

# KEEPING CURRENT

January 30, 2025

## Clear wording of agreement leads to finding of several, not joint nor joint and several liability (*SBLR LLP v. Valleymill Investments Ltd., Art Tile Limited, and McCarthy Tetrault LLP*)

By Michael Lauricella and Isabel Yoo

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

**Michael Lauricella**  
Associate  
416.865.6670  
mlauricella@grllp.com

**Isabel Yoo**  
Associate  
416.865.6655  
iyoo@grllp.com

In a civil action, where there is more than one defendant, a plaintiff will often seek damages against the defendants on a joint and several basis. This means that damages are sought from all of the defendants jointly and from each of the defendants individually. In a contract or agreement, co-signers are often jointly and severally liable for fulfilling the terms of the contract. However, the exact wording of the agreement should be reviewed carefully to determine the exact liability and obligations of the parties.

The importance of an agreement's wording was highlighted in the Toronto Small Claims Court decision in *SBLR LLP v. Valleymill Investments Limited, Art Tile Limited and McCarthy Tetrault LLP* (unreported, Court File No. SC-20-4750/D1/D2).

In this matter, two of the defendants, VI and AT, entered into a co-tenancy agreement to occupy two plazas (the "Co-Tenancy Agreement"). Under the terms of the Co-Tenancy Agreement, the parties would bear their proportionate share of all expenses, depreciation,

losses, and liabilities incurred in relation to the plazas. The Agreement also required the parties to resolve certain disputes by appointing an accounting firm to act as an "umpire". In general, an "umpire" is a neutral third party engaged by two or more parties to help them resolve their disputes.

A dispute arose between the parties, and was taken to the plaintiff accounting firm as umpire to assist in its resolution. An "Umpire Agreement" was entered into between the plaintiff and VI and AT, under which the plaintiff's fees would be based on its time spent in its engagement as umpire.

The Umpire Agreement also provided that invoices would be due and payable within 30 days and that unpaid accounts would be subject to an interest charge of 1% per month.

VI and AT agreed to each be responsible for 50% of the payments owed to the plaintiff under the Umpire Agreement.

During the plaintiff's term as umpire, VI contested the fees and objected to the invoices. On the other hand, AT duly paid 50% of each of the invoices.

Eventually, the plaintiff issued an action in Small Claims Court against both VI and AT for unpaid invoices and accrued interest. VI defended the action by primarily arguing that the plaintiff did not act in an impartial manner, was negligent in its services, and was not entitled to payment of its invoices as a result.

VI also issued a Defendant's Claim (a counterclaim) against the plaintiff, alleging that it suffered financial losses as a result of the plaintiff's actions.

AT defended the action and argued that the plaintiff had no claim against it, given that it had paid its 50% share of the invoices. AT highlighted that it was not jointly liable for VI's outstanding portion and that the Umpire Agreement created several liability only.

AT also issued a Defendant's Claim against VI, claiming damages for any amounts it would be found liable to the plaintiff for VI's failure to pay the outstanding invoices, and sought reimbursement for money on an invoice where it paid 100%.

The court noted that the Umpire Agreement between the parties specifically incorporated the terms of the Co-Tenancy Agreement between VI and AT, which expressly limited contractual liability to several liability. The Co-Tenant Agreement specifically stated that the obligations of each co-tenant with respect to the property and/or all contracts and obligations shall be "several" and "not joint, and not joint and several" unless stated otherwise.

There was no evidence introduced to demonstrate that this term had been altered or deleted by the parties.

Additionally, both witnesses for the plaintiff and for VI admitted during trial that AT had paid its 50% share of the invoices rendered by the plaintiff and that AT was not liable for any of the amounts owing by VI.

The court accordingly found that AT had properly paid its portions of the invoices rendered by the plaintiff and dismissed the plaintiff's action as against it. The court also granted AT's Defendant's Claim against VI for the invoice for which it paid VI's portion, and awarded interest to AT on VI's portion, at the rate of 5% plus prime, pursuant to the Co-Tenancy Agreement.

The court dismissed VI's Defendant's Claim against the plaintiff on the basis that VI failed to provide any clear evidence of fraud, bad faith, or negligence on the part of the plaintiff and failed to provide expert evidence with respect to the standard of care of an umpire. As a result, VI was found liable for the amounts it owed to the plaintiff.

#### **Representation by Gardiner Roberts LLP**

The fully successful defendant, AT, was represented throughout the three-day trial by Michael Lauricella, an associate in the firm's dispute resolution group.

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