

CANADA / JUDGMENT

Bear Creek Contracting Ltd. v. Pretium Exploration Inc.

2020 BCSC 1523

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1523 Bear Creek Contracting Ltd. v. Pretium Exploration Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bear Creek Contracting Ltd. v. Pretium Exploration Inc.,

2020 BCSC 1523

Date: 20201014

Docket: S1913985

Registry: Vancouver

Between:

Bear Creek Contracting Ltd.

Plaintiff

And

Pretium Exploration Inc., RPC Limited Partnership, Rokstad Power GP Inc. and Rokstad Power Construction Services Ltd.

Defendants

And

RPC Limited Partnership acting by its general partner, Rokstad Power GP Inc., Rokstad Power Construction Services Ltd., Rokstad Holdings Corporation,

Rokstad Power (2018) Ltd., Rokstad Power, Rokstad Power (Prairies) Ltd. and Rokstad Power Transmission Services Ltd.

Third Parties

And

Bear Creek Contracting Ltd.

Defendant by Counterclaim

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

In Chambers

(via teleconference)

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Place and Dates of Hearing:

Vancouver, B.C.

August 26 and 27, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 14, 2020

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I. Introduction

[1] This is an application by the plaintiff, Bear Creek Contracting Ltd. ("Bear Creek"), for leave of the Court to amend its notice of civil claim ("NOCC") and to add three new parties as defendants. The application is opposed, in part, by two of the current defendants and all three of the proposed new defendants, on various grounds.

[2] For the reasons that follow, I have concluded that the application should be allowed in part.

II. Procedural History of this Action and Related Litigation

[3] This action arises out of certain construction work that Bear Creek was engaged to perform in connection with the Brucejack Mine (the "Mine") near Stewart, British Columbia.

[4] The mineral claims pertaining to the Mine are owned by the defendant, Pretium Exploration Inc. ("Pretium"). Pretium engaged the defendants, RPC Limited Partnership ("RPC LP"), by its general partner, Rokstad Power GP Inc. ("Rokstad GP") as the prime contractor to build a 57-km overhead transmission line to supply electricity to the Mine (the "Project"). I will refer to RPC LP and Rokstad GP collectively as "Rokstad."

[5] Rokstad engaged Bear Creek in April 2016 to build foundations for the associated transmission line towers. Bear Creek in turn engaged two subcontractors, Blue Max Drilling Inc. ("Blue Max") and More Core Diamond Drilling Services Ltd. ("More Core") to assist it in carrying out that work.

[6] On March 27, 2017, More Core commenced an action in this Court (Terrace Reg. No. TER-S-S-19790) against Bear Creek, Blue Max, Pretium and Rokstad Power Corporation. On April 24, 2017, Blue Max commenced an action in this Court (Terrace Reg. No. TER-S-S-19793) against Bear Creek, Pretium and various entities related to Rokstad.

[7] Bear Creek also commenced this action on April 24, 2017. As originally filed, the NOCC alleged, in summary, that:

- a) in 2014, Pretium engaged Rokstad as general contractor for the Project (Part 1, paras. 13-19);
 - b) on December 22, 2015, Rokstad issued a request for proposal ("RFP") to Bear Creek to build approximately 171 transmission tower foundations (Part 1, para. 20);
 - c) on January 15, 2016, Bear Creek responded to the RFP, relying on information provided to it by Rokstad (Part 1, paras. 21-26);
 - d) on April 28, 2016, Rokstad issued a letter of intent and related instructions to Bear Creek, inviting it to proceed with the work (Part 1, para. 27);
 - e) Bear Creek began the work but no written subcontract was executed (Part 1, para. 29);
 - f) Bear Creek performed the work between April 2016 and September 10, 2016 (Part 1, para. 30);
 - g) Bear Creek was directed by Rokstad and Pretium to expand the scope of the work, causing delays and extra costs for which Bear Creek has not been compensated (Part 1, paras. 24, 31-41, 48-55);
 - h) on November 9, 2016, Bear Creek made a claim of lien in the amount of \$11,118,644.53 pursuant to the Builders Lien Act, S.B.C. 1997, c. 45 [BLA] against Pretium's mineral title to the Mine (Part 1, paras. 44-45);
 - i) on November 28, 2016, Bear Creek issued a claim to Rokstad for unpaid work and additional costs incurred in the amount of \$14,561,827 (Part 1, paras. 42-43);
 - j) Pretium has been unjustly enriched at Bear Creek's expense (Part 1, paras. 46-47); and
 - k) all sums paid by Pretium to Rokstad with respect to the Project are impressed with a statutory and common law trust for the benefit of Bear Creek, which sums Rokstad has misappropriated (Part 1, paras. 56-57).
- [8] After Rokstad and Pretium filed their responses to the claim (on May 30 and July 31, 2017, respectively), Pretium filed a counterclaim and a third party notice ("TPN") against Rokstad (both on July 31, 2017). In its TPN, Pretium attributed to Rokstad responsibility for any loss suffered by Bear Creek.
- [9] Bear Creek then amended its NOCC for the first time (on August 10, 2017) and responded to the counterclaim (on September 29, 2017). In its amended NOCC, Bear Creek alleged that Pretium and Rokstad were required pursuant to s. 4 of the BLA to retain a holdback in favour of the subcontractors, including Bear Creek, and claimed a lien on the holdback.
- [10] This action and its pleadings became considerably more complicated when certain of Rokstad's affiliates, whom I will call, collectively, "Carillion" commenced a proceeding in Ontario under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [CCAA] on January 25, 2018 (Ontario Superior Court of Justice Court File No. CV-18 590812-00CL) (the "CCAA Proceeding"). Carillion obtained an order from that Court (the "Initial Order") that,

among other things, stayed proceedings against the members of the Carillion group of companies, which includes Rokstad. The CCAA Proceeding is ongoing and the stay of proceedings in favour of Carillion remains in effect until at least October 30, 2020.

- [11] On June 13, 2018, Rokstad GP was added as an applicant in the CCAA Proceeding.
- [12] A later order in the CCAA Proceeding approved an Asset Purchase Agreement (the "APA") which transferred certain of Rokstad's assets and liabilities to Rokstad Holdings Corp. ("RHC") or its designated purchaser. RHC subsequently incorporated a new subsidiary, Rokstad Power Construction Services Ltd. ("RPCS") to become that purchaser, an arrangement formalised by a Designated Purchaser Agreement (the "DPA"), which was also approved by the Court in the CCAA Proceeding.
- [13] Bear Creek, through its Ontario counsel, had itself added to the service list in the CCAA Proceeding.
- [14] As a result of those orders in the CCAA Proceeding, a series of new claims and cross-claims were advanced in this action, culminating most recently with Bear Creek's latest proposed amendments, which are the subject of this application.
- [15] First, on December 20, 2018, this Court ordered RPCS to be added as a defendant in this action. On January 7, 2019, Bear Creek filed its second amended notice of civil claim, which advanced a new claim against RPCS on the basis that it had acquired Rokstad's liability to Bear Creek through the APA.
- [16] On January 14, 2019, RPCS responded to Bear Creek's new claim against it and filed its own TPN against Pretium. In that TPN, RPCS attributed to Pretium responsibility for any loss suffered by Bear Creek.
- [17] On February 6, 2019, Pretium responded by amending its response to Bear Creek's claim against it and filing a new TPN against RPCS, RHC and various other Rokstad-related entities.
- [18] On the following day (February 7, 2019), Pretium also responded to the TPN that had been filed against it by RPCS.
- [19] On March 29, 2019, RPCS responded to Pretium's TPN against it.
- [20] Finally, on March 6, 2020, Rokstad (although still covered by the stay of proceedings mentioned above), RHC and the Rokstad Subsidiaries responded to Pretium's TPN against them.

III. The Proposed Amendments

- [21] In its proposed third amended notice of civil claim (the "Third Amended NOCC"), a copy of which is attached as Schedule "A" to these reasons for judgment, Bear Creek seeks leave to amend the NOCC in the following ways:

- a) to clarify or particularise already pleaded causes of action;
- b) to expand the claim for breach of trust;
- c) to add RHC as a new defendant, on the basis that it remains jointly and severally liable with RPCS under the APA for the purchased liabilities, including Bear Creek's claims against Rokstad in this action and for having converted or misappropriated trust funds that it received from Rokstad;
- d) to add as new defendants Aaron Rokstad and Bernard Rokstad (the "Directors"), who are or were directors of Rokstad, RHC and RPCS, for having knowingly caused, assisted or acquiesced in the alleged breaches of trust; and
- e) to advance new allegations against the existing and proposed new defendants (other than Pretium) arising from steps taken by Rokstad and its affiliates that are alleged to be in breach of the alleged trusts.

IV. General Legal Principles

A. Amending Pleadings

- [22] It is not disputed that Bear Creek, having already amended its claim twice before, requires leave of the Court to make this proposed third round of amendments: Rule 6-1(1) of the Supreme Court Civil Rules. The principles to be applied in determining whether leave to amend should be granted in such circumstances are well-settled.
- [23] In *British Columbia (Director of Civil Forfeiture) v. Violette*, 2015 BCSC 1372, Davies J. conveniently summarised the relevant authorities as follows, at paras. 39-41:
- [39] In *Mayer v. Mayer*, 2012 BCCA 77 at para. 215, the Court of Appeal affirmed that the fundamental purpose of pleadings is to define the issues to be tried with clarity and precision, to give the opposing parties fair notice of the case to be met, and to enable all parties to take effective steps for pre-trial preparation.
- [40] Applications for leave to amend pleadings are considered on the same basis as applications to strike pleadings with the question being whether it is plain and obvious that the proposed amendments are bound to fail. In assessing that question, it is not determinative that the law has not yet recognized a particular claim. In its analysis, the court must be generous and err on the side of permitting an arguable claim to proceed to trial. See: *McMillan v. McMillan*, 2014 BCSC 546 at paras. 13-14, and cases cited therein.
- [41] In *Peterson v. 446690 B.C. Ltd.*, 2014 BCSC 1531 at para.37, this Court summarized the general principles arising on an application to amend pleadings as follows:
- [37] Finally, the general principles arising on an application to amend pleading can be summarized as follows:

- (a) Amendment to pleadings ought to be allowed unless pleadings fail to disclose a cause of action or defence: *McNaughton v. Baker*, [1988] 24 B.C.L.R. (2nd) 17 [(C.A.)].
 - (b) Amendments are usually permitted to determine the issues between the parties and ought to be allowed unless it would cause prejudice to party's ability to defend an action: *Levi v. Petaquilla Minerals Ltd.*, 2012 BCSC 776.
 - (c) The party resisting an amendment must prove prejudice to preclude an amendment, and mere, potential prejudice is insufficient to preclude an amendment: *Jones v. Lululemon Athletica Inc.*, 2008 BCSC 719.
 - (d) Costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy.
 - (e) Courts should only disallow an amendment as a last resort: *Jones, McNaughton, Innoventure S & K Holdings Ltd. et al. v. Innoventure (Tri-Cities) Holdings Ltd. et al.*, 2006 BCSC 1567.
- [24] In *Colter Developments Ltd. v. Squamish JV Ltd.*, 2015 BCSC 415, Pearlman J. summarised the applicable principles as follows, at paras. 21-3:
- [21] The principles which govern the granting of amendments to pleadings, as summarized by McLachlin J., as she then was, in *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.*, [1982] B.C.J No. 1500, 30 B.C.L.R. (2d) 45 at para. 2, include the following:
- (a) such amendments should be permitted as are necessary to determine the real question in issue between the parties;
 - (b) the rules will be interpreted to permit the just and speedy determination of the dispute on its merits;
 - (c) the Law and Equity Act, R.S.B.C. 1996, c. 253, s. 10 "requires the court to grant all such remedies as any of the parties may appear to be entitled to 'so that, as far as possible, all matters in controversy between the parties may be completely and finally determined'";
 - (d) the court will take a generous approach to the question of amendments;
 - (e) the court will not allow useless amendments;
 - (f) the court will not give its sanction to amendments which violate the rules which govern pleadings, including the requirements relating to conciseness, material fact, particulars and the prohibition against pleadings which disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious.

- [22] In exercising its discretion judicially, the court will take into account the length of delay, the reasons for delay, the expiry of any limitation period, the presence or absence of prejudice, and the extent of any connection between the existing claims and the proposed new cause of action. None of these factors should be considered in isolation. The overriding question is what is just and convenient: *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 at paras. 67, 74 (C.A.).
- [23] Rule 3-1(2) requires the notice of civil claim to set out a concise statement of the material facts giving rise to the claim. A proposed amendment is deficient and should not be allowed where it is unsupported by material facts: *Salico Property Marketing Corp. v. Farris Vaughan Wills & Murphy*, 2009 BCSC 1489 at para. 72.

B. Adding New Defendants

- [25] Bear Creek brings its application to add new defendants under Rule 6-2(7), which states, in relevant part, as follows:

Adding, removing or substituting parties by order

- (7) At any stage of a proceeding, the court, on application by any person, may,
- (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
 - (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

- [26] The principles to be applied in determining whether it is appropriate to add a proposed new party under that Rule were conveniently summarised by Dley J. in *Meade v. Armstrong (City)*, 2011 BCSC 1591 as follows, at para. 16:
- [16] Mr. Meade's application is brought under Rules 6-1(1) and 6-2 (7) of the Supreme Court Civil Rules. These rules are to be interpreted as follows:
- 1) A party should be added where that party's participation is necessary for the proper determination of the case: *Van de Perre v. Edwards* [2001] 2 S.C.R. 1014 at para. 48;

- 2) The discretion to add parties should be generously exercised so as to enable effective adjudication upon all matters: *Northern Construction Co. v. British Columbia Hydro and Power Authority*, [1970] B.C.J. No. 26 at para. 14;
- 3) In exercising the discretion to add a party, the court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party being joined: *MacMillan Bloedel Ltd. v. Binstead*, [1981] B.C.J. No. 1611 at para. 12;
- 4) Evidence is not required in support of a joinder application. The pleadings may be sufficient to establish that there is a question to be tried between the parties: *Lasik Vision Canada Inc. v. TLC Vancouver Optometric Group Inc.*, [1999] B.C.J. No. 2796 at para. 15;
- 5) Where an applicant relies on pleadings alone, the facts alleged, which if assumed to be true, must disclose a cause of action: *Harrington (Guardian ad litem) v. Pappachristos*, [1992] B.C.J. No. 2600;
- 6) Unless there is prejudice, amendments should be granted liberally to enable the issues to be tried: *Langret Investments S.A. v. McDonnell*, [1996] B.C.J. No. 550 at para. 43.

C. Effect of Expiry of a Limitation Period

- [27] Where, as the respondents each allege here, a new defendant is proposed to be added or a new cause of action pleaded after the expiry of a limitation period, the question becomes whether it is just and convenient to permit the addition or amendment.
- [28] The factors to be considered in that regard were set out in *In Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.), as follows:
- (1) the extent of the delay;
 - (2) the reasons for the delay;
 - (3) any explanation put forward to account for the delay;
 - (4) the degree of prejudice caused by delay; and
 - (5) the extent of the connection, if any, between the existing claims and the proposed new cause of action.
- [29] Groberman J.A., writing for the Court in *Chouinard v. O'Connor*, 2011 BCCA 161 reiterated that the list of factors is not exhaustive, stating as follows at para. 21:

this list of factors has come to be seen as a checklist in applications to add a cause of action or a party after the expiry of the limitation period. It is sometimes forgotten that the list of factors is not an exhaustive one, and that the overriding concern is whether the proposed amendment will be "just and convenient". The factors listed in *Teal Cedar* and in *Letvad* [*Letvad v. Fenwick*, 2000 BCCA 630] will typically be important factors to be considered by a chambers judge, but the decision is ultimately a discretionary one.

[30] In *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329, the Court elaborated on the analysis to be followed in such circumstances, as follows:

- a) if it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence, applying the *Letvad* non-exhaustive list of factors;
- b) if the parties disagree as to whether there is an accrued limitation defence, and the court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence; and
- c) alternatively, when the limitation issue cannot be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Limitation Act, S.B.C. 2012, c. 13, judicial discretion may be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial.

V. Discussion

A. The Objections of Pretium

- [31] Pretium argues that the proposed amendments add two new causes of action against it: a new claim for breach of trust and a new claim that Bear Creek was directed to perform extra work beyond that which it was originally engaged to perform (a claim previously advanced only, or at least primarily, against Rokstad).
- [32] Because those new claims have been brought after the expiry of the governing limitation period, it is argued, leave to make those particular amendments should be refused. Leave to plead the proposed new claim for breach of trust, should, it is argued, also be refused on the grounds that it is bound to fail.
- [33] Bear Creek responds that its proposed amendments do not raise any new causes of action against Pretium, but even if they do, they are not time barred, or, if they are, leave should still be granted to make them. With respect to the proposed amendments alleging a breach of trust by Pretium, Bear Creek argues that the claim, although admittedly novel, is at least arguably meritorious and should be allowed to proceed.

[34] Both Pretium and Bear Creek rely in this regard on the decision of the Court of Appeal in *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122. There, Garson J.A., writing for the Court, had occasion to consider, among other things, the test to be applied in determining whether a proposed amendment to a pleading raises a new cause of action. At paras. 27-28, she adopted both parties' suggested descriptions of what must be pleaded to raise a cause of action, seeing "little difference" between them:

- a) "every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court"; and
- b) "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

[35] In the following paragraphs of the judgment, Garson J.A. cited earlier jurisprudence holding that a proposed amendment will not be taken to raise a new cause of action simply because it "take[s] the cause of action from being one entirely in contract to being one also in tort" or where "a party merely pleads a new or alternative remedy based on the same facts already pleaded." More generally, a proposed amendment will not be taken to raise a new cause of action as long as it does not "change the substance of the issues."

- i. Do any of the proposed amendments raise new causes of action against Pretium for extra work that Bear Creek was directed to perform?

[36] Pretium argues that in paras. 33 and 34 of Part 1 of the proposed Third Amended NOCC, Bear Creek has added a new allegation that Pretium gave certain directions to Bear Creek that were originally alleged to have been given only by Rokstad. Pretium argues that those proposed amendments raise new causes of action, for which the limitation period has expired.

[37] I am not persuaded by that argument.

[38] The original NOCC had already pleaded in para. 31, that:

During performance of the Bear Creek Scope of Work, Bear Creek was directed by Rokstad and by Pretium to expand or change the Bear Creek Scope of Work, including changes in the Bear Creek Work Plan and the design of the foundations.

[Emphasis added.]

[39] Even within para. 33, one of the impugned paragraphs, Bear Creek had originally pleaded that the "directions or failures" complained of included "continuous direction by Rokstad and Pretium to change priority locations." [Emphasis added.]

[40] The addition of Pretium in the other impugned para., 34, does not raise a new cause of action against it. Bear Creek seeks to amend that paragraph to add the underlined words as follows:

Rokstad and Pretium, on behalf of itself and Rokstad, directed Bear Creek to change its methodology and Work Plan and failed to permit Bear Creek to prosecute work in a manner that was most efficient or productive, resulting in increased cost and loss of time to Bear Creek.

[41] That fact was already pleaded from the beginning in paras. 31 and 33.

[42] The most that can be said about these proposed amendments is that they add further particulars to a claim against Pretium that was already pleaded.

[43] Moreover, I also agree with Bear Creek that its proposed amendments merely update the NOCC to reflect the allegations that the defendants, including Pretium, have made against one another in their respective TPNs and the responses thereto.

[44] In summary, I find that the proposed amendments alleging that Pretium directed Bear Creek to perform extra work do not "change the substance of the issues" as already pleaded, and therefore do not raise any new causes of action.

ii. Do the proposed amendments raise a new cause of action against Pretium for breach of trust?

[45] Pretium argues that in paras. 45a-f and 91 of the proposed Third Amended NOCC, Bear Creek seeks to raise a new cause of action against Pretium for breach of trust in relation to Pretium's alleged failure to maintain the statutory holdback as required by s. 5 of the BLA.

[46] Bear Creek responds that no new cause of action is raised in those paragraphs because the essence of that allegation was already pleaded in its amended NOCC filed August 10, 2017, where Bear Creek pleaded that:

[Part 1] 45a. The defendants were obliged pursuant to section 4 of the Builders Lien Act, SBC 1997, chapter 45, to retain a holdback charged with payment of all persons engaged in connection with the improvement, including the plaintiff.

[Part 2] 3a. For a declaration of lien against the holdback required to be retained by the defendants pursuant to section 4 of the Builders Lien Act in the amount of \$14,561,827.00.

[Part 2] 9. Damages for breach of trust.

[Part 3] 1. The plaintiff performed work and supplied materials in relation to the improvement on the Mineral Claims pursuant to its engagement by the defendants. The Plaintiff is entitled to a declaration of builders lien and ancillary relief. The plaintiff is further entitled to a declaration of lien against the holdback required to be retained by the defendants.

[Bold emphasis added.]

[47] Relying on those emphasised words, Bear Creek submits that it had, prior to the expiry of any limitation period, already put Pretium's alleged failure to maintain the statutory holdback in issue.

[48] I am unable to agree with Bear Creek's submission in that regard. Although Bear Creek had previously pleaded that Pretium and Rokstad were "obliged to retain a holdback," there was no allegation that they had failed to do so. That is an essential element of the cause of action that Bear Creek now seeks to advance against Pretium and it is indeed a new allegation, not previously pleaded.

iii. Is the new trust claim against Pretium clearly statute-barred?

[49] I have found that the proposed amendments raise a new cause of action against Pretium for breach of trust. Pretium argues that the claim is statute-barred, relying on both the BLA and the Limitation Act.

[50] Pretium relies in that regard on s. 8(2) of the BLA, which states in relevant part, as follows:

Holdback period

8 (1) If a certificate of completion is issued with respect to a contract or subcontract, the holdback period in relation to

- (a) the contract or subcontract, and
- (b) any subcontract under the contract or subcontract

expires at the end of 55 days after the certificate of completion is issued.

(2) The holdback period for a contract or subcontract that is not governed by subsection (1) expires at the end of 55 days after

- (a) the head contract is completed, abandoned or terminated, if the owner engaged a head contractor, or
- (b) the improvement is completed or abandoned, if paragraph (a) does not apply.

(4) Payment of a holdback required to be retained under section 4 may be made after expiry of the holdback period, and all liens of the person to whom the holdback is paid, and of any person engaged by or under the person to whom the holdback is paid, are then discharged unless in the meantime a claim of lien is filed by one of those persons or proceedings are commenced to enforce a lien against the holdback.

[51] Pretium argues that once the holdback period expired pursuant to that provision, no holdback existed and therefore no lien could attach to it: *Wah Fai Plumbing & Heating Inc. v. Ma*, 2011 BCCA 26. Pretium submits that because the head contract with Rokstad was terminated in February 2017, the holdback period expired 55 days after that, along with Bear Creek's opportunity to claim a lien or a trust on the holdback amount.

[52] Alternatively, argues Pretium, the proposed new trust claim against it is statute-barred by virtue of the expiry of the two-year limitation period prescribed by the Limitation Act. The claim was discoverable no later than March 16, 2017, when Pretium notified Bear Creek by letter that it had failed to retain the holdback as required by the BLA. On that basis, it is argued, the two-year limitation period expired no later than March 17, 2019.

[53] Bear Creek responds that:

- a) its proposed trust claim is not a lien claim, and it therefore survived the expiry of the 55-day holdback period prescribed by s. 8 of the BLA;
- b) there was no discharge of the liens attaching to the holdback amount because Pretium was not entitled to pay out the holdback in light of the lien claims that Bear Creek and others had already initiated before the 55-day holdback period expired; and
- c) there is a triable issue as to whether the two-year limitation period under the Limitation Act began running on March 16, 2017, as Pretium argues, because the "meaning and effect" of Pretium's letter to Bear Creek on that date is ambiguous.

[54] I agree with Bear Creek that the proposed claim for breach of trust is not a lien claim that is necessarily barred by virtue of the expiry of the 55-day holdback period in s. 8 of the BLA.

[55] I also agree with Bear Creek that it is not plain and obvious that Pretium's letter of March 16, 2017 put Bear Creek on notice as to the existence of the cause of action that it now seeks to advance against Pretium, so as to cause the two-year limitation period under the Limitation Act to begin running. It is at least arguable that the letter and its attachments were insufficiently clear in that regard.

[56] Accordingly, I am not prepared to refuse to grant Bear Creek leave to make the proposed amendments on the grounds that they raise new claims against Pretium that are clearly statute-barred. The issue is one that is more appropriately left for trial.

iv. Is the new trust claim bound to fail?

[57] Pretium argues that the proposed amendments in which Bear Creek advances the new trust claim should not be allowed because the claim is bound to fail.

[58] In those proposed amendments, Bear Creek seeks to allege that Pretium failed to maintain a holdback account as required by s. 5 of the BLA, or alternatively, that it failed to establish it, failed to deposit it or misappropriated and converted it.

[59] Those allegations are based on ss. 4 and 5 of the BLA which state, in relevant part, as follows:

Holdback

4 (1) The person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act must retain a holdback equal to 10% of the greater of

- (a) the value of the work or material as they are actually provided under the contract or subcontract, and
 - (b) the amount of any payment made on account of the contract or subcontract price.
- (2) The obligation to retain the holdback under subsection (1) applies whether or not the contract or subcontract provides for periodic payments or payment on completion.
- (3) For the purposes of subsection (1), value must be calculated on the basis of the contract or subcontract price or, if there is no specific price, on the basis of the actual value of the work or material.
- (9) Subject to section 34, a holdback required to be retained under this section is subject to a lien under this Act, and each holdback is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.

Holdback account

5 (1) Subject to subsection (8), an owner must

- (a) establish at a savings institution a holdback account for each contract under which a lien may arise,
 - (b) pay into the holdback account the amount the owner is required to retain under section 4, and
 - (c) administer the holdback account together with the contractor from whom the holdback was retained.
- (2) Subject to sections 9 and 34, all amounts deposited into a holdback account
- (a) are charged with payment of all liens arising under the contractor from whom the holdback was retained,
 - (b) subject to paragraph (a), are held in trust for the contractor referred to in paragraph (a), and
 - (c) must not be paid out of the account without the agreement of all the persons who administer the account.

- [60] In *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*, 2002 BCSC 238, aff'd *Shimco Metal Erectors Ltd. v. North Vancouver (District)*, 2003 BCCA 193, the Court of Appeal recognised that s. 4(9) of the BLA operates to create a lien over monies held in a holdback account, which has since come to be known eponymously as a "Shimco Lien."
- [61] Pretium argues that, contrary to Bear Creek's proposed pleading, the holdback amount contemplated by s. 5(2) is to be held in trust for the benefit of the contractor (in this case, Rokstad), not for subcontractors like Bear Creek, who have no beneficial interest in it, but only a lien against the funds under s. 4(9). More fundamentally, Pretium says that a subcontractor has no remedy under the BLA where, as here, no holdback was retained.
- [62] For that latter proposition, Pretium cites *Wah Fai*. In that case, the Court held that a Shimco Lien could not arise where the owner failed to retain the holdback required under s. 5(2) of the BLA. Levine J.A. writing for the Court, stated (at para. 43) that "[t]he Act does not provide for enforcement of a holdback lien where there has been no holdback, nor is there any reason to extend Shimco to that factual circumstance."
- [63] Pretium also argues that s. 34(1) of the BLA limits the quantum of the claim that Bear Creek can properly advance against it. That provision states as follows:

Limit of claims

34 (1) The maximum aggregate amount that may be recovered under this Act by all lien holders who claim under the same contractor or subcontractor is equal to the greater of

- (a) the amount owing to the contractor or subcontractor by the person who engaged the contractor or subcontractor, and
 - (b) the amount of the required holdback in relation to the contract between the contractor or subcontractor and the person who engaged the contractor or subcontractor.
- (2) For the purposes of subsection (1) (a),
- (a) an amount claimed by way of counterclaim against a contractor or subcontractor by the person who engaged the contractor or subcontractor does not reduce the amount owing to the contractor or subcontractor by that person,
 - (b) a payment that is made in bad faith to a contractor or subcontractor by the person who engaged the contractor or subcontractor does not reduce the amount owing to the contractor or subcontractor by that person, and
 - (c) a payment to a contractor or subcontractor by the person who engaged the contractor or subcontractor that is made
- (i) after a claim of lien has been filed by a lien holder claiming under the contractor or subcontractor,

(ii) if the person has actual notice of the claim of lien, and

(iii) if the claim of lien has not been removed or cancelled from the title to the land, under section 23 or 24 or otherwise, at the time the payment was made,

does not, to the extent of the lien, reduce the amount owing to the contractor or subcontractor by that person.

(3) Despite subsection (2), a person may, on the default of another person that the first person engaged, apply money held by the first person in excess of the required holdback in order to remedy that default or compensate for damage caused by the default.

[64] Pretium argues that that provision effectively precludes Bear Creek from recovering the "full amount of its claim", or \$14,561,827, against Pretium, as the proposed amendments allege. That is because the total amount payable to Rokstad under the prime contract was \$61,500,000, 10% of which is \$6,150,000. The limit applies, Pretium adds, regardless of the fact that Pretium failed to keep the holdback as required of it by s. 5(1), because the remedy for that failure is limited to the required holdback amount: *Iberdola Energy Projects Canada Corporation v. Factory Sales & Engineering Inc. d.b.a. FSE Energy*, 2017 BCSC 1776, rev'd in part on other grounds, 2018 BCCA 272.

[65] Bear Creek responds that:

- a) its pleadings allege that it was directed by Pretium to perform certain work, thereby making it a "contractor" as that term is defined in s. 1 of the BLA, and as such, it is entitled to claim a beneficial interest in the holdback amount;
- b) even if it is only a subcontractor, the authorities have not ruled out an in personam claim by a subcontractor against an owner for breach of its statutory holdback obligations;
- c) the maximum in s. 34 of the BLA applies only to lienholders seeking to recover on their liens and does not apply to in personam claims such as the one that Bear Creek seeks to advance against Pretium; and
- d) the maximum in s. 34 is higher than Pretium argues it to be because under s. 34(2)(c), payments that Pretium made to Rokstad after Bear Creek filed its lien claims cannot be credited to the amounts owing to Rokstad.

[66] I agree with Pretium that para. 45c(b) of the proposed Third Amended NOCC is an improper pleading because it makes a demonstrably incorrect statement of law. In particular, it misstates the effect of s. 5(2) of the BLA, insofar as it refers to a "statutory trust in favour of all persons engaged in connection with the improvement, including Bear Creek" when the statute actually confers the beneficial interest in the holdback amount only on the contractor. It follows that that paragraph, and any other parts of the proposed Third Amended NOCC claim that are based on it (that is, wherever Bear Creek seeks to enforce the so-called "Bear Creek Holdback Trust", such as in paras. 45d(b), 45e and 91 of Part 1), are bound to fail. On that basis, I refuse to allow those particular amendments to be made.

[67] Moreover, I cannot see how Bear Creek could properly amend para. 45c(b) to allege that the so-called "Bear Creek Holdback Trust" was held for it as a contractor in its own right. The term "contractor" is defined in s. 1 of the BLA as follows:

"contractor" means a person engaged by an owner to do one or more of the following in relation to an improvement:

- (a) perform or provide work;
- (b) supply material;

but does not include a worker.

[68] Despite its argument to the contrary, Bear Creek does not plead that it was a contractor in that sense. Its pleading, or proposed pleading, is that it was directed by Pretium to perform certain work, but those directions are only alleged to have been given after Bear Creek had already been "engaged" on the Project by Rokstad, thereby making Rokstad the only true contractor for the Project.

[69] On the other hand, while I am refusing to allow Bear Creek to plead the so-called "Bear Creek Holdback Trust" in paras. 45e and 91 of Part 1 of the proposed Third Amended NOCC, I have concluded that the rest of the paragraphs referencing the "Bear Creek Holdback Trust" (after removing that reference) are properly pleaded. I agree, in particular, with Bear Creek's argument that the law has not categorically foreclosed a subcontractor like Bear Creek from making an in personam claim against an owner for having failed to comply with the holdback obligations imposed on it by the BLA.

[70] While the decision in Wah Fai clearly precludes subcontractors like Bear Creek from asserting the statutory lien in the absence of a holdback fund to which it can attach, there may be other remedies available to them in those circumstances. As Bear Creek argues, that is apparent from the concurring judgment of Chiasson J.A., where he stated as follows:

[72] The appellant's difficulty derives from the legislation. Section 4 provides for a lien. The legislation is silent on any remedy that may be available to a claimant arising out of an owner's failure to meet the statutory obligation to retain funds to which that lien could attach. There may be such a remedy, about which I give no opinion, but a declaration of lien is not one of them.

[Emphasis added.]

[71] Finally, I have reached a similar conclusion with respect to Pretium's argument based on the maximum recovery available under s. 34 of the BLA. Despite that provision, I cannot say that Bear Creek is bound to fail in pursuing Pretium for the entire amount of its claim. Bear Creek has raised questions as to the applicability of that provision to its claims and the actual size of that limit, assuming it applies, in the circumstances of this case. Such questions are more properly left for trial.

v. Conclusions on Pretium's Objections

[72] I am refusing the application for leave to amend the NOCC to add the following proposed new paragraphs:

- a) 45c(b) of Part 1; and
- b) 45d(b), 45e and 91 of Part 1, insofar as they refer to the so-called "Bear Creek Holdback Trust."

B. The Objections of RPCS

[73] RPCS argues that Bear Creek should be denied leave to make many of the proposed amendments on the basis that they are improper on various grounds, including one or more of the following:

- a) they raise new causes of action against RPCS that are barred due to the passage of time, pursuant to the BLA or the Limitation Act;
- b) they are inconsistent with Bear Creek's other pleadings; and
- c) they are unnecessary, vexatious or constitute an abuse of process insofar as they:
 - i. invite an inference of fraud without alleging it outright;
 - ii. advance allegations that are not material to the causes of action pleaded;
 - iii. constitute an improper collateral attack on orders previously made in the CCAA Proceeding;
 - iv. improperly plead evidence rather than material facts; and
- v. are based in part on confidential documents that Bear Creek has used in breach of the terms on which they were provided to it.

[74] Bear Creek responds that:

- a) the proposed amendments do not raise any new causes of action against Rokstad, but even if they do, they are not time-barred, or, if they are, leave should still be granted to make them;
- b) to the extent that any of the proposed amendments are inconsistent with its previous pleadings, the inconsistency is not improper;
- c) Bear Creek seeks to plead misconduct by Rokstad, its affiliates and the Directors in failing to disclose to the Court or the monitor in the CCAA Proceeding the existence of the alleged trusts; it seeks to do so not to invite an inference of fraud or otherwise challenge any orders made in that proceeding, but to illustrate the alleged breach of trust and the knowing assistance of it by those parties;
- d) the proposed amendments plead material facts, not evidence; and
- e) there has been no misuse of confidential information.

- i. Do any of the proposed amendments raise new causes of action against RPCS, and if so, should leave to make them be refused on the grounds that they are statute-barred?

[75] RPCS argues that the following paragraphs in the proposed Third Amended NOCC raise new causes of action against Rokstad, for which RPCS too is alleged to be liable:

- a) Part 1: 28.1, 34, 37-41, 43, 47, 47a, 52, 59-65; and
b) Part 3: 3.

[76] Paragraph 28.1 is an entirely new addition, which states as follows:

Although the value of the work specified in the Letter of Intent was only to a value of \$2.5 million, which Rokstad knew was far less than the full cost of the Bear Creek Scope of Work, as set out below, Rokstad and, or in the alternative, Pretium on behalf of itself and Rokstad, and with the knowledge and agreement of Rokstad, instructed Bear Creek to proceed and continue with the entire Bear Creek Scope of Work on the understanding that Rokstad and Bear Creek would conclude a subcontract for the Bear Creek Scope of Work.

[77] I am not persuaded that this paragraph raises a new cause of action against Rokstad. Although it makes an arguably new allegation as to Rokstad's knowledge that the \$2.5 million project cost contemplated by the Letter of Intent was too low, that allegation in particular and the rest of the paragraph in general appear to be intended to particularise broader allegations pleaded previously elsewhere in the NOCC, such as those alleging that:

- a) "[i]n preparing the Response and responding to the RFP, Bear Creek relied substantially on the information provided by Rokstad " (Part 1, para. 22); and
b) the Project "was initiated by Pretium on the basis of incomplete, misleading and preliminary design documents " and that therefore " Pretium and Rokstad provided assurances to Bear Creek that monetary compensation and extension of time would be provided to Bear Creek in recognition of the challenging and changing nature of the project" (Part 1, para. 48).

[78] Bear Creeks seeks to amend para. 34 of Part 1 as follows:

Rokstad and Pretium, on behalf of itself and Rokstad, directed Bear Creek

[79] Bear Creek also seeks to make the same or similar changes to paras. 37-41 and 52 of Part 1 and para. 3 of Part 3.

[80] I am not persuaded that the addition of those underlined words gives rise to a new cause of action against Rokstad. For reasons set out above in addressing Pretium's objections that are in the same vein, the proposed amendments in this category do not "change the substance of the issues" that have already been raised in the pleadings to date, including the current NOCC and the current defendants' respective third party notices.

[81] Bear Creek seeks to amend para. 43 as follows:

Rokstad has failed to honour the Notice of Claim [of lien] at all or in part, despite demand and despite being paid by Pretium for the work and materials provided and the costs incurred by Bear Creek as described in the Notice of Claim.

- [82] I am not persuaded that the addition of those underlined words gives rise to a new cause of action against Rokstad. The allegation that Pretium paid Rokstad for the work that Bear Creek did on the Project is not new (see, for example, the existing allegations as to the "sums paid by Pretium to Rokstad" in Part 1, para. 56 or the "significant additional compensation paid by Pretium to Rokstad" in Part 1, para. 52).
- [83] In the proposed changes to para. 47 and proposed new para. 47a of Part 1, Bear Creek seeks to plead that Rokstad (and not just Pretium) was unjustly enriched at Bear Creek's expense. I am not persuaded that those allegations raise a new cause of action against Rokstad. While it presents a new theory as to the legal basis for Rokstad's liability, the factual allegations supporting it are already pleaded. It is no different than adding a new claim in tort to one currently pleaded with the same facts only in contract, which is one of the examples cited in *Swiss Reinsurance* of the kind of change that has previously been held not to give rise to a new cause of action.
- [84] Finally, in proposed new paras. 59-65, Bear Creek seeks to plead that Rokstad and its affiliates participated in a so-called "Cash Sweep System" whereby alleged trust monies were misappropriated by Rokstad and its affiliates with the Directors' assistance. This is not, in my view, a new cause of action against Rokstad, but rather an apparent effort to particularise the breach of trust already pleaded (for example, in paras. 56 and 57 of Part 1).
- [85] In summary, I am not persuaded that Bear Creek seeks to raise any new causes of action against Rokstad in the proposed amendments.

ii. Should leave to amend be refused in part on the basis that Bear Creek is seeking to plead inconsistently?

- [86] Rule 3-7(6) states that a party "must not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading."
- [87] RPCS argues that the following paragraphs in the proposed Third Amended NOCC are inconsistent with each other or Bear Creek's other pleadings, including the NOCC, its response to the counterclaim and its responses to the claims of Blue Max and More Core, and for that reason should not be permitted:
- a) Part 1: paras. 28.1, 30, 34, 37, 38-41 and 52;
 - b) Part 2: para. 6a; and
 - c) Part 3: paras. 3, 4.
- [88] RPCS argues that para. 28.1, reproduced above, is inconsistent with Bear Creek's other pleadings because it:

- a) suggests that there was only "an understanding" that a contract would be concluded, whereas the NOCC pleads elsewhere (such as at para. 8 of Part 2) that there was in fact a contract concluded; and
 - b) pleads that Bear Creek was directed to do certain work by "Rokstad and, or in the alternative, Pretium on behalf of itself and Rokstad, and with the knowledge and agreement of Rokstad" whereas in proposed new para. 30, Bear Creek seeks to plead that Bear Creek performed that work "at the direction of Rokstad and Pretium," without pleading the same alternative.
- [89] In the same vein, RPCS objects to the proposed new pleadings in paras. 28.1, 34, 37 and 38-41 of Part 1 and para. 3 of Part 3, where Bear Creek seeks to plead that conduct previously attributed only to Pretium should now be attributed to "Pretium on behalf of itself and Rokstad" and sometimes also "with the knowledge and agreement of Rokstad." Those proposed additions are, it is argued, inconsistent with each other and with Bear Creek's previous pleading in the NOCC and its response to the counterclaim, where Pretium, by itself, is alleged to have directed Bear Creek directly.
- [90] Finally, RPCS objects to Bear Creek's seeking to plead an unjust enrichment while also pleading the existence of a contract that, according to RPCS, serves as the juristic reason for any enrichment.
- [91] I am not persuaded that any of those impugned pleadings are intolerably inconsistent with one another, at least not in the sense contemplated by the authorities.
- [92] Despite Rule 3-7(6), it is clearly permissible to plead in the alternative. Rule 3-7(7) states as follows:
- (7) Subrule (6) does not affect the right of a party to make allegations in the alternative or to amend or apply for leave to amend a pleading.
- [93] It is also permissible for a plaintiff to advance a claim in unjust enrichment while also pleading the existence of a contract that could serve as the juristic reason for the enrichment alleged. The circumstances in which a contract may serve as a juristic reason precluding a successful claim of unjust enrichment were discussed by Kelleher J. in *Tyk v. Graham*, 2017 BCSC 920, as follows at para. 101:
- [101] While the existence of a contract can be a sufficient juristic reason for enrichment, the benefit obtained must be within the scope of the contract. This was noted by Myers J. in *Noh v. Plaza 88 Developments Ltd.*, 2010 BCSC 1491, aff'd 2011 BCCA 461 as follows:
- [55] . . . Whether a contract [exists] is certainly a major part of the juristic reason analysis, but it is not the ending point. Where a valid and enforceable contract requires the plaintiff to benefit the defendant, the contract is, no doubt, a sufficient juristic reason for the enrichment. On the other hand, where the benefit is bestowed outside the scope of the contract, or where a contract has failed for lack of consideration or frustration, the contract might not constitute a sufficient juristic reason

- [94] For that reason, this Court has held that a plaintiff should be permitted to seek damages in unjust enrichment and restitution in the alternative to those in breach of contract, particularly where it is possible that the claim in contract could fail while that in unjust enrichment could succeed: see, for example, *Murray Market Development Inc. v. Casa Cubana*, 2018 BCSC 568.
- [95] More fundamentally, not every inconsistency in a pleading will be treated as an abuse of process. In *Illingworth v. Evergreen Medicinal Supply Inc.*, 2019 BCCA 471, DeWitt-Van Oosten J.A., writing for the Court, stated as follows at para. 68:
- [68] There is no question that taking inconsistent positions may result in a finding of abuse of process. However, such is not automatically the case. As noted by Willcock J.A., writing for the Court in *Glover v. Leakey*, 2018 BCCA 56, "an abuse of process does not arise from inconsistent prior pleadings alone; there must be something more giving rise to an injustice" (at para. 32).
- [96] RPCS has not identified any basis to conclude that the alleged inconsistencies that it complains about would give rise to an injustice of that kind. I am therefore not persuaded that any of the impugned pleadings have been shown to be improper on this ground.

iii. Should leave to amend be refused in part on the basis that one or more of the proposed amendments are unnecessary, vexatious or an abuse of process?

[97] Rule 9-5(1) states as follows:

Scandalous, frivolous or vexatious matters

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[98] In *Willow v. Chong*, 2013 BCSC 1083, Fisher J., as she then was, elaborated on the test to be applied in determining whether a pleading contravenes Rule 9-5(1)(b) as follows, at para. 20:

Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (S.C.); *Skender v Farley*, 2007 BCCA 629. If a pleading is so

confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious.

[99] The concept of an abuse of process is more general. The categories of abuse of process are open and abuse of process can capture any circumstances in which the court is used for an improper purpose: *Babovic v. Babowech*, [1993] B.C.J. No. 1802 (S.C.) at paras. 17-8. In *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, LeBel J., writing for the Court, explained the nature of the doctrine as follows:

39. In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. wrote for the majority of this Court that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process: para. 35; see also P. M. Perell, "A Survey of Abuse of Process", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 243. Abuse of process was described in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, as the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice", and in *R. v. Conway*, [1989] 1 S.C.R. 1659, [page 245] at p. 1667, as "oppressive treatment". In addition to proceedings that are oppressive or vexatious and that violate the principles of justice, McLachlin J. (as she then was) said in her dissent in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007, that the doctrine of abuse of process evokes the "public interest in a fair and just trial process and the proper administration of justice". Arbour J. observed in *C.U.P.E.* that the doctrine is not limited to criminal law, but applies in a variety of legal contexts: para. 36.

40 The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of res judicata and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that the doctrine of abuse of process

engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [(C.A.)], at p. 358

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith*, *supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process.

[Emphasis added by Lebel J.]

41 As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In *Canam Enterprises* and in *C.U.P.E.*, the doctrine was used to preclude relitigation of an issue in circumstances in which the requirements for issue estoppel

were not met. But it is not limited to preventing relitigation. For example, in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process (paras. 101-21). The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute.

[100] One species of abuse that has been recognised in the past, and that RPCS argues applies here, arises when a pleading is found to constitute a collateral attack on an order made in a different proceeding.

[101] The policy embodied in the doctrine of collateral attack was explained in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 71, in which Iacobucci J., writing for the Court, found it not to apply on the facts before the Court in that case:

71 The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79 ; D. J. Lange*, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). ... Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. ... Consequently, the collateral attack doctrine does not apply.

[102] The narrow scope of the doctrine was more recently emphasized by the Court of Appeal in *Lamb v. Canada (Attorney General)*, 2018 BCCA 266. There, Willcock J.A., writing for the Court on this point, after citing *Garland*, stated as follows at para. 92:

In my view, the jurisprudence specific to collateral attacks relates to litigation that calls upon the court to pass judgment on the validity of an order that should properly be challenged in another forum. Extending the description of a collateral attack to any action that calls upon the court to revisit an issue litigated elsewhere is inapt and unnecessary as the doctrines of abuse of process and issue estoppel provide a more appropriate remedy.

- [103] He added that the doctrine has a "relatively limited scope." Its "focus remains on whether the impugned pleadings intend to invalidate, or otherwise challenge the legal force of, an existing order" (at para. 94).
- [104] RPCS argues that the following paragraphs of the proposed Third Amended NOCC should be disallowed on the basis that they contravene Rule 9-5(1) in one or more ways:
- a) Part 1: paras. 8.1, 10.2, 11.2, 11.3, 28.1, 30, 59-89; and
 - b) Part 2: para. 3a.
- [105] In paras. 8.1, 11.2, 11.3, Bear Creek seeks to clarify or update corporate names and relationships in the Rokstad group of companies. Such matters are routinely pleaded for context. I find no fault with those proposed amendments.
- [106] In paras. 28.1 and 30, Bear Creek seeks to plead that it had an "expectation" or an "understanding" that the parties would conclude a subcontract for the work, pursuant to which Bear Creek would be paid adequately. RPCS argues that those allegations are unnecessary and vexatious because they are not material to any of the causes of action pleaded. I disagree. They can be said to particularise Bear Creek's other pleadings by explaining how it was induced by Pretium and Rokstad to do extra work.
- [107] In paras. 59-65 (which describe the so-called "Cash Sweep System"), Bear Creek alleges how trust funds were misappropriated by Carillion and the Rokstad defendants. RPCS argues that the claim is bound to fail, relying on Wah Fai. For reasons set out above in connection with Pretium's objection in the same vein, the ruling in Wah Fai may arguably be confined to lien claims arising against the holdback required by s. 5(1) of the BLA. If it is, then it may be open to Bear Creek to advance a claim such as this for breach of a trust arising under s. 10 of the BLA or at common law. I am not prepared to rule out that possibility at the pleadings stage.
- [108] I have reached a different conclusion with respect to the proposed amendments that allege misconduct on the part of Carillion and the Rokstad defendants in the CCAA Proceeding. In those paragraphs, Bear Creek alleges that they obtained orders on an ex parte basis, without proper notice to Bear Creek, while withholding relevant information from the CCAA Court. The inference that appears to be invited is that the CCAA Court was, as a result, misled into making orders that it would not otherwise have made, to Bear Creek's detriment. The essential complaint appears to be that the Rokstad defendants improperly failed to ensure that the alleged trust funds were preserved for Bear Creek through the Carillion restructuring.

- [109] I am not persuaded by RPCS's contention that those proposed amendments constitute an improper collateral attack in the strict sense. Bear Creek does not seek in this action to appeal the impugned CCAA orders or to have them set aside per se. Rather, Bear Creek seeks to hold the Rokstad defendants to account for what is alleged to be the adverse impact on Bear Creek of the orders that were made, or not made, in the CCAA Proceedings.
- [110] Although not a collateral attack in the strict sense, those proposed amendments are, I find, nevertheless improper for a number of other reasons.
- [111] First, I agree with RPCS that in many of those paragraphs, Bear Creek seeks to plead evidence rather than material fact, contrary to Rule 3-7(1). Second, they go to a question that is not really material to the issues that are properly before the Court in this action and are therefore unnecessary and vexatious. This action is not properly concerned with the grounds on which the CCAA Court made the orders that it did. If they were to be allowed, they would take an already complicated litigation far off course. Third, it appears that Bear Creek is effectively seeking to re-litigate the basis for several of the CCAA orders in this action, relying on what is said to be new evidence that was not available to the CCAA Court, despite the fact that Bear Creek did not raise those concerns before the CCAA Court when it had the opportunity to do so. Such conduct amounts to an abuse of process.
- [112] On those grounds, I am refusing leave to make the proposed amendments in Part 1, para. 10.2 (leave is refused only in respect of the words "upon an ex parte application") and all of paras. 66-70, 73-78, 81 and 86(c).
- [113] Finally, I also agree with RPCS that proposed new paras. 87 and 89 are unnecessary because they coincide or at least overlap extensively with the allegations already made in para. 58. Those three paragraphs should be consolidated into one.
- iv. Should Bear Creek be denied leave to make one or more of the proposed amendments because it has used documents in breach of the terms on which they were provided to it?
- [114] RPCS argues that Bear Creek should be denied leave to make certain of the proposed amendments on the grounds that it has used confidential documents (namely, redacted versions of the APA, an amendment to it and the DPA), in a manner inconsistent with the terms of use set out in the cover email with which those documents were originally delivered to Bear Creek's former counsel on October 26, 2018.
- [115] Mr. Fraser, Bear Creek's current counsel, has advised the Court that he was not aware at the time he compiled the application material of the contents of that email. Moreover, he acquired the redacted version of the APA that is before me from the monitor's public website. When counsel for RPCS first raised this issue with Mr. Fraser after receiving his application materials, Mr. Fraser responded by demanding formal production of the documents by RPCS, on the basis that they are expressly referred to in the pleadings. To date, this has not occurred.

[116] In the circumstances, I am not persuaded that there is any basis to refuse leave to make any of the proposed amendments on this ground.

v. Conclusions on RPCS's Objections

[117] In summary, I am refusing leave to make the proposed amendments in Part 1, para. 10.2 (leave is refused only in respect of the words "upon an ex parte application") and all of paras. 66-70, 73-78, 81 and 86(c).

[118] Leave to add proposed new paras. 87 and 89 is also refused, but with leave to consolidate the contents of those paragraphs with existing para. 58.

C. The Objections of the Directors

[119] The Directors argue that leave should not be granted to permit Bear Creek to plead the new claims it seeks to advance against them because they are:

- a) an abuse of process, insofar as those claims are advanced in contravention of orders made in the CCAA Proceeding;
 - b) frivolous, vexatious and otherwise disclose no viable claims; and
 - c) advanced after the expiry of the governing limitation period.
- i. Is Bear Creek's Claim against the directors stayed, barred or extinguished by any order in the CCAA Proceeding?

[120] The Directors argue that Bear Creek's proposed new claims against them constitute an abuse of process because they are advanced in contravention of several of the orders previously made by Hainey J. in the CCAA Proceeding, including the "Amended Initial Order" made January 25, 2018, the "Addition of Applicants Order" made June 13, 2018 and the "Claims Procedure Order" made July 6, 2018. Accordingly, it is argued, Bear Creek's proposed new claims against them are either stayed, barred, extinguished or should properly be pursued in the CCAA Proceeding rather than in this action.

[121] Bear Creek argues that its proposed new claims against the Directors are not stayed because the stay ordered by Hainey J.:

- a) does not apply to conduct occurring after January 25, 2018;
- b) does not apply to the conduct of the Directors in their capacity as directors of RPCS or RHC; and
- c) applies only to liabilities imposed by law on directors by virtue of their status as directors, which does not include the kinds of claims that Bear Creek seeks to advance here.

[122] The orders made in the CCAA Proceeding are binding on this Court by virtue of s. 16 of the CCAA, which states as follows:

Every order made by the court in any province in the exercise of jurisdiction conferred by this Act in respect of any compromise or arrangement shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces in the same manner in all respects as if the order had been made by the court enforcing it.

[123] On June 13, 2018, Hainey J. made an order in the CCAA Proceedings (the "Additional Applicants Order") that, among other things, amended the Initial Order to add Rokstad GP as an "Additional Applicant" and granted it all of the rights and protections afforded to the original applicants under the Initial Order. It also granted its directors and officers all of the rights and protections afforded to the directors and officers of the original applicants under the Initial Order. For reasons that are unclear, the Additional Applicants Order also added RPC LP as an applicant but does not appear to have extended the same protection to its directors and officers.

[124] All proceedings against the Applicants' directors and officers were stayed by the Amended Initial Order, in the following terms:

except as permitted in subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the applicants with respect to any claims against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors and officers are alleged under any law to be liable in their capacity as directors or officers for the payment of such obligations.

[Emphasis added.]

[125] The underlined language appears to have been drawn from s. 5.1 of the CCAA, which restricts the permissible scope of any compromise or arrangement of claims made against a debtor company's directors. That provision states as follows:

Claims against directors -- compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

- (2) A provision for the compromise of claims against directors may not include claims that
 - (a) relate to contractual rights of one or more creditors; or
 - (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

- (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances

[Emphasis added.]

- [126] Bear Creek cites Great Basin Gold Ltd. (Re), 2015 BCSC 1199 as authority for the proposition that directors and officers are, as a matter of law, not protected by such a stay if they are sued on a company obligation in their personal capacity. I am not persuaded that Great Basin Gold goes that far, however. The result in that case turned to a large degree on the fact that the receivership order at issue there contained no express provision extending the stay to the debtor's directors and officers, as does the order at issue here.
- [127] Nevertheless, I agree with Bear Creek that its proposed new claims against the Directors are not stayed by the terms of Hainey J.'s orders. Bear Creek does not allege that the Directors are liable under any law in their capacity as directors and officers for the payment of a Rokstad obligation. Rather, Bear Creek alleges that they are liable for a Rokstad obligation in their personal capacity by virtue of their wrongful conduct. In other words, the fact that they also happened to be directors and officers of Rokstad at the time is not the basis for the alleged liability, so as to bring those claims under the rubric of the stay.
- [128] Bear Creek's proposed new claims against the Directors face a more difficult hurdle in the Claims Procedure Order, however.
- [129] The term "Directors" is defined in Schedule "A" to the Claims Procedure Order at para. (z) to include "any former or present director of the Applicants ". The term "Applicants" is defined in para. (f) to include Rokstad GP and others (but not RPC LP, RPCS or RHC).
- [130] Because the Directors fall within that definition in their capacity as directors of Rokstad GP, Bear Creek's proposed new claims against them fall squarely within the definition of "D&O Claims" at para. (y), which include:
- any and all Claims against the Directors and Officers, including any Claims under applicable environmental legislation or Claims for breach of trust under Provincial Lien Legislation, or otherwise, that in any way relate to or arise out of or in connection with (i) the assets, obligations, business or affairs of the Applicants, or (ii) the CCAA Proceedings or any matter or transaction involving any of the members of the Applicants occurring in or in connection with the CCAA Proceedings.
- [131] Bear Creek argues that its proposed new claims against the Directors fall outside that definition, in whole or in part, because only Rokstad GP (but not RPC LP, RPCS or RHC) is named as an "Applicant" in the definition of that term cited above. I disagree.
- [132] The language used to define the scope of the "D&O Claims" is broad enough to capture all of the pre-filing conduct alleged by Bear Creek against the Directors because it can be said to "relate to or arise out of or in connection with the assets, obligations, business or affairs" of

Rokstad GP (on the basis that RPC LP, and therefore its directors, could only act through Rokstad GP). It is also broad enough to capture all of the post-filing conduct alleged by Bear Creek against the Directors because it can be said to "relate to or arise out of or in connection with the CCAA Proceedings" and a "matter or transaction involving [Rokstad GP] occurring in or in connection with the CCAA Proceedings." They are not "Excluded Claims."

[133] All D&O Claims fall within the definition of "Called Claims" at para. (i).

[134] Proofs of Claim in respect of all "Called Claims" were required by s. 16 of the Claims Procedure Order to be filed with the monitor on or before the Called Claims Bar Date (August 20, 2018). The consequences of not having done so were set out in s. 17, which states, in relevant part, as follows:

17. THIS COURT ORDERS that, subject to further order of this Court, any Person that does not file a Proof of Claim in respect of a Called Claim as provided for herein such that the Proof of Claim is received by the Monitor on or before the Called Claims Bar Date, (a) shall be and is hereby forever barred from making or enforcing such Called Claim against the Applicants and all such Called Claims shall be forever extinguished

[135] Bear Creek argues that this provision did not operate to bar or extinguish its proposed new claims against the Directors because only claims "against the Applicants" were barred. Even if that were so, however, the last four quoted words operate to "extinguish" all such claims, whether against the Applicants or otherwise.

[136] Finally, Bear Creek argues that s. 17 of the Claims Procedure Order cannot be interpreted to extinguish its proposed new claims against the Directors because s. 5.1 of the CCAA restricts the kind of claims against directors that can properly be "compromised" in a CCAA proceeding. I agree with the Directors that the purpose and effect of the Claims Procedure Order was not to "compromise" the D&O Claims, but rather to ensure that they were brought forward and adjudicated exclusively within the context of the claims procedure established by that order.

[137] For those reasons, I agree with the Directors that Bear Creek's proposed new claims against them are brought in contravention of the Claims Procedure Order and therefore cannot properly be advanced in this action.

ii. Other Grounds

[138] In light of my conclusion in that regard, it is not necessary for me to address the other objections raised by the Directors.

iii. Conclusion on the Directors' Objections

[139] Bear Creek's application to add the Directors as defendants is refused.

[140] I am refusing Bear Creek leave to make the amendments in the following paragraphs of the proposed Third Amended NOCC:

- a) Part 1, paras.11.7, 64, 71, 80, 85 and 90;
- b) Part 1, para. 65 (remove reference to "the Rokstad Directors");
- c) Part 2, paras. 5 and 6b (remove reference to "the Rokstad Directors"); and
- d) Part 3, paras. 1b (remove reference to "the Rokstad Directors"), 6 (remove reference to "the Rokstad Directors") and 7 (in its entirety).

D. The Objections of RHC

[141] In opposing Bear Creek's application to add it as a defendant, RHC argues that the new claims that Bear Creek seeks to advance against it constitute an abuse of process insofar as they contravene the terms of another order that was made by Hainey J. in the CCAA Proceeding, namely the "Approval, Vesting and Charge Priority Order made June 20, 2018 (the "Vesting Order"). RHC also argues that Bear Creek's claims against it should have been advanced in the CCAA Proceeding pursuant to the Claims Procedure Order. Finally, RHC argues that Bear Creek should not be granted leave to advance those claims because of the expiry of the governing limitation period.

[142] Bear Creek responds that:

- a) neither the Claims Procedure Order nor the Vesting Order operate to bar its claims against RHC; and
- b) the claims that it seeks to advance against RHC are almost identical to those that it is advancing and proposes to advance against RPCS, which was recently added as a party.
- i. Is Bear Creek's Claim against RHC stayed, barred or extinguished by any order in the CCAA Proceeding?

[143] RHC's abuse of process argument is different from that of the Directors in several important respects.

[144] First, while I have found that Bear Creek is advancing the proposed new claims against the Directors in direct contravention of the Claims Procedure Order, the same cannot be said for RHC. The Claims Procedure Order does not purport to affect the liabilities of RHC.

[145] Second, the Vesting Order, unlike the Claims Procedure Order, does not expressly bar or extinguish any claims. As its title suggests, it operates, among other things to:

- a) approve the APA;
- b) vest certain Assets and Liabilities in the Purchaser (as those capitalised terms are defined in the APA); and
- c) address the priority of charges attaching to the proceeds of sale.

[146] In arguing that it acquired assets under the APA free and clear of Bear Creek's claims, RHC relies on s. 9 of the Vesting Order, which states as follows:

9. THIS COURT ORDERS that upon delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "Monitor's Certificate"), all of the Vendors' right, title and interest in and to the Assets, as defined in the APA, shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have been attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims), including the "Encumbrances", which term shall not include the permitted encumbrances as set out in Schedule "F" to the APA (the "Permitted Encumbrances"). For greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Assets (except for Permitted Encumbrances) are hereby expunged and discharged as against all the Assets.

[147] As RHC acknowledges, however, the effect of that provision can only be understood in light of the terms of the APA itself, which is expressly approved by the same order (at s. 3). The main issue in dispute between RHC and Bear Creek in this regard is therefore whether Rokstad's liabilities to Bear Creek were in fact transferred to RHC by the APA, as Bear Creek alleges.

[148] Suffice it to say, it is not an abuse of process for Bear Creek to plead that they were. To the extent that Bear Creek needed to adduce evidence in support of its allegation in that regard, it has done so. As Bear Creek argues, there are provisions in the APA (in particular, ss. 2.2(a) (ii), 2.5 and Schedule "H") that could at least arguably be read to:

- a) transfer liability for Bear Creek's claims against Rokstad to RHC; and
- b) render RHC jointly and severally liable for any such liability with RPCS, as the designated purchaser.

[149] To the extent that RHC can point to other provisions in the APA or the DPA that suggest otherwise, there is a live issue between the parties as to the effect of those agreements, an issue that is more appropriately left to be litigated in the action. There is no valid basis to refuse Bear Creek leave to plead the allegation.

ii. Are Bear Creek's Claims against RHC clearly statute-barred, and if so, does that mean it should not be added as a defendant?

[150] RHC also argues that it should not be added as a defendant because the claims against it are statute-barred. Because that argument was not developed in RHC's written submissions or orally, and therefore not addressed by Bear Creek in reply, I have concluded that any such defence should be formally pleaded, responded to, and then left to be litigated in the action.

iii. Conclusion on RHC's Objections

[151] The application to add RHC as a defendant is allowed. I am granting Bear Creek leave to amend its claim to advance the same claims against RHC that it advances against RPCS.

VI. Summary and Disposition

[152] The application to add RHC as a defendant is allowed. The application to add the Directors as defendants is refused.

[153] Bear Creek has leave to file the proposed Third Amended NOCC in the form attached as Schedule "A", except for the following portions of it, and any references to them elsewhere:

- a) Part 1, para. 45c(b);
- b) Part 1, paras. 45d(b), 45e and 91, insofar as they refer to the so-called "Bear Creek Holdback Trust";
- c) Part 1, para. 10.2 (leave is refused only in respect of the words "upon an ex parte application");
- d) Part 1, paras. 66-70, 73-78, 81 and 86(c);
- e) Part 1, paras. 87 and 89, but with leave to consolidate the contents of those paragraphs with existing para. 58;
- f) Part 1, paras. 11.7, 64, 71, 80, 85 and 90;
- g) Part 1, para. 65 (remove reference to "the Rokstad Directors");
- h) Part 2, paras. 5 and 6b (remove reference to "the Rokstad Directors"); and
- i) Part 3, paras. 1b (remove reference to "the Rokstad Directors"), 6 (remove reference to "the Rokstad Directors") and 7 (in its entirety).

[154] The parties have leave to speak to costs if they are unable to agree on the appropriate order in light of my decision.

"Milman J."

Schedule "A"

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