IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mao v. Liu,* 2017 BCSC 226

Date: 20170210
Docket: S160498
Registry: Vancouver

Between:

Jun Mao and Jing Li

Plaintiffs

And

Jiukang Liu, also known as Tony Liu, and Tony Liu Notary Corporation

Defendants

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiff:	K.G. McKenzie
Counsel for the Defendants:	Q.T. Duong I.M. Knapp
Counsel for the Proposed Third Parties, Stephen Li and Royal Pacific Realty Corp:	K.A. Murray
Place and Date of Trial/Hearing:	Vancouver, B.C. January 3 - 4, 2017
Place and Date of Judgment:	Vancouver, B.C. February 10, 2017

[1] These reasons for judgment address two applications. The plaintiffs apply pursuant to Rule 9-7 for the summary trial of liability with damages to be assessed. The defendants apply pursuant to Rule 3– 5 for an order permitting them to deliver a third party notice naming Borden Ladner Gervais (BLG), CE International Resource Holdings LLC (CEIR), Stephen Ping Li and Royal Pacific Realty Corp. (Royal Pacific).

THE ALLEGATIONS IN THE NOTICE OF CIVIL CLAIM

[2] The plaintiffs allege:

a) they entered into a contract on November 3, 2014 to purchase real property in Vancouver for the sum of $5,560,000;

b) CEIR was a creditor of the registered owners of the property and had conduct of sale pursuant to an order of this Court (the "Court Order");

c) pursuant to an "engagement letter" dated November 10, 2014 and on the letterhead of the defendants, the plaintiffs retained the defendants to complete the conveyance of the title to the property to them;

d) the engagement letter included provisions that the defendants would "negotiate appropriate closing undertakings with solicitor/notary for the Seller" and would "make inquiries as to the residency status of the Seller pursuant to the *Income Tax Acts* [sic] as required";

I observe that all parties understood it was the residency of the registered owners of the property that was relevant.

e) the defendants sent a draft statutory declaration concerning the residency status of the registered owners of the property to the lawyers for CEIR which was BLG, who "refused to sign the statutory declaration as to the residency of the Registered Owners, saying that this was a court ordered sale and their client was neither the vendor nor the owner of the property, and therefore not in a position to make any representations with respect to the property or any issues relating to it";

f) one of the registered owners was not a resident of Canada at the time of the purchase of the property;

g) "Contrary to the terms of the Engagement Letter, the Defendant Tony Liu Notary Corporation proceeded with the conveyance of the Property despite not having any indication as to whether the Registered Owners were residents or non-residents of Canada for tax purposes under the *Income Tax* Act"; and

h) by letter dated February 23, 2015, the Canada Revenue Agency (CRA) advised the plaintiffs that no certificate of compliance with s. 116 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) had been obtained in relation to the purchase of the property and accordingly the plaintiffs were obliged to pay withholding tax which was assessed at $695,000.

THE DEFENDANTS' ALLEGATIONS

[3] In their response to civil claim the defendants made admissions the effect of which is that the following facts are not in issue:

a) the plaintiff's entered into the contract of purchase for the property as alleged;

b) CEIR had conduct of the sale pursuant to the court order;

c) the identity of the registered owners of the property, one of whom was not a resident of Canada at the time of the purchase of the property;

d) pursuant to the engagement letter the plaintiffs retained the defendant notary corporation to convey title to the property to them;

e) the engagement letter included a term that the defendant notary corporation was "to make inquiries as to the residency status of the Seller pursuant to *the Income Tax Acts* [sic] as required"; and

f) title to the property vested in the plaintiffs on November 17, 2014.

[4] Paragraph 9 of the notice of civil claim reads as follows:

> The Defendant Tony Liu Notary Corporation sent out a statutory declaration as to the residency status of the Registered Owners, but the lawyers for CE International Resources Holdings LLC, who were acting for CE International Resources Holdings LLC in the sale of the Property, refused to sign the statutory declaration as to the residency of the Registered Owners, saying that this was a court ordered sale and their client was neither the vendor nor the owner of the property, and therefore not in a position to make any representations with respect to the property or any issues relating to it.

[5] Paragraph 4 in the response to the notice of civil claim reads:

> In response to paragraph 9 of Part 1 of the Notice of Civil claim, the Defendants admit that they sent Borden Ladner Gervais LLP ("BLG") the lawyers for CE International Resources Holdings LLC (the "Judgment Creditor"), a statutory declaration as to the residency status of the Judgment Creditor and that BLG indicated that this was a court-ordered sale and their client was neither the vendor nor the owner of the Property and that their client is not in a position to make any representations with respect to the Property or any issues relating to it. All other facts alleged in the said paragraph are outside the knowledge of the Defendants.

[6] Notwithstanding the last sentence in paragraph 4 of the response to civil claim I conclude the defendants have admitted the facts alleged in paragraph 9 of the notice of civil claim.

[7] The defendants plead that the conveyance of the property was completed in accordance with the contract of purchase and sale and of the court order. They allege there was an "indication" the registered owners were residents of Canada for purposes of the *Income Tax Act*.

[8] In part two of the response to civil claim the defendants allege that the plaintiffs entered into the contract of purchase and sale before they signed the engagement letter and the contract was unconditional and binding on them. I understand this allegation to be the basis for the defendants to assert that the contract of sale defines the transaction the plaintiffs were bound to perform, without withholding any portion of the purchase price, even if they learned that the registered owners of the property were not residents of Canada at the time of the purchase.

[9] The defendants also allege that they conducted a title search on November 10, 2014 of the property which showed:

a) the mailing address of the registered owners was the address of the property;

b) the registered owners had owned the property for more than 12 years; and

c) "there was a history of mortgages [against the property] in favour of financial institutions in Canada".

These are the alleged "indication" that the registered owners were residents of Canada at the relevant time.

[10] Further the defendants plead they wrote to BLG requesting undertakings including:

> The net sale proceeds will be forwarded to you "in trust" on your undertaking to:
>
> …
>
> 4. (If applicable) Non-Resident Clearance Undertaking:
>
> a. Funds are provided on your further undertaking:
>
> i. that if the property is personal use property, to hold in trust 25% of the gross purchase price or if the property was income producing, to hold in trust 25% of the land value and 50% of the improvement value as pro-rated from current assessed values to the actual gross purchase price (the "Holdback");
>
> ii. to pay to Canada Revenue Agency ("CRA") the amount it requires to issue and release to each Seller a Clearance Certificate ("Certificate"); and
>
> iii. to provide me with the Purchaser's copy of the Certificate upon receipt or if the Certificate has not been received by the 30th day of the month following closing, pay to CRA the amount of the Holdback on my demand ("the Demand Date").

[11] The defendants allege this Court approved the sale and that out of the proceeds of sale BLG was to pay "taxes, arrears of taxes, interest and penalties on arrears of taxes in respect of the [property]". I understand this allegation to mean it was BLG that was obligated to withhold a portion of the sale proceeds to satisfy the CRA.

[12] Further the defendants plead that the notes to "Seller's Statement of Adjustments" include a certification "that it is a Canadian resident and that it will not be a non-resident of Canada within the meaning of the Income Tax Act (Canada) at the time of the sale".

[13] The defendants further plead that when BLG wrote to them enclosing "the executed Seller's Statement of Adjustments" BLG confirmed that:

> On or about November 13, 2014, BLG wrote to the Defendants enclosing, *inter alia*, a copy of the executed Seller's Statement of Adjustments signed on behalf of the Judgment Creditor (the "BLG Letter"). In the letter, BLG confirmed as follows:
>
> "Upon our receipt of the funds due to the [Judgment Creditor] in accordance with the [Seller's Statement of Adjustments], we undertake to pay out the funds as required by the Order."

The words I have emphasized are said by the defendants to be an acknowledgement by BLG that it would withhold part of the purchase money to satisfy the CRA.

[14] The defendants plead in paragraph 11 of part two of the response to civil claim that:

> The copy of the executed Seller's Statement of Adjustments enclosed with the BLG Letter had a number of terms in the Notices to the Seller's Statement of Adjustments crossed out despite the specific direction in the Undertaking Letter not to amend the statement without the Defendants' approval. One of the terms crossed out was the term with respect to the seller's residency status.

[15] The defendants also plead that they informed the plaintiffs prior to completion of the purchase and sale of the property "of a possible issue with respect to taxes pursuant to the [*Income Tax Act*]" but the plaintiffs "decided to proceed with the transaction despite the potential risk of tax liability".

[16] Lastly the defendants plead that:

a) any loss or damage suffered by the plaintiffs was the fault of the registered owners, CEIR, BLG "and/or others";

b) if any tax was owed pursuant to the *Income Tax Act* it is payable by the registered owners, BLG or CEIR and that BLG "was required to pay any taxes from the proceeds of sale in accordance with the court order"; and

c) the plaintiffs have failed to mitigate any loss or damage by pursuing a claim against BLG, CEIR or the registered owners which they "are required" to do "before they can claim against these defendants".

[17] The central issue on the question of the liability of the defendants is whether it was their duty to make inquiries to determine whether the registered owners of the property were residents of Canada at the time of the purchase and if they breached that duty.

[18] If the registered owners were not residents of Canada the plaintiffs risked incurring a tax liability. Section 116(5) of the *Income Tax Act* reads:

> **Liability of purchaser**
>
> **(5)** Where in a taxation year a purchaser has acquired from a non-resident person any taxable Canadian property (other than depreciable property or excluded property) of the non-resident person, the purchaser, unless
>
> **(a)** after reasonable inquiry the purchaser had no reason to believe that the non-resident person was not resident in Canada,
>
> **(a.1)** subsection (5.01) applies to the acquisition, or
>
> **(b)** a certificate under subsection 116(4) has been issued to the purchaser by the Minister in respect of the property,
>
> is liable to pay, and shall remit to the Receiver General within 30 days after the end of the month in which the purchaser acquired the property, as tax under this Part for the year on behalf of the non-resident person, 25% of the amount, if any, by which
>
> **(c)** the cost to the purchaser of the property so acquired
>
> exceeds

> **(d)** the certificate limit fixed by the certificate, if any, issued under subsection 116(2) in respect of the disposition of the property by the non-resident person to the purchaser,
>
> and is entitled to deduct or withhold from any amount paid or credited by the purchaser to the non-resident person or otherwise recover from the non-resident person any amount paid by the purchaser as such a tax.

[19] In my view if the defendants agreed to make the "reasonable inquiry" referred to in the above subsection, but failed to do so, and failed to advise the plaintiffs of their potential tax liability, and the plaintiffs have been assessed taxes because at least one of the registered owners of the property was not a resident of Canada at the time title to the property was conveyed to the plaintiffs, the defendants will have breached the contract with the plaintiffs defined by the engagement letter and will be liable for the consequent loss and damage incurred.

[20] The defendant Jiukang Liu, also known as Tony Liu was examined for discovery in this action on May 12, 2016. He agreed that he had entered into the "engagement letter" and that he thereby was obligated to determine from the solicitor for the registered owners through a statutory declaration that they were residents of Canada.

[21] On his examination for discovery Mr. Liu was shown a letter from BLG the solicitor for CEIR, and the following exchange then took place:

> Q And in the middle of that page under item 3, it says:
>
> "We confirm that as this is a court-ordered sale, the CEIR is neither the vendor nor the owner of the property. CEIR is not in a position to make any representations with respect to the property or any issues related to it."
>
> Right?
>
> A Yes.
>
> Q And you read that, and that was part of the thing that made you call Betty at Borden Ladner Gervais; right?
>
> A Yes.
>
> Q Because at this time, you-know you're not going to get that signed statutory declaration back regarding residency or non-residency, and they're not going to give you any undertakings with respect to what they're doing with the sale proceeds in the trust account; right?
>
> A Yes.
>
> Q And then you have that telephone call with Betty at Borden Ladner Gervais, and she says it's because they're not the owners of the property; they represent a creditor, and that's that; right?
>
> A Right.
>
> Q And you never advised Jing Li of that conversation, did you?
>
> A I told -- I mentioned the conversation to Steven.
>
> Q Right. My question is: You never told Jing Li about that conversation, did you?
>
> A I don't remember.
>
> Q Did you or didn't you?
>
> A I may not, but I don't remember.
>
> Q So you told him, Steven Li, [the real estate agent] after you got these documents back from Borden Ladner Gervais, that there's a court order and the conveyance should go as per

the court order, and the court order has a provision for how taxes are to be dealt with; right?

A Yes.

Q You didn't tell him anything else about concerns with the order, did you?

A I might say they have to do everything in accordance with the order.

Q Right. So you didn't tell him anything else; right?

A No.

Q "No" you agree, or "no" you disagree?

A I agree.

Q Okay. And you never had a conversation like this with Jing Li before she provided you or when she provided you with the net sale proceeds to complete, did you?

A Not in this deal.

Q Right. You never told her that Borden Ladner Gervais didn't sign the stat dec did you?

A I don't remember I phoned her. But I assume Steven Li would tell her.

Q Okay. So you assume that Steven Li told her, but my question was: You never told her directly about these issues you just told us about that you communicated to Steven Li? You never told any of that to Jing Li, did you?

A As I said, I don't remember.

Q So you're saying it's possible and you don't remember?

A Might be. But --

Q You have no knowledge, no recollection whatsoever of a conversation with Jing Li regarding these issues; correct?

A Yes.

Q Yeah. Okay. So, to your knowledge, you never told her about Borden Ladner Gervais not signing the non-resident holdback undertaking; correct?

A If I don't remember, I would say yes.

Q And you don't remember?

A Yes.

Q So you say yes; right?

A Right.

Q So you never told her that - and by "her," I mean Jing Li -- that you didn't get a signed statutory declaration back, did you?

A If I don't remember, I would say yes, I did not.

Q And you never told her that by completing this contract, her and her husband would be at risk for 25 percent of the purchase price if it turned out that the owners were non-resident'

MR. DUONG: At any point?

MR. MCKENZIE:

Q Prior to the completion?

A Yes. But we are dealing with the seller in accordance with the court order.

Q Yes. Okay. Look, I understand that. But my first question is: You never told Jing Lil that if the vendor -- if the registered owners were non-resident, she could be exposed to a 25 percent purchase holdback from CRA if Borden Ladner Gervais didn't hold back tax funds? You never had that conversation with her, did you?

A No.

Q "No," you agree with my statement, or "no," you disagree?

A I agree with your statement.

Q And you never told that to her husband, Jun Mao, because he wasn't even around; right?

A Yes.

Q And your conversation on the phone with Steven Li was they didn't sign those documents but it should be as per the court order, and the court order has a tax provision in it; right?

A Right.

Q But you never told Steven Li [the sales agent] that there would be the potential of the purchasers being responsible for a 25 percent non-resident holdback either, did you?

A No.

Q "No," you agree with that statement, or "no," you disagree?

A I agree.

…

Q And you never told her, to your recollection, that those documents weren't accepted by the other side; in fact, they were specifically rejected by the other side; right?

A As I said, I don't remember.

Q Right.

A I cannot say "never."

Q What are you saying? I hope I did, because if I didn't, I would be liable to them?

A I don't remember I made a phone call or not between the 13th and the 17th.

Q Do you agree that you had an obligation to notify Jing Li of the potential risk of completing this contract of purchase and sale with respect to the non-resident holdback, given that the undertaking wasn't accepted and the statutory declaration wasn't signed?

A Yes, I do.

Q And you have no recollection of actually fulfilling that obligation to her; correct?

A Yes.

[Emphasis added.]

[22] I consider the above evidence to be a clear acknowledgement of a breach of duty by the defendants. Nevertheless, the defendants submit that the evidence on this application for a summary trial is not certain on that point and thus this matter is not suitable for a summary trial.

[23] The defendant, Mr. Liu, made an affidavit on September 26, 2016, in response to an affidavit of Jing Li about the residency question. Mr. Liu's affidavit reads in part:

> 14. In the Affidavit, Jing Li states that I did not explain the transaction documents to her, with the exception of the Statement of Adjustments, and that her capacity to read English is very limited. In order to ensure that Jing Li fully understand the nature and effect of her transaction, all of my communications with Jing Li were in Mandarin, including my explanation to her, of the legal documentation, which I undertook fully.
>
> 15. In the Affidavit, Jing Li also states that I did not discuss with her about liability surrounding a non-resident seller of property or that there would be monetary consequences if the owner of the Property was a non-resident. This is untrue. During our meeting on November 13, 2014, Jing Li wanted to revisit the conversation Steven and I had had previously regarding tax implications in connection with a purchase. I advised her at that time that where the seller of the property was a non-resident and did not pay capital gains tax, the liability to pay this amount would fall on the buyer.

…

22. On November 17, 2014, the completion date for the purchase of the Property, Jing Li attended at my office to deliver the balance of the funds required to complete the purchase. In the Affidavit, Jing Li states that I never discussed with her about whether she wanted to complete the transaction. This is untrue. I confirmed with Jing Li upon her delivery of the bank draft whether I was to proceed with the purchase of the Property given the risks involved in this transaction. I also confirmed with her that she had spoken to Steven regarding my phone conversation with him. Jing Li instructed me to proceed with registration as she did not want to be in breach of the Contract and risk losing the Deposit.

[24] I do not accept the affidavit evidence of Mr. Liu is truthful. His evidence on his examination for discovery, several months before he made his affidavit, was unequivocal that he had no memory of telling Jing Li about the risk of her liability to pay tax if the registered owners were not residents of Canada. No explanation is given about how his memory revived between May and September 2016.

[25] Furthermore, it is implausible that the plaintiff Jing Li would have instructed Mr. Liu to proceed with the conveyance despite the risk of a substantial tax liability, which could readily be prevented and the purchase and sale satisfactorily completed. Jing Li denies she gave those instructions.

[26] The last sentence in paragraph 22 of Mr. Liu's affidavit, if true, which I do not accept, would reflect a legal error in Jing Li's mind, of which Mr. Liu had a duty to disabuse her. Section 116(5)(d) of the *Income Tax Act* entitles a purchaser to withhold the necessary tax and s. 227(1) of the *Income Tax Act* provides that "no action lies against any person for deducting or withholding any sum of money in compliance or intended compliance with this act". In short if Mr. Liu had advised Jing Li to withhold the necessary tax from the purchase price the plaintiffs would not thereby have breached the contract nor risked losing their deposit.

[27] I find this matter is suitable for a summary trial.

[28] I find that the plaintiffs contracted with the defendants to advise on whether the registered owners of the property were Canadian residents at the time of the purchase. The defendants made an inquiry of BLG about the residency of the registered owners and were told BLG could provide no information on that topic. No further steps were taken to make the "reasonable inquiry" referred to in s. 116(5) of the *Income Tax Act*.

[29] The defendants argue that from the purchase money it was BLG that was obliged to pay the non-resident withholding tax. There is nothing in the evidence to suggest BLG had agreed to do so. On the contrary it had expressly rejected any involvement with the non-resident tax implications of this conveyance. I do not accept the language of the contract of purchase and sale imposed a burden on BLG to withhold the non-resident portion of the purchase price.

[30] I find no "indication" that the registered owners were residents of Canada which could satisfy the obligation of the defendants to make a reasonable "inquiry" as required by the *Income Tax Act*. I cannot find the Vendors' Statement of Adjustments could be relied on by the defendants to indicate the registered owners were residents of Canada.

[31] The standard of care the law imposes on the defendants is that of a reasonably competent Notary Public: see *Esser v. Luoma*, 2004 BCCA 359. It is clear the defendants failed to meet that standard. Expert evidence is not needed of the standard.

[32] The defendants submit that to try liability alone is to "litigate in slices". I do not agree. Rule 9-7(15) allows this Court to grant judgment generally or on an issue. I see no impediment to granting judgment with damages to be assessed.

[33] The defendants submit the plaintiffs have not yet suffered any damage and therefore liability cannot be found. I do not agree. The plaintiffs have been assessed taxes exceeding $600,000, which they have a current obligation to pay.

[34] The defendants submit the plaintiffs have a duty to mitigate their damage by challenging the assessment and perhaps succeeding in reducing it to zero. On what basis could the plaintiffs contest the assessment? To assert the registered owners were residents of Canada at the time of the purchase would be false. Nor can the plaintiff's assert that a reasonable inquiry was made to ascertain the residence of the registered owners. The defendants, who were the plaintiffs' agents for that purpose, made no inquiry. The plaintiffs are not required to engage in a futile challenge of the assessment.

[35] I find the defendants are liable to the plaintiffs. There will be judgment with damages to be assessed.

THE APPLICATION TO TAKE THIRD-PARTY PROCEEDING

[36] The following is a chronology of the steps taken in this action:

- January 19, 2016 the notice of civil claim is filed.
- January 21, 2016 the notice of civil claim is served on the defendants.
- February 26, 2016 the defendants file a response to civil claim.
- May 12, 2016 the defendant Mr. Liu is examined for discovery.
- September 14, 2016 the plaintiffs file an application for a summary trial of liability.
- September 15, 2016 the defendants file an application to issue a third party notice against BLG.
- September 20, 2016 the plaintiffs file an application response opposing the application to join BLG as a third party.
- September 28, 2016 the defendants file a response to the plaintiffs' application for a summary trial of liability.

- November 14, 2016 the hearing of the plaintiffs' application for summary trial is adjourned to January 3, 2017 by consent.

- November 21, 2016 the defendants file an application to deliver a third party notice against BLG, CEIR, Stephen Ping Li and Royal Pacific Realty Corporation.

- December 1, 2016 the plaintiffs file an application response opposing the defendants' application to deliver a third party notice to BLG, CEIR, Stephen Ping Li and Royal Pacific Realty Corporation.

- January 4, 2017 the plaintiffs' application for a summary trial of liability is heard along with the defendants' application to deliver a third party notice.

[37] There has been a lengthy delay by the defendants in seeking to take third-party proceedings. Rule 3-5(4)(b) of the Supreme Court Rules provides that a defendant may take third-party proceedings within 42 days of receipt of the notice of civil claim, but thereafter must seek leave. The defendants waited many months before applying to deliver a third party notice. I have no evidentiary explanation for the delay. I have been told the defendants tried in vain to persuade the plaintiffs to join additional defendants. I can see no plausible reason for the plaintiffs to have agreed to do so.

[38] In *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2013 BCSC 1741 Goepel J.(now J.A.) dismissed an application to deliver a third party notice because of delay. Mr. Justice Goepel found the plaintiff would suffer significant prejudice because it would lose its trial date if leave was granted. Further if the third party notice was issued the trial would be significantly longer.

[39] Mr. Justice Goepel observed at paragraph 61 of his reasons:

> I do not accept KWL's suggestion that the dismissal of their application will lead to the indiscriminate use of third party proceedings within 42 days of a defendant being served. The New Rule does not require the indiscriminate use of third party proceedings. The New Rule does, however, force a defendant to give early consideration to the question of adding additional parties. That is consistent with the object of the rules to secure the just, speedy and inexpensive determination of every proceeding on its merits. This is not, I suggest, a significant burden for a defendant. In many cases the role of potential third parties will be known to the defendant at the outset of the litigation or shortly thereafter. When a defendant only learns about a potential third party well into the litigation it will be a factor the court will have to consider in determining whether or not leave should be given to issue the third party notice.
>
> [Emphasis added.]

[40] Mr. Justice Goepel also commented that when the issuance of a third party notice would lead to the loss of a trial date it is incumbent on the applicant "to explain by affidavit the reason why the application is being brought at such a late date". As I have mentioned I have no explanation, supported by affidavit evidence, for the defendants' delay.

[41] An appeal from the order of Goepel J. was dismissed.

[42] The matter before me is distinguishable on its facts from *Tyson Creek*. In that case a date for a lengthy trial would have been lost if leave was granted to issue a third party notice. In the present matter there is no scheduled date for a conventional Rule 12-1 trial. Nevertheless, it is my view that there is compelling prejudice to the plaintiffs if third parties are now added.

[43] The plaintiffs have diligently advanced this litigation toward a summary trial. The Defendants complain that the plaintiffs have moved along too expeditiously. There can be no basis for such a complaint. Although the plaintiffs have not obtained a date for a conventional trial in my view they had no obligation to do so. A summary trial on affidavits is no less legitimate a means of resolving a civil claim than is a conventional trial with live witnesses. The efforts of the plaintiffs to have their summary trial application heard as soon as reasonably possible has been justified. Those efforts have been thwarted in part by the defendants' delay in applying to issue a third party notice, which led to the adjournment of the plaintiffs' application.

[44] The plaintiffs' efforts to have their claim adjudicated in a "just, speedy and inexpensive" manner, will come to nought if the defendants are found to be entitled to wait from January 21, 2016 until November 21, 2016 to apply to issue a third party notice. If leave is now granted the plaintiffs will wait many more months for the determination of their claim when in my view the liability of the defendants is clear.

[45] I am conscious that third-party proceedings are a means to avoid a multiplicity of proceedings and that dismissal of the defendants' application may lead to them taking separate proceedings against those they are advised may be liable to make contribution or to indemnify. However, the risk of separate proceedings cannot outweigh the prejudiced to the plaintiffs if the determination of their claim is long delayed. They have received a notice of assessment for in excess of $600,000 and it has been payable for almost two years.

[46] In the result, I exercise my discretion against granting leave to the defendants to issue a third party notice.

[47] I will add that Ms. Murray on behalf of the proposed third parties Stephen Ping Li and Royal Pacific made a forceful submission resisting the defendants' leave application on the basis that the draft third party notice is so legally defective that it is bound to fail. In particular, she submits that the draft third party notice is defective because it alleges that the proposed third parties owed duties only to the plaintiffs and breached those duties. The draft third party notice does not allege that the proposed third parties owed duties to the defendants. Ms. Murray relies on a number of authorities including *Yemen Salt Mining Corp. v. Rhodes-Vaughan Steel Ltd.*, [1976] B.C.J. No. 57. I agree with Ms. Murray that the draft third party notice could not succeed.

[48] My order is that the application for leave to take third-party proceedings is dismissed. It will be for the defendants to take advice on bringing a separate action.

[49] The plaintiffs are entitled to their costs of the summary trial and the proposed third parties are entitled to their costs on the application of the defendants to take third-party proceedings.

"Mr. Justice Affleck"