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CANADA / JUDGMENT

## 3555 Gilmore Holdings Ltd. v. Cascade Divide Enterprises, Inc.

2014 BCSC 823

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COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 823 3555 Gilmore Holdings Ltd. v. Cascade Divide Enterprises, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

3555 Gilmore Holdings Ltd. v. Cascade Divide Enterprises, Inc.,

2014 BCSC 823

Date: 20140512

Docket: S132928

Registry: Vancouver

Between:

3555 Gilmore Holdings Ltd.

Plaintiff

And:

Cascade Divide Enterprises, Inc.

Defendant

And:

Telephone Navigata-Westel Communication Inc.

Third Party

Before: Master Bouck

Reasons for Judgment

Counsel for the Plaintiff:

D. Pangman,

J. Wriley

Counsel for the Defendant:

R. Millen

Counsel for the Third Party:

M.W. Pierce,

L. Awlasiewicz

Place and Date of Hearing:

Vancouver, B.C.

April 29, 2014

Place and Date of Judgment:

Vancouver, B.C.

May 12, 2014

## Introduction

- [1] The third party ("TNW") seeks leave to file a response to the notice of civil claim. The procedural aspect of this application is apparently novel as none of the parties were able to find authority directly on point. While the defendant ("Cascade") and third party suggest that the application seeks nothing more than the amendment of existing pleadings, the plaintiff submits that the application is more properly framed as an application to set aside a default judgment. Alternatively, the plaintiff says that the proposed pleading is an abuse of process.

## Facts

- [2] This lawsuit concerns the enforceability of a lease for office space located at 3555 Gilmore Way in Burnaby, B.C. (the "Leased Premises"). The plaintiff is the landlord/owner of the Leased Premises, and the defendant the named tenant in the lease. The lease was executed on or about January 31, 2012, and intended to cover a 12-year term commencing January 1, 2013.
- [3] The plaintiff terminated the lease on April 9, 2013, alleging various breaches including non-payment of rent. The plaintiff seeks judgment of \$145,287.48 plus damages and special costs. The claim for damages is said to exceed \$4 million.

- [4] After execution of the lease but before its termination, TNW purchased the defendant's assets and assumed responsibility for the lease ("the 2012 Transaction").
- [5] The plaintiff commenced this action against the defendant in late April 2013. In its response to civil claim, Cascade does not deny the validity of the lease. Rather, the defendant alleges that the plaintiff breached the terms of the lease by unilaterally applying deposit monies towards unpaid rent and unreasonably withholding consent to transfer the lease to TNW.
- [6] Importantly, the defendant pleads:
14. On numerous occasions since November 30, 2012, including by correspondence dated December 14 and 28, 2012, respectively, TNW has confirmed with the plaintiff that TNW takes full responsibility for the obligations of the defendant under the Lease.
- [7] TNW was named a third party by the defendant in pleadings issued May 24, 2013. The defendant seeks contribution and indemnity from TNW with respect to any monies found owing to the plaintiff under the lease.
- [8] A response to the third party notice was filed by TNW on June 17, 2013.
- [9] On November 27, 2013, the plaintiff filed a summary trial application. Because of changes of counsel and other procedural matters, the summary trial was adjourned from January 31 to March 31 and now will be heard in August 2014. However, issues have been severed such that the August trial will only address the plaintiff's claim for unpaid rent. The plaintiff's claim for damages will be adjudicated separately at an unspecified later date.
- [10] On March 12, 2014, TNW brought its own application seeking the present relief as well as dismissal of the summary trial application on the basis that the proceeding was not suitable for determination under Rule 9-7 of the Supreme Court Civil Rules (the "SCCR").
- [11] By agreement, the application for dismissal of the summary trial application will be heard in conjunction with the summary trial. TNW then filed a fresh notice of application seeking the present relief.
- [12] Cascade supports the position taken by the TNW on this application. Nonetheless, the defendant and third party are adverse in interest in another action regarding the 2012 Transaction (the "Cascade action"). The plaintiff is not a party to that proceeding. However, the pleas made in the Cascade action address the lease and the application respondents' obligations thereunder.

#### Procedural Issue

- [13] The court must first determine the correct procedure to be followed on this application and thus the legal analysis to be performed.
- [14] In its notice of application, TNW relies on Rule 3-5 (12) of SCCR which states:

3-5 (12) A third party who has filed a response to third party notice may, within the period for filing and serving a response to the third party notice, file and serve on all parties of record a response to civil claim to the plaintiff's notice of civil claim, raising any defence open to a defendant.

[Emphasis added]

- [15] As can be seen, TNW does not require leave of the court in order to file the proposed pleading. That explains the dearth of authorities addressing this kind of application. Nonetheless, leave is sought because TNW is aware of the plaintiff's opposition to such a filing.
- [16] TNW submits that the relief sought is analogous to an amendment to existing pleadings: Rule 6-1. The proposed pleading is not an amended response of the defendant. However, even if it were characterized as such, leave from the court is only required after a case planning conference has occurred or a notice of trial filed: Rule 6-1 (1) (a).
- [17] The parties agree that if leave is required, the threshold to be met for allowing amendments to a pleading is relatively low.
- [18] The plaintiff says that TNW is really asking the court for "permission to file a pleading notwithstanding its default". On that basis, the plaintiff relies on authorities addressing the setting aside of default judgments: Rule 3-8. Among other things, TNW would need to show that the defences raised in the proposed response are "meritorious": *Bank of Montreal v. Erikson* (1984), 57 B.C.L.R. 72 (C.A.).
- [19] Strictly speaking, the proposed response is filed out of time. However, unlike the defendant, TNW is not required to file a response to the notice of civil claim in order to stave off default judgment. Rule 3-5 (12) is permissive. No default proceedings could be taken by the plaintiff against the third party. In other words, there can be no judgment or order to set aside.
- [20] The plaintiff also relies on authorities addressing the striking of a pleading: Rule 9-5 (1) (d).
- [21] The correct procedure under the SCCR would see TNW file its response to the notice of civil claim, with the plaintiff then applying to strike the pleading. Even if the present application is dismissed and that procedure followed, the parties will be back in chambers arguing the same points. The objectives described in Rule 1-3 (1) bode against requiring strict adherence to the SCCR before deciding the application. Despite procedural irregularities, the issue between the parties is squarely before the court.
- [22] I have concluded that this application is not governed by either Rule 6-1 or 3-8, but rather Rule 9-5. Even if I am wrong in that conclusion, and Rule 6-1 applies, the court may still dismiss the application if the proposed pleading is found to be an abuse of process.

## Discussion

- [23] Given my conclusion on the procedural issue, I will not address the arguments made with respect to either amendments to pleadings or the setting aside of a default judgment. Instead, the analysis will focus on whether the proposed response is an abuse of process: Rule 9-5 (1) (d). In that analysis, I will assume that all of the facts already pled and proposed to be pled can be established at trial: *McNaughton v. Baker*, [1988] 4 W.W.R. 742 (B.C.C.A.). However, the court is not restricted to the relevant pleadings themselves as affidavit evidence may also be considered.
- [24] As submitted by the plaintiff, it is an abuse of process for a party to take inconsistent positions in litigation: *Vanmills Establishment v. Coles* (1992), 8 C.P.C. (3d) 178 (B.C.S.C.) and *Halagan v. Reifel*, (October 1, 1998), Vancouver Registry, C945038 (B.C.S.C.).
- [25] Simply put, the plaintiff says that the defendant and TNW affirm the existence and enforceability of the lease in this action and the Cascade action (albeit alleging certain breaches of terms by the landlord) but now seek to plead its non-existence and unenforceability.
- [26] The Cascade action is brought by both the defendant and its subsidiary, Next Layer Inc. The action was commenced on January 25, 2013, and names TNW and five other parties as defendants. The pleading is lengthy but the following excerpts are relevant to this application:
15. This claim arises from the aftermath of an asset purchase transaction on November 30, 2012 in which the Plaintiff Cascade sold certain assets, comprising a substantial portion of its business including its subsidiaries 0865 and NavCom, to the Defendant TNW, The other Defendants guaranteed TNW's obligations to Cascade and provided security for TNW's purchase. The transaction involved the following documentation, details of which are provided below:
- (a) Asset Purchase Agreement among Cascade as Vendor, TNW as Purchaser, and 0865, NavCom and the Family Trust as indemnitors;
  - (b) General Security Agreements granted by TNW, 0865 and NavCom in favour of Cascade;
  - (c) Guarantees by Mr. Laliberte, 0865 and NavCom of TNW's obligations;
  - (d) a Transition Agreement between Cascade and TNW for the provision of certain services by TNW to Cascade following the transaction; and
  - (e) a Post-Closing Matters Agreement, setting out certain transaction documents that were to be provided following the closing.

31. On November 30, 2012 (the "Closing Date"), the parties entered into an asset purchase agreement (the "APA") whereby Cascade agreed to sell and TNW agreed to purchase the Business, comprising a substantial portion of the Cascade's operating assets, for \$6.44 million (the "Purchase Price").
35. Article 2.01 outlined the Purchased Assets, which included the following:
- (c) Leased Premises set out in Schedule 2.01(d);
48. In association with the APA, TNW and Cascade executed an Assignment and Assumption Agreement (Assumed Contracts) dated November 30, 2012 (the "Assignment Agreement"), by virtue of which Cascade assigned and TNW assumed and agreed to perform all of Cascade's rights and obligations under the Contracts, comprising all relevant contracts for the operation of the Business. The assigned Contracts included the Support Services Agreement, the Telecommunications Agreement, and leases of numerous premises. The leased premises were particularly important because they included office space (which was to be shared with Next Layer pursuant to the Support Services Agreement) and the locations of some of Next Layer's co-location facilities, which are essential to its operations.
81. Under the APA, and further reinforced by the covenants of the Assumption Agreement and the Assignment Agreement, TNW agreed to assume Cascade's leasing obligations of various premises. The assigned premises were set out in Schedule 2.01(d) to the APA, and include the head office for the Business, located at 3555 Gilmore Way in Burnaby, British Columbia (the "Gilmore Office"). The value of Cascade's outstanding obligations under the lease of the Gilmore Office was over \$6 million.
82. While TNW has acknowledged its liability for the lease of the Gilmore Office in correspondence with both the Plaintiffs and the landlord, it has defaulted on its obligations. As a result the landlord has issued Cascade a notice of default.
83. This default on the Gilmore Office lease by TNW constitutes a breach of the Assignment Agreement, the Assumption Agreement and the APA, and thereby a default thereunder and under the General Security Agreements.

[Emphasis added]

- [27] On January 31 and February 1, 2013, Cascade/Next Layer and TNW sought a variety of relief from the court. The applications were heard by Fitzpatrick J.
- [28] In oral reasons for judgment issued February 1st, the court addresses the lease obligations as follows:
- [59] The lease was also a very contentious matter. The evidence indicates that the lease in Burnaby where both Cascade and Next Layer had their head offices was to be taken over by TNW. Obligations under the lease were addressed within the context of the Assignment and Assumption Agreements.

- [60] Notwithstanding those agreements, almost immediately after the closing, Mr. Laliberte on behalf of TNW chose to take a different tack with the landlord. TNW moved from the premises shortly after the closing and indicated to the landlord that there would have to be negotiations on the outstanding obligations that remained under that lease.
- [61] I do not comment negatively on TNW's decision to move. There are often good reasons to move to less expensive accommodations towards lessening expenses. Counsel for TNW has explained that this decision was made to help rationalize or restructure Cascade's operations, in the hopes of improving the financial health of the Business.
- [62] Mr. Laliberte's approach in relation to the lease is a somewhat curious one, particularly in light of his comments to certain Cascade employees on December 2, 2012 that things were going to get "rocky" in the days following his taking over the operations of Cascade, addressing certain operational matters, and effecting the "turn around" of the Business.
- [63] The difficulty with his approach was that it brought about a default under the lease. A notice of default under the lease was issued by the landlord, noting defaults to the extent of \$67,000. The consequences of those defaults have fallen upon the shoulders of Cascade, who of course remains the principal obligant under the lease at this time. Quite clearly, the substantial contractual obligations that were put in place between Cascade and TNW were intended to avoid this very result. TNW assumed liability for this contract so that Cascade would not be met with defaults under its contracts without having any resources to cover those obligations after having transferred the Business away to another party with only the promise of payment to come.
- [29] Fitzpatrick J. ordered TNW to pay \$68, 2147 to the solicitors for Cascade/Next Layer with the monies to be held in trust pending further court order or agreement. The court also made this proviso:
8. For greater certainty, this is an interlocutory order of the Court, and is made without prejudice to:
- (a) the ability of the parties to advance their respective legal positions on the issues raised in this proceeding at trial or otherwise; and
- (b) the ability of the Court to grant any final relief sought by the parties at the trial of this action or otherwise,
- [30] The Cascade action has not being actively litigated since the February 1st order was issued.
- [31] The third party's proposed response raises altogether new allegations of the plaintiff's misrepresentations, breaches of condition or fundamental breach of the lease and invokes the doctrine of frustration. The facts which are said to support these defences are also new to the pleadings. The newness of these allegations does not in and of itself make the proposed pleading an abuse of process. However, the timing of these new allegations does invite the court to consider whether the application is strategic rather than a necessary or

proper step in ensuring all issues between the parties will be addressed at trial. The strategy, of course, is to raise allegations which require viva voce evidence and thus defeat the summary trial application.

[32] Leaving aside the motives of TNW (which is not determinative of the application), the question to be answered is whether the pleading is inconsistent with the existing pleas made by the defendant in both this action and the Cascade action.

[33] In *Vanmills Establishment and Albert Gilbert Duncan Crux v. John A. Coles*, 8 C.P.C. (3d) 178, 33 A.C.W.S. (3d) 239, the court describes the relevant law as follows:

8 The law surrounding the election by a party between inconsistent rights is succinctly dealt with in two British Columbia decisions. The first is *Morrison-Knudsen Company Inc. et al. v. B.C. Hydro & Power Authority* (No. 2), [1978] 4 W.W.R. 193, 85 D.L.R. (3d) 186 (B.C. C.A.), where at pp. 245-246 [W.W.R.], the court held:

It is necessary at the outset to distinguish between the two kinds of election that one must consider in a case such as this: an election between inconsistent rights and an election between alternative remedies. When faced with a fundamental breach the innocent party to a contract may elect to affirm the contract and hold the other party to the performance of its contractual obligations and sue as well for damages. On the other hand, he may elect to accept the breach as a repudiation of the contract. This is an election between inconsistent rights. It must generally be made with promptitude and communicated to the other party, and, once made, it is irrevocable. Where a plaintiff, having elected to accept the breach as a repudiation, commences proceedings for his remedy, he may have, in a proper case, the right to quantum meruit as an alternative to the right of damages. His election between these alternatives is an election between alternative remedies and need not be made until judgment. The taking of judgment on one of the alternatives binds the plaintiff and he may not then have the other remedy.

The distinction is dealt with in *United Australia Ltd. v. Barclay's Bank*, *supra*. In that case the appellants had started an action against a company on a cheque, framing the action as money had and received to the use of the appellants. The cheque had been unlawfully issued to the company. The action was discontinued and no judgment obtained. They then brought an action against the bank for conversion of the cheque. It was held that the commencement of the first action did not amount to an election to waive the tort so as to preclude the bringing of the second action. In the course of his speech in the House of Lords, Lord Atkin said at pp. 29-30 [A.C.]:

It seems to me that in this respect it is essential to bear in mind the distinction between choosing one of two alternative remedies and choosing one of two inconsistent rights. As far as remedies were concerned, from the oldest time the only restriction was on the choice between real and personal actions. If you chose the one you could not claim on the other ...

On the other hand, if a man is entitled to one of two inconsistent rights, it is fitting that, when, with full knowledge, he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which, after the first choice, is by reason of the inconsistency

no longer his to choose. Instances are the right of a principal dealing with an agent for an undisclosed principal to choose the liability of the agent or the principal, the right of a landlord where forfeiture of a lease has been committed to exact the forfeiture or to treat the former tenant as still tenant, and the like. To those cases the statement of Lord Blackburn in *Scarf v. Jardine* (1882), 7 App. Cas. 345 at 360 (H.L.), applies: "where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted." In a later passage, at p. 361, Lord Blackburn speaks of a man choosing between two remedies, but it is plain that he is speaking of remedies in respect of the inconsistent things as stated above. The case was one where the plaintiff had a right of recourse against two former partners, or against two new partners, but obviously not against both. Lord Blackburn quotes *Dumpro's case* (1603), 4 Co. Rep. 119b, 76 E.R. 110 (sub nom. *Dumper v. Syms*), which was a plain case of inconsistent rights, the question of waiver of a forfeiture. I think, therefore, that on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment.

An election by the innocent party to keep a contract alive after a fundamental breach is not an election between alternative remedies but an election between inconsistent rights. Either the contract is still there and the rights are under it, or the contract is rescinded because of an accepted repudiation and very different rights have come into being.

9 In *Sandell Developments Ltd. v. Boivin* (1986), 2 B.C.L.R. (2d) 261 (S.C.), Hinds J. (as he then was) dealt with an application under R. 19(24) to strike out pleadings on the basis that the pleadings were an abuse of the court process because the plaintiff was advancing inconsistent rights. At pp. 264-265 His Lordship said as follows:

The general thrust of the argument advanced by counsel for Mustang on the hearing of this application was that the plaintiff was advancing inconsistent rights in the endorsement to the writ of summons as distinct from advancing inconsistent remedies. He submitted that the plaintiff had elected to advance its claim on the basis of rescission of the interim agreement and could not, at the same time, advance its claim on the basis of an interest in the land being held in trust by Mustang for the plaintiff. He relied upon two authorities: *United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1, [1940] 4 All E.R. 20 (H.L.), and *Forster v. Defiant One Charters Ltd.*, [1985] B.C.W.L.D. 4021, B.C.S.C., Southin J., Vancouver No. C852864, 28th August 1985 (not yet reported).

The *United Australia* case is the leading authority on the difficult area of the distinction between choosing one of two alternative remedies and choosing one of two inconsistent rights. At p. 37, Lord Atkin expressed himself as follows:

Concurrently with the decisions as to waiver of tort, there is to be found a supposed application of election, and the allegation is sometimes to be found that the plaintiff elected to waive the tort. It seems to me that in this respect it is essential to bear in mind the distinction between choosing one of two alternative remedies and choosing one of two inconsistent rights. As far as remedies were concerned, from the oldest time the only restriction was on the choice between real and personal actions. If you chose the one, you could not claim on the other. Real actions have long disappeared, and, subject to the difficulty of including two causes of action in one writ, which has

also now disappeared, there has not been, and there certainly is not now, any compulsion to choose between alternative remedies. You may put them in the same writ, or you may put one in first and then amend and add or substitute another. I will cite one authority which has to deal with the question whether a claim for injury to a passenger was founded on contract or tort for the purposes of the County Courts Act. Lord Esher said, in *Kelly v. Metropolitan Ry. Co.* (19), at p. 946:

At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim on one ground and proves it on another he is not now embarrassed by any rules as to departure.

On the other hand, if a man is entitled to one of two inconsistent rights, it is fitting that, when, with full knowledge, he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which, after the first choice, is by reason of the inconsistency, no longer his to choose.

In the *Forster* case Southin J. applied the principles expressed in *United Australia* to a case where the plaintiff sought to advance a claim based upon a right of specific performance and, at the same time, sought to advance a claim based upon a right of rescission. It was found that the plaintiff had affirmed the contract and had thus elected to pursue one of the inconsistent rights, namely, the right of specific performance. Accordingly, it was held that the plaintiff could not pursue the alternative right of rescission, from which the plaintiff's attempt to maintain an injunction granted *ex parte* was derived. It is noted, however, that Southin J. expressed the following caution at p. 7:

I was not the recipient of any submissions on the precise limits of the principles expressed in *United Australia Ltd. v. Barclays Bank Ltd.* [supra] which is the leading case on the difference between inconsistent rights and the duty to elect and inconsistent remedies which one may claim to the point of judgment. I wish to make it clear, therefore, that this is not a considered judicial opinion given after a full argument on what may be a difficult question of law.

In *Morrison-Knudsen Co. Inc. v. B.C. Hydro & Power Authority*, [1978] 4 W.W.R. 193, 85 D.L.R. (3d) 186, the British Columbia Court of Appeal applied the *United Australia* case: see pp. 244-46.

The foregoing authorities establish that a party, who has elected to pursue one of two inconsistent rights, cannot later pursue the other; but a party may pursue two alternative remedies up to the time of judgment, at which time an election of remedy must be made.

10 This is not a matter of a litigant pursuing inconsistent remedies, where no election is necessary until judgment. There can be no doubt that in the instant action Crux is attempting to pursue inconsistent rights. Crux elected in his action against Sigurdson to claim that he had disposed of his legal and beneficial interest in the C.I.S. shares to Coles. Having elected to sue Sigurdson on that basis, I find that Crux cannot now sue Coles in the instant action on the basis that he retained a beneficial interest in the C.I.S. shares. In my opinion, his election in his action against Sigurdson is binding upon him. The principle that, in the case of inconsistent rights, a

plaintiff's irrevocable and unequivocal election is deemed to be made by the commencement of an initial action is established in *Scarf v. Jardine* (1882), 7 App. Cas. 345, 30 W.R. 893 (H.L.) and *Ashmore v. Bank of B.N.A.* (1913), 4 W.W.R. 1014, 18 B.C.R. 257, 13 D.L.R. 73 (C.A.).

[Emphasis added]

[34] *Halagan v. Reifel* bears some resemblance to the case at bar. In dismissing an application to amend a reply and statement of defence to counterclaim, the court made the following observations:

- "neither pleadings nor any other of the court processes are a game to be played according to what appears to be a strategic advantage at the time. The court expects a party to take a position which is consistent with its evidence and to maintain that position in its dealings with the court. In other words, saying something to one judge and saying the opposite to another will not be countenanced."; and
- "a party must not in a subsequent pleading make any allegation of fact, raise any new ground, or claim inconsistent with the previous pleading of his."

[35] Nevertheless, it is recognized that a finding of abuse of process is exceptional and generally reserved to matters involving the doctrine of *res judicata*.

[36] TNW argues that there are no inconsistencies between the pleadings filed to date and the proposed pleadings. It notes that the order of Fitzpatrick J. in the Cascade action was made without prejudice to any future claims asserted by the defendant in that action. As there has been no final determination on the enforceability of the lease in the Cascade action, the position taken in this action could still be asserted in both actions.

[37] The proposed response includes the following:

14. As a result of the Plaintiffs failure to (a) cooperate with the Defendant to enable the Defendant to obtain the necessary permits and approvals in respect of the Data Centre Lease, and (b) to enter into the Data Centre Lease with the Defendant, the Office Space Lease is void ab initio and is of no force or effect.
15. Further, or in the alternative, the Plaintiffs failure to (a) cooperate with the Defendant to enable the Defendant to obtain the necessary permits and approvals in respect of the Data Centre Lease, and (b) to enter into the Data Centre Lease with the Defendant, constitutes a breach of condition or, alternatively, a fundamental breach of the Office Space Lease. The Third Party states that as a result of the Plaintiffs breach of condition or, alternatively, its fundamental breach, the Defendant was and is relieved of any and all obligations under the Office Space Lease, as alleged or at all.

16. Further, or in the further alternative, the Third Party states that as a result of the City of Burnaby's failure to issue the necessary permits and approvals in respect of the Data Centre Lease, in a timely manner or at all, the Defendant's use of the premises under the Office Space Lease and the Data Centre Lease was rendered impossible. The Third Party pleads and relies upon the doctrine of frustration.
17. Further, or in the further alternative, the Landlord Representations are negligent and/or innocent misrepresentations upon which the Defendant reasonably relied to its detriment in executing the Office Space Lease. As a result, the Plaintiff is estopped from seeking to rely upon or enforce the Office Space Lease.
- [38] The plaintiff's alleged misrepresentations, inducements, and breaches of conditions is said to have occurred long before the 2012 Transaction. That conduct would be within the knowledge of the defendant. Yet, the defendant did not raise any such claims in its response to civil claim, nor does the defendant seek amendments to its pleadings that are consistent with the allegations raised in the proposed response.
- [39] TNW may only raise defences available to Cascade. Under the authorities cited, those defences may not assert inconsistent rights with existing pleadings. In its response, the defendant admits entering into the lease in question. It also pleads that TNW was entitled to an assignment of that lease.
- [40] In my view, those pleas are inconsistent with the rights asserted in the proposed response, namely that the lease is void ab initio ("null from the beginning") or even voidable.
- [41] In the Cascade action, the defendant pleads that the lease is valid, but TNW is responsible for any of the losses determined to be owing to the plaintiff. The pleadings specifically assert that the lease became the responsibility of TNW in the 2012 Transaction. It is both incongruous and inconsistent to include the lease in the 2012 Transaction (and confirm as a live asset or obligation in the pleadings) and now say that the lease was void or voidable from day one.
- [42] Moreover, in the third party notice, the defendant denies any breaches of the lease but does not deny its existence or enforceability. Again, the rights asserted in the proposed response are inconsistent with this existing pleading.
- [43] Because the pleadings themselves are blatantly inconsistent, I have not touched upon the affidavit evidence in any detail. Nonetheless, I find that the evidence is replete with examples of the defendant's affirmation of the lease and TNW's obligations pursuant to the lease. Again, that evidence is inconsistent with the allegations made in the proposed response.
- [44] In conclusion, I find that that the proposed response is, on its face, an abuse of process and ought not to stand as a pleading in this action. The defendant's affirmation of the lease is demonstrated throughout the affidavit evidence presented on this application.

[45] This conclusion results in dismissal of TNW's application.

[46] Rule 9-5 (1) allows the court make an award of special costs upon pronouncement of this order. If the parties are unable to reach an agreement on costs, I direct that written submissions be provided by no later than May 30, 2014.

"C.P. Bouck"

Master C.P. Bouck

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