

CANADA / JUDGMENT

## Air Palace Co., Ltd. v. Rotor Maxx Support Limited

2023 BCCA 197

COURT

British Columbia Court of Appeal

DECIDED

24 April 2023

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2023 BCCA 197 Air Palace Co., Ltd. v. Rotor Maxx Support Limited

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Air Palace Co., Ltd. v. Rotor Maxx Support Limited,

2023 BCCA 197

Date: 20230424

Docket: CA48896

Between:

Air Palace Co., Ltd.

Appellant

(Defendant)

And

Rotor Maxx Support Limited

Respondent

(Plaintiff)

Before:

The Honourable Mr. Justice Voith

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

February 6, 2023 (Rotor Maxx Support Limited v. Air Palace Co., Ltd.,  
2023 BCSC 170, Vancouver Docket S183230).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

S.J. Bae

Counsel for the Respondent:

W.S. Taylor

Place and Date of Hearing:

Vancouver, British Columbia

April 24, 2023

Place and Date of Judgment:

Vancouver, British Columbia

April 24, 2023

Summary:

The applicant seeks to stay an order of the court below, pending determination of their appeal. That order struck out parts of the applicant's response to civil claim as an abuse of process, and denied their application to amend their response to civil claim and file a counterclaim. HELD: Application dismissed. There appears to be no merit to the intended appeal, largely because the issues raised mirror those already raised and dismissed in an action in Korea. The applicant has not met its onus to demonstrate it will suffer irreparable harm if a stay were not granted. At best, being required to continue discoveries in the court below pending appeal will result in inefficiency or inconvenience if they are ultimately successful in this Court. The balance of convenience also weighs in favour of declining the stay. This action began in 2018 and the trial has been adjourned twice already. If a stay is granted, the current trial date will necessarily be lost. Conversely, if a stay is not granted, the trial date will only be pushed back if the appeal is successful.

VOITH J.A.:

## OVERVIEW

- [1] The applicant, Air Palace Co., Ltd. ("AP"), seeks a stay of proceedings in relation to the order of Madam Justice Baker in the court below pending the disposition of its appeal. That order struck out a portion of the applicant's response to civil claim as an abuse of process, and denied its application to amend its response to civil claim and file a counterclaim. The order also awarded costs to the plaintiff, Rotor Maxx Support Limited ("RMS").
- [2] The stay AP seeks relates to an action commenced in 2018 that has been adjourned twice already and is now set to go to trial in January 2024.

## BACKGROUND

- [3] RMS is a British Columbia company offering aircraft disassembly, maintenance and repair. AP is a commercial aircraft business in South Korea.
- [4] In March 2015, the engine of an AP-owned helicopter was transferred to British Columbia so RMS could perform repairs on it. Seven months later, the engine was returned to AP in South Korea.
- [5] A fuel leak incident occurred sometime thereafter, and in September 2016 RMS employees performed further repairs on the engine in South Korea. The engine was reinstalled and the helicopter was taken for a test flight, during which another incident--a "Hot Start Event"--damaged the engine. The damaged engine was shipped to British Columbia for assessment.
- [6] RMS alleged the parties agreed RMS would conduct the repairs, but AP denied such an agreement was ever reached. RMS leased a rental helicopter to AP during the repairs.
- [7] In 2017, AP initiated a claim against RMS in South Korea for breach of contract and negligence, alleging RMS caused the Hot Start Event. RMS unsuccessfully applied to have the matter heard in British Columbia rather than South Korea.
- [8] AP lost its claim at trial and was unsuccessful at the first level of appeal. A further appeal has been sought in South Korea.
- [9] In 2018, RMS commenced the underlying claim in British Columbia for breach of contract, alleging AP has not paid for the engine repairs they conducted, nor paid rental fees for, or returned, the helicopter engine. In response, AP pled RMS was negligent in conducting their engine repairs and installation.

## The Hearing Before Justice Baker

- [10] Before Justice Baker, RMS applied to strike AP's negligence claims as res judicata or an abuse of process given the outcome of the proceedings in South Korea. It did so, I was told, under Rules 9-5(1)(b) and (d) of the Supreme Court Civil Rules.

- [11] AP applied to amend its response to plead equitable set-off, breach of contract, breach of fiduciary duty, conversion and detinue, and breach of implied duty of good faith. It also sought leave to file a counterclaim against RMS for breach of contract, conversion and detinue, unjust enrichment, breach of fiduciary duty, and punitive damages.
- [12] Justice Baker identified five 'interlocking issues' before her:
- a) Is AP barred from raising as defences in the British Columbia proceeding, claims which were tried and dismissed in the Korean proceeding?
  - b) Can AP raise issues with RMS's work in 2010 and 2011 as an equitable set-off against the claims of RMS in this litigation?
  - c) Do the proposed amendments to the response to civil claim disclose a reasonable defence in relation to the claims of breach of fiduciary duty?
  - d) Do the proposed amendments to the response to civil claim disclose a reasonable defence in relation to any remaining issues?
  - e) Should AP be permitted to file the proposed counterclaim?
- [13] On the first issue, the judge concluded AP was barred by issue estoppel from raising defences relating to the period between 2015 and 2016:
- [49] I find that the Korean proceeding resulted in a final determination of all issues arising out of work done by RMS from 2015 to 2016. AP's response to civil claim, the proposed amended response to civil claim, and the proposed counterclaim all raise the same issues that were resolved in the Korean proceeding. The parties to the Korean proceeding and the claim before me are the same. In its response to civil claim and its proposed amended response, AP is attempting to relitigate issues which have already been determined by a competent court.
- [14] The judge also found cause of action estoppel applied to prevent AP "from raising any and all claims against RMS arising out of RMS's maintenance of AP's helicopter engine from 2015 to 2016": at para. 55. Under the heading "Are any of AP's defences an abuse of process", she further concluded it was in the interests of justice that all claims and defences relating to this period be struck from AP's response to civil claim, and that the proposed amended response to civil claim be disallowed: at para. 57.
- [15] Turning to the second question, the judge found AP's allegations in relation to 2010 and 2011 events had no relationship to the issues raised in the British Columbia action concerning the 2015-2016 period. Therefore, they could not be raised as an equitable set-off against RMS's claims and, further, RMS would be prejudiced if the set-off claims were permitted.

- [16] On the third issue, the judge was "not satisfied that AP has properly pled the material facts required to advance a claim for breach of fiduciary duty", nor was she satisfied the pleadings could be amended to properly plead that claim: at para. 87. The breach of fiduciary pleadings were subsequently not allowed.
- [17] On the fourth question, the judge found it impossible to disentangle AP's proposed amendments to the response to civil claim from the claims she had already disallowed. Though she acknowledged it might be possible for AP to plead proper defences for discrete aspects of RMS's claim, she could not allow the pleading in its current form, nor could she extract reasonable defences from it as presently worded. The judge concluded, "I find the proposed amended response to civil claim to be so confusing that it is difficult to understand what is being pleaded and, it would be an abuse of process to allow them to stand": at para. 92. She disallowed the proposed amended response, but granted AP leave to bring a new application with a revised form of pleading consistent with her reasons.
- [18] Finally, on the fifth question, the judge observed that AP's proposed counterclaim restated many of the same propositions advanced in the proposed amended response to civil claim, which she had not allowed. It was therefore "fundamentally flawed" and did not enable the court or RMS to determine the material facts upon which the various claims rested. She held it would be an abuse of process to allow AP to file the proposed counterclaim in its current form (at para. 97), but made no finding as to whether AP was out of time to file an amended pleading.
- [19] Having answered those questions, the judge made the following orders:
1. Paragraphs 1-13, 18 and the words "caused by the plaintiff's negligence" in paragraph 22 of the response to civil claim be struck from the response to civil claim as an abuse of process;
  2. Air Palace Co., Ltd.'s application to amend its response to civil claim is denied, with leave to re-apply;
  3. Air Palace Co., Ltd.'s application to file a counterclaim is denied, with leave to re-apply; and
  4. Rotor Maxx Support Limited is entitled to costs of both applications on this hearing, and for its costs thrown away on the first application brought by Air Palace Co., Ltd. to file an amended response to civil claim and counterclaim, which did not proceed.
- [20] AP filed a notice of appeal on February 24, 2023, seeking to set aside the order above. In the present application, it seeks to stay the proceedings and the order pending the determination of its appeal.

## LAW

- [21] Sections 30(c) and 33 of the Court of Appeal Act, S.B.C. 2021, c. 6 provide a justice of this Court with the power to stay part or all of proceedings in the matter from which the appeal has been brought:

## General powers of a justice

30 In an appeal or other matter before the court, a justice may do one or more of the following:

- (c) make interim orders to prevent prejudice to any person;

## Stays of proceeding

33 (1) After an appeal or application for leave to appeal is brought, a justice may, on terms and conditions the justice considers appropriate, order a stay of all or part of proceedings, including execution, in the cause or matter from which the appeal is brought.

[22] To obtain a stay, the applicant must demonstrate:

- a) that there is some merit to the appeal in the sense that there is a serious question to be determined;
- b) that irreparable harm would be occasioned to the applicant if the stay is refused; and
- c) that, on balance, the inconvenience to the applicant if the stay is refused would be greater than the inconvenience to the respondent if the stay is granted.

See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334.

[23] In all cases, the overarching consideration is whether granting the stay would be in the interests of justice: *Coburn v. Nagra*, 2001 BCCA 607 at paras. 7, 9; *A Lawyer v. The Law Society of British Columbia*, 2021 BCCA 284 at para. 39.

## DISCUSSION

### Merits

[24] AP's submissions primarily focus on the merits of its appeal. It contends the appeal is meritorious for a number of reasons. It says the judge erred in:

- a) Concluding issue estoppel barred AP from raising various defences related to any of the issues in the Korean proceeding;
- b) Concluding action estoppel barred AP from raising any and all claims and defences arising from RMS's maintenance of AP's helicopter between 2015 and 2016;
- c) Striking AP's proposed claims and defences in the response to civil claim and amended response to civil claim as an abuse of process;
- d) Disallowing AP's claims for equitable set-off; and
- e) Concluding the breach of fiduciary duty claim was not properly pled.

- [25] The last two alleged errors can be succinctly dealt with, so I will briefly address those first. AP says the trial judge erred in disallowing its claims concerning work performed by RMS in 2010-11 as an equitable set-off for the 2015-16 claims. It accepts the judge properly described the relevant legal framework, but it says she misapplied that framework in asserting that the set-off being claimed must arise from the same event. Respectfully, I do not believe this accords with her reasons as the judge looked to whether the claims were "interrelated": at para. 70. The applicant asserts, without explaining, that "the repair transactions and/or contracts" as between the two time periods "are inherently connected, just as each repair is connected". The trial judge flatly found "no factual or legal connection" between the two time periods: at para. 71. She further described several reasons why it would be unfair to allow AP to raise this claim and why RMS would be prejudiced if the equitable set-off was allowed: see paras. 75-76.
- [26] With respect to breach of fiduciary duty, AP claims RMS had an ad hoc fiduciary duty toward AP because RMS technicians trained AP employees in helicopter maintenance. The trial judge observed, correctly, that "[f]iduciary duties do not arise in ordinary commercial relationships": at para. 83. She also found AP had not pleaded the material facts required to advance this claim. She was unconvinced the pleadings could be properly amended to do so, though her final order granted leave for AP to reapply for a further amendment.
- [27] I am unable to say there is any merit to these grounds of appeal. I have also reviewed AP's amended pleadings and see no reason to interfere with the trial judge's assessment of their deficiency.
- [28] I now turn to the remaining three grounds, which largely turn on AP's contention that their claims in the British Columbia action are "separate and distinct" from those determined in the Korea proceedings. It says the Korea case only dealt with which party was responsible for an installation error which led to the 2016 'Hot Start Event'. It says it did not deal with the unrelated matter of whether RMS used defective parts in its repair of the helicopter engine that it alleges also resulted in damage. AP claims, therefore, the judge was wrong to apply issue and cause of action estoppel to this case.
- [29] I am doubtful there is any merit to these submissions. The trial judge expressly noted AP's action in Korea alleged RMS was liable for breach of contract and negligence "in the supply, maintenance and installation" of various parts relevant to the Hot Start Event: at para. 8.
- [30] The Korean District Court found the 2016 Hot Start Event "occurred not because the fuel control unit, etc. of this case was repaired [by RMS] in Canada in a faulty way but because the required readjustment or fitting work was not properly performed [by AP employees] on the emergency throttle rack in The Republic of Korea": at para. 44. This language suggests there was no 'faulty' or, put differently, 'defective' work involved in RMS's repair of the engine. Rather, fault lay with AP's employees. With this finding in hand, it is not clear there remains any room for AP to argue the Hot Start Event occurred as a result of some other action on the part of RMS.

- [31] Further, and importantly, it would have been open to AP to raise the issue concerning the supply of defective parts within the Korea action. For whatever reason it chose not to. This is an important aspect of cause of action estoppel. If a plaintiff could have raised a relevant issue in a first action but did not, it will generally be barred from raising that issue in a second action: D. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Markham, Ont: LexisNexis, 2015) at 139, citing *Erschbamer v. Wallster*, 2013 BCCA 76 at para. 17. The trial judge was attentive to this when she said "the defences which AP seeks to advance in the B.C. action were either argued or could have been argued with reasonable diligence in the Korean proceeding": at para. 54, emphasis added.
- [32] With respect to the abuse of process finding, AP makes two submissions. First, AP says the matters advanced in its response to civil claim and draft amended pleadings could not amount to an abuse of process because they are not a simple re-litigation of the Korea claims but rather they advance a separate cause of action. The trial judge's estoppel findings address that issue.
- [33] Beyond this, though, its submissions frame the doctrine of abuse of process too narrowly. Abuse of process extends beyond a technical analysis of the issues as between the parties to litigation; it engages the integrity of the administration of justice itself: *Ontario v. Ontario Public Service Employees Union*, 2003 SCC 64 at para. 12; *Pan Afric Holdings Ltd. v. Athabasca Holdings Ltd.*, 2018 BCCA 113 at para. 36.
- [34] This observation leads me to AP's second and alternative submission. AP contends that even if its claims do amount to a re-litigation, that alone is insufficient to ground a finding of abuse of process. It says "more is required, such as unjust harassment or an additional serious element". The authorities that address the proposition the appellant raises are inconsistent: Lange at 199-201.
- [35] However, in my view, if more is required then more existed in this case. The trial judge's reasons confirm as much. At para. 75, albeit in relation to the set-off issue, the judge observed that in the Korean action, AP admitted it had no complaints with RMS' work other than the work done in 2015 and 2016. She found that "it would not be fair or equitable for AP to raise allegations which contradict the position it took in litigation in Korea": at para. 75. A party is not permitted to knowingly advance inconsistent positions in different actions. Such behaviour can constitute an abuse of process: *Este v. Esteghamat-Ardakani*, 2018 BCCA 290 at paras. 93-94; leave to appeal to SCC ref'd, 38384 (14 March 2019).
- [36] Second, at para. 46, the judge described the proposed amended response to civil claim as "prolix in the extreme" adding that it "pleads evidence, is disorganized and repetitive, and fails to plead material facts for some of the more obscure claims advanced". Elsewhere she commented it was difficult, if not impossible, for her to surgically edit the pleadings to determine which portions, if any, might be acceptable: at paras. 88, 91. As the respondent points out, she concluded the amended response to civil claim was "so confusing that it is difficult to understand what is being pleaded and it would be an abuse of process to allow

them to stand": at para. 92. The judge made similar findings in relation to AP's counterclaim (at paras. 94-96) and she struck that pleading as an abuse of process: at para. 97. Abuse of process is intended to address, among other things, judicial economy. Here the applicant's pleadings were deficient in this respect. In combination with her findings on re-litigation, these factors provide an additional basis to support her abuse of process finding.

- [37] For these reasons, I see no real merit in the proposed grounds of appeal. But even if there were some merit to AP's appeal, the remaining criteria for a stay are not met in this case.

### Irreparable Harm

- [38] The key question at the irreparable harm stage is "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": RJR-MacDonald at 341.
- [39] AP says that not granting a stay of Justice Baker's order would prejudice it by requiring it to "[go] to discoveries without a settled pleading", thus compromising its ability to make full answer and defence. This ignores the fact that a judgment under appeal is presumed to be correct: *Gill v. Darbar*, 2003 BCCA 3 at para. 7. If a stay is not granted, discoveries may still proceed on the pleadings as they presently stand. If AP is successful on appeal, further discoveries and further document disclosure may be needed, but this is more in the nature of inconvenience or inefficiency than harm of an irreparable nature.
- [40] Overall, the power to grant a stay "is discretionary and should be exercised only where necessary to preserve the subject matter of the litigation and pending final decision of the Court or to prevent irremediable damage, or where there are other special circumstances": *Contact Airways Limited v. De Havilland Aircraft of Canada Limited* (1982), 42 B.C.L.R. 141 at 143 (Chambers). Mere inconvenience does not constitute a special circumstance: *Hong Kong Bank of Can. v. Touche Ross & Co.* (1987), 18 B.C.L.R. (2d) 55 at 57 (Chambers). In my view, AP has not met its burden to show it would suffer irreparable harm if the stay is not granted.

### Balance of Convenience

- [41] The balance of convenience further supports declining the stay. At this stage a judge should determine "which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits" by weighing the interests of the parties and balancing the potential harm to each: RJR-MacDonald at 342.
- [42] AP contends that if Justice Baker's order is not stayed, its efforts to obtain documents through discovery from RMS that are relevant to their amended response to civil claim will have been for nothing. It again argues it may be required to conduct discoveries that would be incomplete.

[43] As noted earlier, this action began in 2018 and the trial has already been adjourned twice. The trial is now scheduled for January 2024, and there appear to be a number of available appeal dates well before that time. If a stay is granted, that trial date will likely be lost irrespective of whether AP is successful or not on appeal. Conversely, if a stay is not granted and AP is unsuccessful on appeal, the trial would still be able to proceed in January. If a stay is not granted and AP is successful on appeal, then depending on what issues AP succeeds on, the trial date might, or might not, need to be pushed back. But preparations for the trial would advance in the interim. Accordingly, I consider that the balance of convenience weighs in favour of RMS.

## DISPOSITION

[44] To summarize, AP's intended appeal has little if any merit, and AP has not met its onus to demonstrate it would suffer irreparable harm if the stay were not granted. Staying the entirety of the proceedings in the court below would unnecessarily halt preparations for trial. As such, the balance of convenience and the interests of justice lie with RMS in this application.

[45] AP's application for a stay of proceedings pending appeal is dismissed.

"The Honourable Mr. Justice Voith"

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