SUPREME COURT OF NOVA SCOTIA
Citation: *White v. Iosipescu*, 2015 NSSC 257

Date: 2015-09-30
Docket: *Halifax*, No. 344284
Registry: Halifax

Between:

Anne-Marie White, Margaret White and Jenny White

Plaintiffs

v.

Michael Iosipescu, Phillip Whitehead and Century Property Management Inc.

Defendants

Judge: The Honourable Justice Pierre L. Muise, J

Heard: July 9, 2015, in Yarmouth, Nova Scotia

Counsel: Kyle Mercer for Greg Barro, for the Plaintiffs
Augustus M. Richardson, Q.C., for the Defendant Phillip Whitehead
No one appearing behalf of the Defendants Michael Iosipescu and Century Property Management Inc.

INTRODUCTION

[1] The Plaintiffs, Anne-Marie White, Margaret White and Jenny White, on February 21, 2011, filed a Notice of Action against the Defendants, Michael Iosipescu, Phillip Whitehead and Century Property Management Inc. The Statement of Claim alleged that which follows.

[2] Mr. Iosipescu and Mr. Whitehead, at the material times, were partners in the law firm Iosipescu, Whitehead and Metlege ("IWM"). All three Plaintiffs were clients, or had been clients, of Mr. Iosipescu.

[3] In 2006 and in 2009, in response to investment opportunities which Mr. Iosipescu offered to the Plaintiffs, they advanced loans in varying amounts to him and/or to his company, the Defendant, Century Property Management Inc. ("Century Property"). They received promissory notes reflecting the amounts loaned. They also received regularly monthly interest payments in the amounts specified in those promissory notes for a period of time.

[4] In 2010, Mr. Iosipescu informed the Plaintiffs that the money they had invested with him had been lost. However, he did, himself, pay Jenny White the ten thousand dollars ($10,000.00) she had invested.

[5] Mr. Whitehead was also in a solicitor/client relationship with the Plaintiffs or had a fiduciary duty to them as a result of his position as Mr. Iosipescu's partner. Mr. Iosipescu and Mr. Whitehead breached the fiduciary duty and standard of care owed to the Plaintiffs in, among other things: being in a conflict of interest and failing to advise them of same; failing to advise of the risks of the investment and to seek independent legal advice; and, failing to meet the ethical standards required of lawyers in Nova Scotia.

[6] A defence was filed on behalf of Mr. Whitehead on April 1, 2011.

[7] On March 19, 2013, by consent, the Plaintiffs filed an amended Statement of Claim. It added allegations that the 2009 investments or loans were transferred through Mr. Whitehead to an individual with which he had personal connections, Ashish Janmeja, and the company with which Mr. Janmeja was associated, Cangra Distribution Inc. ("Cangra"). The funds were to be used to buy building materials from China to be resold in Nova Scotia, which ultimately did not occur. It further alleged that which follows.

[8] Mr. Iosipescu and Mr. Whitehead failed to secure the funds advanced in the manner expected by the Plaintiffs. Mr. Whitehead failed to provide information to the Plaintiffs which would have given them notice that the funds were being used for a purpose other than that represented, or would have prevented them from advancing the funds. Neither Mr. Iosipescu, nor Mr. Whitehead, took steps to ensure the funds were used for the purpose they were requested. Mr. Whitehead made representations, in his professional capacity, regarding the lack of problems with Mr. Janmeja and Cangra, when he knew or ought to have known of their poor financial position.

[9] Mr. Whitehead and Mr. Iosipescu: provided misrepresentations which caused the Plaintiffs to advance the funds and to keep them invested; failed to properly inform the Plaintiffs; and, failed to take steps to protect the Plaintiffs from becoming victims of fraud.

[10] A Notice of Defence was filed on behalf of Mr. Iosipescu and Century Property on July 8, 2013.

[11] On June 15, 2015, the Plaintiffs filed a Motion to Amend the Notice of Action and Statement of Claim, including by removing Jenny White and Century Property as parties. Mr. Iosipescu, on his own behalf and on behalf of Century

Property, agreed to the amendments proposed by the Plaintiffs prior to the Notice of Motion being filed. Mr. Whitehead did not.

[12] Following filing of the Plaintiffs' motion, Mr. Whitehead took no position in relation to the removal of Jenny White, provided he would be permitted to use the transcript of her discovery for any purpose, pursuant to ***CPR*** 18.20(2). The Plaintiffs consent to that condition.

[13] On June 29, 2015, Mr. Whitehead filed a Notice of Motion to be heard on the same day as the Plaintiffs' motion. The motion sought to amend his Statement of Defence by adding: references to the ***Contributory Neligence Act*** and the ***Tortfeasors Act***, as well as supporting allegations of fact; and, a cross-claim against Century Property. The cross-claim alleges that all loans or investments were advanced to Century Property, which was controlled by Mr. Iosipescu. They were advanced based on representations made by Mr. Iosipescu on behalf of Century Property. Mr. Whitehead seeks contribution and indemnity from Century Property.

[14] The Plaintiffs consented to Mr. Whitehead's motion being granted. Century Property, through its representative, Mr. Iosipescu, was provided with notice of the

motion, and, did not contest it. It is proper that those proposed amendments be made.

[15] However, Mr. Whitehead opposes the amendments and the removal of Century Property, requested by the Plaintiffs.

ISSUES

[16] The Court must decide whether it should exercise its discretion under ***Civil Procedure Rule*** 83.02 to permit the amendments requested by the Plaintiffs. Therefore, the following issues need to be determined:

1. Should the Plaintiffs be permitted to remove Century Property as a Defendant?
2. Should the Plaintiffs be permitted to amend their Notice of Action and Statement of Claim as requested?

LAW AND ANALYSIS

Issue 1: Should the Plaintiffs be permitted to remove Century Property as a Defendant?

[17] ***Civil Procedure Rule*** 83.04(3) states:

> "A notice may be amended to remove a party from a proceeding, but the removed party may make a motion for costs or other relief."

[18] This provision, in isolation, might suggest that a party can be removed as of right at any time. However, the Court in ***M5 Marketing Communications Inc. v. Ross (C.O.B. Ross Built Home)***, 2011 NSSC 32, at paragraph 16, stated:

> "I maintain the position that the cases decided prior to the implementation of the current rules continue to offer guidance in deciding whether to exercise discretion to allow amendments to pleadings or to add or remove parties. Unless precluded by the expiration of a limitation period (Rule 83.04(2)) or 'unless doing so would cause serious prejudice [emphasis added] that cannot be compensated in costs …' [Rule 35.06(2)] the Court has discretion to allow a party to either amend the pleadings or to add or remove a party."

[19] As part of its rationale for this conclusion, the Court made reference to some of the provisions in ***Rule*** 35 dealing with a Judge's discretion to remove or add a party. The following are of relevance in the case at hand.

[20] ***Rule*** 35.06(2) states:

> "A Judge may make an order removing or adding a party to prevent the defeat of a proceeding, unless doing so would cause serious prejudice that cannot be compensated in costs or an abrogation of an enforceable limitation period."

[21] Subsections (1) to (3) of ***Rule*** 35.08 state:

> **"35.08** (1) A judge may join a person as a party in a proceeding at any stage of the proceeding.
>
> (2) It is presumed that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing.
>
> (3) The presumption is rebutted if a judge is satisfied on each of the following:
>
> (a) joining a person as a party would cause serious prejudice to that person, or a party;
>
> (b) the prejudice cannot be compensated in costs;
>
> (c) the prejudice would not have been suffered had the party been joined originally, or would have been suffered in any case."

[22] A similar power is contained in section 5 of the ***Tortfeasors Act***, R.S.N.S. 1989, c. 471, which states:

> "Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant or may be made a third party to the action upon such terms as may be deemed just."

[23] In my view, the ***Civil Procedure Rules*** do not modify the powers contained in section 5 of the ***Tortfeasors Act*** as contemplated by section 49 of the ***Judicature Act***, R.S.N.S. 1989, c. 240.

[24] If the Court has the discretion to add a party, it does not make sense that it would not have the discretion to prevent the removal of a party which could appropriately be added by the Court.

[25] In addition, in the case at hand, the removal of Century Property is intimately linked to the other proposed amendments. Consequently, if the circumstances are such that the Court ought to exercise its discretion to prohibit the amendments, then, "unless doing so would cause serious prejudice that cannot be compensated in costs or an abrogation of an enforceable limitation period" the Court ought to also prohibit removal of Century Property.

[26] Since Century Property has already been included as a party from the beginning, no issue of prejudice which cannot be compensated in costs arises from requiring that it remain as a Defendant.

[27] For the same reason, it would not affect the enforceability of any limitation period. In addition, as will be discussed later, the limitation period for the claims advanced has not yet expired.

[28] Part of the prejudice which Mr. Whitehead argues he will suffer, if Century Property is removed, arises from he being forced to commence a third party claim. In light of my view that there is an intimate link between the other amendments and the removal, I will address the purported prejudice arising from removal of Century Property as a defendant in the course of addressing whether Mr.

Whitehead has established grounds for the Court to refuse to exercise its discretion to permit the amendments requested.

[29] As already indicated, whether or not the Plaintiffs ought to be permitted to remove Century Property as a party, will be dependent upon whether or not it ought to be permitted to amend its pleadings as requested.

Issue 2: Should the Plaintiffs be permitted to amend their Notice of Action and Statement of Claim as requested?

[30] ***Civil Procedure Rule*** 83.02 states:

> "**83.02** (1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.
>
> (2) The amendment must be made no later than ten days after the day pleadings close, unless the other parties agree or a judge permits otherwise."

[31] The law regarding amendment of pleadings after they can no longer be made as of right is well outlined at paragraphs 13 to 15 of ***Halifax (Regional Municipality Pension Committee) v. State Street Global Advisors Ltd.***, 2012 NSSC 64, as follows:

> **"[13]** The approach to the exercise of the discretion provided by **Rule 83.02(2)** was described in *Garth v. Halifax (Regional Municipality)* 2006 NSCA 89, per Cromwell J.A.:
>
> > [30] The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs ... .
>
> [**14**] Further direction is found in *Global Petroleum Corp. v. Point Tupper Terminals Co.* (1998), 170 N.S.R.(2d) 367 (C.A.) where Bateman J.A. wrote, at para. 15:
>
> > The law regarding amendment of pleadings is not complicated: leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs.
>
> [**15**] The burden to demonstrate either serious prejudice that cannot be compensated with costs, or bad faith, rests upon the plaintiff, subject to rebuttal. The evidentiary burden is high. e.g., *M5Marketing Communications Inv. v. Ross* 2011 NSSC 32, at para. 31."

[32] The Court, at paragraph 31, also provides the following germane comments:

> "[A] motion to amend pleadings, where there is a demonstrable legitimate purpose for the amendments, should not be denied simply because it also has the effect of undermining the opposing party's litigation strategy. There must be some further or other motive at play."

Bad Faith

[33] Gregory Barro, on behalf of the Plaintiffs, wrote a letter dated August 24, 2011, to Augustus Richardson, Q.C., acting on behalf of Mr. Whitehead. The letter enclosed proposed amendments to the Statement of Claim which were

ultimately effected by consent in 2013. The letter characterized the changes as follows:

> "Essentially, I have taken out any reference to fraudulent activity, focussing primarily on negligence."

[34] The proposed amendments, at that time, did not diverge from the transactions being characterized as loans and/or investments, and involving Century Property.

[35] In 2010, other persons who had invested in Cangra, purportedly through the Defendants, following the collapse of Cangra, commenced applications against Cangra, Mr. Iosipescu, Mr. Whitehead, and IWM. Mr. Whitehead then commenced an application against other parties, including Century Property; and, Mr. Iosipescu and IWM commenced an application against still other parties. All of those applications were eventually consolidated by order of Justice Moir issued October 7, 2013.

[36] In that proceeding, the Lawyers Insurance Association of Nova Scotia ("LIANS") retained Robert Dickson, Q.C. to represent Mr. Iosipescu and IWM in relation to the allegations of lawyer negligence. Similarly, Augustus Richardson, Q.C. was retained to represent Mr. Whitehead. He was also retained to represent

Mr. Whitehead in the within action. However, LIANS did not retain counsel to represent Mr. Iosipescu in the within action.

[37] According to the discovery evidence of Anne-Marie White, following the collapse of Cangra, Mr. Iosipescu advised her that the Plaintiffs should claim against him and LIANS. That was following Mr. Iosipescu advising the Plaintiffs, by letter dated May 31, 2010, of how the investments went wrong.

[38] In a letter dated July 19, 2010, to Jenny White, Marven C. Block, on behalf of MCB Management Company Limited, informed her that they had also invested in the Cangra scheme through, and as a result of representations by, IWM. He indicated that a number of persons who had also invested money were planning to start legal action against the law firm based on negligence. He stated his understanding that Century Property did not have any assets or money for payment and also expressed his view that "without commencing legal action based upon negligence of the solicitors, there is no hope of recovery".

[39] Mr. Barro, on behalf of the Plaintiffs, wrote a letter dated June 16, 2014 to Mr. Dickson. He made reference to that letter in his letter of June 13, 2014, to Mr. Iosipescu. The letter to Mr. Iosipescu states:

> "Further to our attendance at the discovery on February 24th, I enclose a copy of my letter to Robert Dickson. I would encourage you to speak to Mr. Dickson regarding this matter."

[40] In his letter to Mr. Dickson, Mr. Barro expressed that which follows. He understands that Mr. Dickson is representing Mr. Iosipescu in the other proceedings arising from the crumbled Cangra investments. He has reviewed the pleadings in that matter and notes that the allegations against Mr. Iosipescu are essentially the same as those of the Plaintiffs in the case at hand. He also noted the long-standing solicitor/client relationship between Mr. Iosipescu and the Plaintiffs, as well as Mr. Iosipescu's acknowledgment of same at discovery examination. The letter referred to a discussion that Mr. Barro had with Mr. Iosipescu following discovery examination and noted that Mr. Iosipescu "strongly feels that LIANS should be defending him with respect to this claim and not just the claim of" the other investors. Mr. Barro suggested that LIANS had a duty to defend as there was a clear allegation of breach of lawyer standard of care. Thus, Mr. Barro was urging Mr. Dickson to reach the same conclusion.

[41] I infer from the fact that LIANS has still not retained anyone to represent Mr. Iosipescu in the within matter that Mr. Dickson did not agree with the conclusion urged by Mr. Barro. The problematic and distinguishing feature in the

within matter is, more likely than not, the loan/investment arrangement alleged in the Statement of Claim.

[42] Having sought, but been refused, consent to make the amendments requested in this motion, Mr. Barro filed the within motion on June 15, 2015.

[43] In my view, these circumstances provide strong and compelling evidence that the requested amendments are for the purpose of bringing into play coverage through LIANS, as opposed to a legitimate purpose related to advancing or establishing the claims.

[44] The Plaintiffs have not provided any evidence to refute that. The Plaintiffs merely submit that the main motivation for the amendments is to focus on what they believe they can prove and what is likely to be proceeded with as the most sound case.

[45] The Plaintiffs were asked to point to the factual basis for the change in pleadings. They first asserted that it was Century Management's lack of participation in the process. However, in my view, that does not impact the strength of their case against Century Management; and, there are procedures in place to deal with such lack of participation.

[46] They also pointed to pages 12 and 13 of the transcript of the discovery examination of Anne-Marie White, starting at line 23 of page 12. However, in my view, that portion of the transcript simply states that Anne-Marie White had no solicitor/client discussions with Mr. Whitehead. It says nothing regarding the merits or strength of a claim arising out of investments or loans to or through Mr. Iosipescu and/or Century Property.

[47] In contrast, Mr. Whitehead provided ample evidence pointing to the claims arising from the crumbled investments or loans being easier to prove than the solicitor's negligence claims. That evidence includes that which follows.

[48] During her discovery examination, Anne-Marie White testified that she knew that at least the second one hundred thousand dollar ($100,000.00) amount she invested was going to Century Property, which she understood to be Mr. Iosipescu's company.

[49] The Plaintiffs, in their own affidavit of documents, produced a cheque dated April 20, 2009, in the amount of one hundred thousand dollars ($100,000.00), made out to Century Property and drawn on the account of Anne-Marie White. That affidavit of documents also contains an associated promissory note from Mr. Iosipescu to Anne-Marie White stating:

> "In consideration of a loan in the amount of one hundred thousand dollars (100,000.00) Canadian advanced on April 20, 2009, I promise to repay on demand to Anne-Marie White of Halifax the principal sum of one hundred thousand dollars ($100,000.00) together with interest at 14% per annum calculated monthly not in advance."

[50] In a letter dated May 31, 2010, to the Plaintiffs, Mr. Iosipescu stated:

> "I used my company, Century Property Management Inc., as a conduit for the receipt and disbursement of funds for purchase order financing on behalf of persons like yourself. These funds were from various investors and from my own money. You were protected by the issue of promissory notes and in some cases mortgages on property. The legal work to issue the promissory notes and mortgages was done by my office and I waived my fees. All total, the amount advanced to Cangra was approximately $2.1 million."

[51] This is clear evidence of an investment/loan from Anne-Marie White involving Century Property.

[52] Also in the Plaintiffs' affidavit of documents, there are cheque stubs from Century Property Management Inc. showing interest payments made for the Plaintiffs in December of 2009 and in January of 2010.

[53] Similarly, the affidavit of documents contains cheques from Anne-Marie White to Mr. Iosipescu dated in May of 2006, one in the amount of one hundred thousand dollars ($100,000.00), and another in the amount of fifty thousand dollars ($50,000.00). There are accompanying revised promissory notes for each of these amounts advanced in May of 2006, promising repayment on demand of the

principal sums with interest at 12% per annum. There is also a comparable revised promissory note from Mr. Iosipescu to Jenny White in relation to twenty thousand dollars ($20,000.00) advanced by her in May of 2006 with a promise to repay the principal on demand with interest at 12% also.

[54] The discovery evidence of all three Plaintiffs is replete with references describing the funds advanced to Mr. Iosipescu and Century Property being investments or loans or both.

[55] Despite this clear evidence, the Plaintiffs seek to amend their Statement of Claim to remove all references to: Century Property; loans and investments; promissory notes; interest payments made; and, security for loans. They seek to substitute a mere advancement or depositing of funds.

[56] In my view, they have not provided any legitimate reason for seeking to drop these claims in relation to which they have clear evidence. In my view, there is no indication in the evidence that they have a better chance of success in a claim in negligence, especially professional negligence, and particularly against Mr. Whitehead, given their acknowledgement, in their answer to Mr. Whitehead's demand for particulars, that they never communicated directly with him. They acknowledged that all communication with Mr. Whitehead was through Mr.

Iosipescu or other employees of IWM, or through indirect communication such as forwarded emails.

[57] In ***National Bank Financial Ltd. v. Potter***, 2008 NSCA 92, the Court of Appeal cited with approval the Trial Judge's comment that, in the context of amendments to pleadings, bad faith can be inferred where no factual basis is provided for seeking to remove material allegations of fact and those material allegations of fact are in some way detrimental to the interest of the parties seeking their removal. At paragraph 38, the Court emphasized that it was in the context of that case that the absence of such an explanation supported an inference of bad faith and that instances where a party will be required to offer explanation for discontinuing a claim will be rare.

[58] In the context of the case at hand, the requested removal of the claims is contradictory to the clear evidence and the understanding of the Plaintiffs. The request is being made following efforts by the Plaintiffs' solicitor to have LIANS appoint counsel for Mr. Iosipescu, and respond to the claim, which efforts have been unfruitful. There is an indication that Century Property has no assets. Maintaining the allegations of default on loans and/or misrepresentations regarding investments is detrimental to the interests of the Plaintiffs in having LIANS respond to their claim. Consequently, absent an explanation for the requested

amendments, the most reasonable inference, and perhaps the only reasonable inference, is that they are requested to bring into play LIANS representation and funds.

[59] In addition, where amendments to the pleadings are being sought for such an ulterior purpose, it may constitute abuse of the Court's process, which the Court ought to prevent so as to avoid bringing the administration of justice into disrepute: ***National Bank Financial Ltd. v. Potter (appeal by Barthe Estate)***, 2015 NSCA 47, para 208.

[60] In my view, with the exception of small portions of the requested amendments, I find that they are sought in bad faith, for an ulterior purpose unconnected to the merits of the claims. As such, it is appropriate for the Court to exercise its discretion to refuse permission to make those amendments.

[61] This would be sufficient to dispose of the motion. However, as indicated above, I will address the issue of prejudice to Mr. Whitehead arising from removal of Century Property as a defendant.

Prejudice Not Compensable In Costs

[62] Mr. Whitehead advances two forms of non-compensable prejudice if the amendments are permitted such that Century Property is removed as a Defendant.

[63] Firstly, he points out that if Century Property is not a party, it makes it more difficult to get information from it. They have already had difficulty obtaining information from Century Property, even while included as a party, because Mr. Iosipescu has not fulfilled various discovery undertakings and is not providing information for Century Property.

[64] Secondly, he submits that removing Century Property as a Defendant will remove his ability to obtain, from the Court, an order apportioning the responsibility to contribute towards the damages, in the event of a finding of liability, amongst the Defendants, including Century Property.

[65] The production and discovery issues arising from Century Property being removed as a party may be rectified by Mr. Whitehead adding it as a third party. Much of the prejudice arising from having to add Century Property as a third party, in my view, could be compensated in costs.

[66] Neither party has raised any question regarding any time limitation on the ability of Mr. Whitehead to bring a third party claim against Century Property; and, there does not appear to be any limitation period impediment.

[67] The Court in ***MacKenzie v. Vance***, [1977] N.S.J. No. 463 (N.S.S.C., A.D.) concluded that a defendant's cause of action against a third party for indemnity or contribution only arises upon that defendant being found to be liable to the plaintiff, such that the limitation period only begins to run then. The Court in ***Smith v. Atlantic Wholesalers Ltd. (c.o.b. Super Valu)***, 2012 NSSC 14: noted that the Court in ***MacKenzie v. Vance*** reached its decision without considering ***Stetar v. Poirier***, [1975] 2 S.C.R. 884; and, reached the conclusion that, if it had considered ***Stetar v. Poirier***, it would it "would have concluded that the limitation period for the indemnity claim commenced upon the accrual of the plaintiff's cause of action against the proposed third party". On that basis, the Court in ***Smith v. Atlantic Wholesalers*** held "that the limitation period for a third party indemnity action in Nova Scotia starts to run at the time that the plaintiff's cause of action against the proposed third party accrues".

[68] In the case at hand, the shortest applicable limitation period for an unfiled claim of the types already filed by the Plaintiffs is six years from when the Plaintiffs were informed, in 2010, that the money they had invested had been lost. That six year period has not yet expired. Its expiry also precedes the expiry of the limitation period of two years from the effective date of the ***Limitation of Actions Act***, S.N.S. 2014, c. 35 (i.e. September 1, 2015). Therefore, Section 23(3) of the

Limitation of Actions Act , in its current form, does not operate to shorten that limitation period.

[69] I will now turn to the question of whether creating a situation where Mr. Whitehead will be forced to add Century Property as a third party creates prejudice related to apportionment of liability amongst tortfeasors, that is not compensable in costs.

[70] Section 4(1) of the ***Tortfeasors Act*** states:

> "In any action for contribution under this Act or on the summary application of any one of two or more tortfeasors found liable in damages in any action, the amount of contribution recoverable from any persons shall be such as may be found by the judge presiding at the trial or the court on appeal, to be just and equitable having regard to the extent of that person's responsibility for the damage, and the judge or the court on appeal shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity".

[71] Section 3(c) states:

> "Where damage is suffered by any person as a result of a tort, whether a crime or not, any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this Section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought".

[72] The parties disagree in relation to whether Section 4(1) can be used to apportion the requirement to contribute among defendants only, or whether it includes a third party. Mr. Whitehead argues it can only be apportioned among defendants. The Plaintiffs argue it can also be extended to third parties.

[73] Neither party provided any authority to support their argument. I have not been made aware of any case directly on point. I note that in ***A.C.A. Cooperative Assn. v. Associated Freezers of Canada Inc.***, [1992] N.S.J. No. 255 (N.S.S.C., A.D.), the Court, though it discussed Section 4 of the ***Tortfeasors Act***, "apportioned" liability equally amongst defendants, some of which also happened to be third parties, under the Nova Scotia ***Contributory Negligence Act.*** Much more recently, in ***Kasperson v. Halifax (Regional Municipality)***, 2012 NSCA 110, in *obiter*, at paragraph 51, the Nova Scotia Court of Appeal noted that a judge may order "contribution" by a third party, "or others who may become parties", "by apportionment under the *Contributory Negligence Act*, R.S.N.S. 1989 c. 95 or s. 4 of the *Tortfeasors Act*". That indicates that such an order for apportionment under s. 4 of the ***Tortfeasors Act*** may include third parties.

[74] Further, in ***Associated Freezers***, the Court ordered that the apportionment of liability was only "for purposes of contribution among the liable parties and [would] not affect the rights of the plaintiff customers to recover in full from any

one of them jointly and severally". It ordered that on the basis that the injury done to the plaintiff customers was "indivisible", with the actions of each tortfeasor being a "proximate cause" of that loss.

[75] In the within Action, the Plaintiffs have lost their investments. They allege they would not have suffered that loss but for the actions of Mr. Whitehead and Mr. Iosipescu, for himself and Century Property, who were acting jointly, as part of a common scheme. In this Motion, Mr. Whitehead has not demonstrated any divisibility of the injury he is alleged to have caused. Therefore, more likely than not, as in ***Associated Freezers***, any apportionment would only be for the purposes of contribution among the tortfeasors, still leaving each of them jointly and severally liable to the Plaintiffs.

[76] Further, if the suggestion that Century Property has no assets is accurate, it makes it even less likely that the Court would, following trial, grant an order which would require the Plaintiffs to recover a portion of their loss directly from Century Property.

[77] Consequently, in my respectful view, in the circumstances of this case, Mr. Whitehead, from a practical point of view, has not shown that he has any greater chance of reducing his liability to pay damages to the Plaintiffs if Century Property

is a defendant, as opposed to a third party. Either way, more likely than not, he would be in the position of having to seek to recover contribution from Century Property, while still being severally liable for the full amount of the Plaintiffs' loss.

[78] For these reasons, I find that Mr. Whitehead has not demonstrated that he will suffer prejudice that is not compensable in costs if the Plaintiffs are permitted to remove Century Property as a defendant.

CONCLUSION

[79] Generally, my conclusion on the issue of prejudice would justify granting permission to make the requested amendments. However, given my finding that, subject to minor exceptions, the proposed amendments are being sought in bad faith, for an ulterior purpose, in my view, the most appropriate exercise of my discretion is to refuse to permit the amendments.

[80] For the foregoing reasons, with the exception of those requested amendments which I will discuss shortly, I exercise my discretion to disallow the disputed amendments requested, including removal of Century Property as a party.

[81] Since it has been agreed that Jenny White may be removed as a party, references to her in the Statement of Claim may be removed and any consequential grammatical corrections made.

[82] Also, I see nothing objectionable with allowing the proposed amendments which follow. They do not, in my view, form part of the amendments sought in bad faith, for an ulterior purpose. I, therefore, exercise my discretion to permit them. They comprise the addition of the words/phrases:

(a) At paragraph 14, "advised that the purpose for which the previous funds were given was finished, but that he had another opportunity. Iosipescu";

(b) At paragraph 16, "additional money as well as for permission to use the money referred to in paragraph 9, which could have been returned to the Plaintiffs", and ", at the direction of the Defendant. Iosipescu deposited this cheque, as well as the one hundred and fifty thousand dollars ($150,000.00) which was to be returned to the Plaintiffs, into the Defendant, Iosipescu's trust account.";

(c) At paragraph 26(b), "Iosipescu knew the Plaintiffs had the means to provide him with the money that he was seeking as a result of his

acting for the Plaintiffs in the past and his ongoing solicitor/client with the Plaintiffs; and,

(d) At paragraph 26(e), "by depositing the funds he received from the Plaintiffs into his trust account to be used at his direction.".

[83] In my view, these requested amendments contain allegations of fact which are in conformity with the understanding, and evidence in the possession, of the Plaintiffs. They merely provide additional detail to support the claims arising out of the investments and/or loans.

ORDER

[84] On the basis of these conclusions and the consent of the parties on the non-contentious issues, I order that which I will outline in the paragraphs which follow.

[85] Jenny White may be removed as a party, provided, however, that, even following her removal, Mr. Whitehead will be permitted to use the transcript of her discovery for any purpose, pursuant to ***Civil Procedure Rule*** 18.20(2).

[86] The Plaintiffs are granted permission to make the amendments to their Notice of Action and Statement of Claim referred to at paragraphs [81] and [82] herein.

[87] Otherwise, permission for the Plaintiffs to make the requested amendments to their Notice of Action and Statement of Claim, including by removing Century Property as a defendant, is refused.

[88] Mr. Whitehead is granted permission to amend his Statement of Defence by adding references to the ***Contributory Negligence Act*** and the ***Tortfeasors Act***, along with the allegations of fact supporting the claim of contributory negligence by the Plaintiffs, and, a cross-claim against Century Property, all as specified in Schedule "A" to his Notice of Motion herein.

[89] If the Plaintiffs, Mr. Iosipescu and Century Property do not communicate to the Court, within 5 days of receipt of this decision, calculated in accordance with ***Civil Procedure Rule*** 94.02, any objection to the form of the order drafted by counsel for Mr. Whitehead, and which accompanied his Notice of Motion, the Court will grant the order regarding amendments to Mr. Whitehead's Statement of Defence in that form.

[90] I ask counsel for Mr. Whitehead to prepare the order regarding the remaining issues and to send it to the lawyers for the Plaintiffs, as well as to Mr. Iosipescu, in his personal capacity and as representative of Century Property, with a signature line for their consent as to form.

COSTS

[91] I have received some preliminary submissions on costs from Mr. Whitehead. I do not have any submissions from any other party. Therefore, if the parties are unable to agree upon costs, I ask that they provide their submissions on that issue in writing.

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Muise, J.