONSC 6344 (Div. Ct.) assist the appellants. In that case, after a plaintiff had settled matrimonial proceedings against her husband, she sued her former lawyer for negligence. The lawyer claimed over against the husband. In refusing leave to appeal from an order refusing to stay the action against the lawyer, Pardu J. (as she then was) observed that there was no contractual duty and no other basis had been advanced upon which it could be argued that the husband owed any duty to his wife's lawyer. Since there was no viable legal basis to the third party claim against the husband, the no-claims-over provision of the release did not justify a stay of the main action against the lawyer.

[44] The appellants also rely on *Ieradi*, where Lederer J. stayed a third party claim but not the main action, after he concluded that there was no viable claim against the third party in respect of the plaintiff's claim against his lawyers for negligence. The plaintiff was party to an agreement for the purchase of shares and had retained the defendant law firm to act on the transaction. His action against the vendors had been settled on terms that included a no-claims-over clause. The plaintiff then sued the law firm for negligence, alleging that his lawyers had failed to tender. The lawyers asserted that they could not tender because of the plaintiff's inability to obtain financing, but they also commenced a third party claim against the vendors, claiming contribution and indemnity. Lederer J. framed the question as whether the claim for negligence against the lawyers was independent

of the claims made in the third party proceeding. He concluded that, based on what was alleged, the defendant lawyers could not pass their negligence over onto the third parties. He explained at para. 25:

In the case before the Court, if the solicitors were negligent, it is their actions or failure to act which created the liability. The third parties cannot be liable for the professional negligence of the lawyers. If the defendant solicitors were unable to tender because the vendors could not provide clear title and, as a result, the necessary financing was not available, the solicitors were not negligent. This does not lead to a claim over in which the third parties, the vendors, are liable for the negligence of the defendant solicitors. The proposition that the solicitors were unable to tender as a result of the failure of the third parties to provide clear title is a defence to the plaintiff's claim. The problem for the defendant solicitors is that, as a defence it does not result in a third party action and does not attract the protection offered by the release.

[45] In this case, as in *Ieradi*, the focus is on "the case before the court". The question is not whether, as a matter of law, a professional is precluded from making a claim over against a client or some other party when sued for negligence, but whether on the facts of the case, there is any viable claim over if the defendant is found liable to the plaintiff for all or part of its claim. In *Ieradi*, Lederer J. expressed this as whether the negligence claims against the defendants are independent of their claims made in the third party action and whether the third party action is legally viable.

[46] Where the main action contains claims that are independent of any allegations of wrongdoing by the third parties, they will be allowed to proceed. This happened in *Sinclair-Cockburn* in respect of the claim for an accounting against the defendant Richards. Similarly, in *Woodcliffe Corp. v. Rotenberg*, 2005 CanLII 23675 (Ont. C.A.), leave to appeal refused, [2005] S.C.C.A. No. 432, an action by a developer against a law firm was stayed in part together with a stay of the law firm's third party claim against a party protected by a no-claims-over provision in a release. Part of the action that sought an accounting from the law firm was allowed to continue because it was independent of and could not be subject to any third party proceeding by the law firm, and the developer was granted leave to file an amended statement of claim asserting only that claim. This court concluded that, in all other respects, the allegations of negligence and breach of duty in the professional negligence action were "inextricably linked" to the allegations of wrongdoing by the third parties, and that it would have been unfair to the defendant to permit the main action to proceed in its entirety while upholding the stay of the third party action.

[47] Accordingly, I do not agree with the appellants that a third party claim against a former client can never succeed in a professional negligence case, and that there can therefore be no viable claim over that would engage the abuse of process doctrine. It will depend on the facts of the particular case and the allegations that are made.

Application to This Case

[48] The appellants contend that, when properly considered, the claims in the main action do not in fact engage the matters raised in the third party proceedings. They assert that their claim is for misrepresentation: that in response to the instructions to update the corporate records and ensure that the appellants' interests were properly recorded and protected, Paul and Peter told them that all was in order. The appellants contend that the defendant respondents had an obligation to ensure that their statements were correct and not negligently made: they cannot place the blame on someone else for failure to do what they were told to do. For these reasons the defendant respondents do not have a viable third party claim in respect of what is pleaded against them in the main action.

[49] I disagree. First, the appellants seek to describe their action somewhat narrowly by pointing to the alternative claim of negligent misrepresentation. The thrust of their action however is their claim that the defendant respondents were retained by them and breached their duties to ensure that their shareholdings were protected. The statement of claim specifically claims that the defendant respondents were negligent: that they owed a duty to the appellants "to ensure that the books and records were updated appropriately and to ensure that they were not improperly divested of their shares without compensation or consideration", and that Paul and Peter breached that duty by failing to update the

books and records of the company in accordance with generally accepted legal and accounting practices.

[50] It is reasonable for the defendant respondents, in denying a breach of their duty of care, to plead that they relied on information provided by the third parties, and to seek contribution and indemnity from such parties if the information turned out to be incorrect. Paul's statement of defence denies any knowledge that the appellants were shareholders in J+W Foods, and pleads that he relied on information he was provided at a meeting with the appellants, William Jr., Tasia, Steven and John. His third party claim pleads that, if he is found liable to the appellants (which would necessarily entail finding that he knew or ought to have known about the appellants' shareholding, and that he breached his duty to take steps to protect the appellants' interests), Paul is entitled to contribution and indemnity from the third parties because he relied on the information he was provided by the third parties about the appellants' shareholdings at the meeting. In other words, if he was negligent in preparing the corporate documents, he is entitled to contribution or indemnity from any one or more of the third parties who led him to believe that the appellants were not shareholders in J+W Foods.

[51] Second, the relief sought in the statement of claim makes it clear that the appellants are in fact seeking to litigate an issue that they settled. The appellants plead that as a result of the defendant respondents' negligence they were divested of their shares and suffered damages. They claim a declaration that they are one

third owners of the J+W Foods shares, notwithstanding that the Release they signed expressly releases any claim to shares in the company.

[52] The motions judge did not err when he concluded that the defendant respondents were being sued in the professional negligence action with respect to the subject matter of the Release. In the Release the appellants released, among other things, “any claim to an interest in the corporate shareholdings” of J+W Foods. There is no ambiguity in the terms of the Release, and it is entirely consistent with the offer communicated by Paul on behalf of J+W Foods, William Jr. and Steven about the scope of the matter to be covered by the settlement. By the terms of the Release and in particular the no-claims-over clause, the releasees, including J+W Foods, bargained for “peace” – that is, that they would not be implicated in proceedings in which the appellants claimed ownership of J+W Foods. The appellants undertook not to commence any proceedings that could result in a claim over being made against the releasees in connection with the subject matter of the Release.

[53] Third, it became clear in the course of the appellants’ argument that they are focusing on the merits of the third party claim: that is, would it be appropriate for the defendant respondents to have relied on information provided by someone else without, for example, verifying the information independently? The appellants contend that “it was the lawyer’s obligation to take instructions from the president” (alleged to have been Dorothy Fehr) and not from William Jr., and “to ensure that

the corporate records accurately reflected the shareholdings”, and that, for this reason Paul does not have a valid claim over against anybody for failing to undertake his professional obligation in a non-negligent manner. While ultimately the appellants may be correct that the defendant respondents were not entitled to rely on information received at the meeting, I agree with the motions judge that this argument confounds the potential merits of the third party proceedings with their viability.

[54] The authority to stay an action at the behest of a stranger to a release on the basis of a no-claims-over clause is, as the motions judge noted, anchored in the court’s ability to respond to an abuse of process. The court must determine in each case whether the pursuit of the action would in fact result in an abuse of process. In this case, it was appropriate to stay the main action, as a result of which the third party proceedings were also stayed. The third party claim raises a “viable” third party claim, that is one that could be made out on proper evidence, that the defendant respondents reasonably relied on inaccurate information that was provided by one or more of the third parties.

[55] As a final submission that was made in reply, the appellants’ counsel suggested that the appellants were prepared to limit their claims in the main action to damages, and to not pursue the claim for a declaration that they are shareholders in J+W Foods. They proposed that, consistent with some of the authorities, they could undertake to limit their claims in this way so that the third

parties would have no exposure to liability from a continuation of the main action. Apart from the fact that this offer was made too late in the proceedings to be given any effect, it would not be sufficient. The substance of the professional negligence claim is that the defendant respondents were negligent in not preserving and protecting the appellants' shareholdings. The claim in the action is inextricably linked to the third party claim, irrespective of the remedy sought by the appellants. In other words, in this case, there is not, and cannot be, a claim in the main action that is independent and could not be subject to the third party proceedings.

E. DISPOSITION

[56] For these reasons I would dismiss the appeal. I would also dismiss the cross-appeal as moot. If the parties are unable to agree on costs, they may provide, within 30 days, written submissions limited to five pages each, exclusive of any costs outline.

Released: October 20, 2023 "K.M.v.R."

"K. van Rensburg J.A."
"I agree David M. Paciocco J.A."
"I agree Thorburn J.A."