

CANADA / JUDGMENT

Shoolestani v. Ichikawa

2017 BCSC 1589

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Supreme Court of British Columbia

DECIDED

7 September 2017

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2017 BCSC 1589 Shoolestani v. Ichikawa

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shoolestani v. Ichikawa,

2017 BCSC 1589

Date: 20170907

Docket: S151691

Registry: Vancouver

Between:

Amir Yashar Shoolestani, Amir Behzad Shoolestani,

Esmail Shoolestani, and Ashraf Rezaei Pour

Plaintiffs

And

Glen Isao Ichikawa a.k.a. Glen Ichikawa,

Amnis Engineering Ltd.,

HDR Corp., HDR Inc. a.k.a. HDR, Inc. a.k.a. HDR,

Kawa Engineering Ltd.,

Peter Kiewit Infrastructure Co., Kiewit Corporation, Kiewit Management Co., Peter Kiewit Sons Co. a.k.a. Kiewit,

Knight Piésold Ltd. a.k.a. Knight Piésold Consulting a.k.a. Knight Piésold

Defendants

And

Amir Yashar Shoolestani, Amir Behzad Shoolestani,

Esmail Shoolestani, and Ashraf Rezaei Pour

Defendants by Counterclaim

Before: The Honourable Mr. Justice J. Sigurdson

Reasons for Judgment

Plaintiff Amir Behzad Shoolestani:

Appearing in person on behalf of

Ashraf Rezaei Pour

Plaintiff Ashraf Rezaei Pour:

Appearing in person

Counsel for Amnis Engineering Ltd.,

Glen Ichikawa, Kawa Engineering Ltd.:

Guy P. Holeksa

Courtney A. McLachlan

Place and Dates of Hearing:

Vancouver, B.C.

March 13, 27,31 and June 6, 2017

Place and Date of Judgment:

Vancouver, B.C.

September 7, 2017

- [1] This is an application by the plaintiff Ashraf Rezaei Pour ("Ms. Pour") under Rule 9-5 to strike out the pleadings in the counterclaim of the defendants Amnis Engineering Ltd., Glen Ichikawa and Kawa Engineering Ltd. (collectively, "the Amnis defendants").
- [2] Ms. Pour seeks to strike out the counterclaim of the Amnis defendants for defamation, abuse of process, malicious prosecution and interference with contractual relations and interference with economic relations.

- [3] Briefly, Ms. Pour is one of four plaintiffs, all members of the same family, who commenced an action against Mr. Ichikawa, Amnis Engineering Ltd. ("Amnis") and 10 other corporate defendants in 2015 for various different claims including wrongful dismissal and moneys allegedly owed to them for work they did as employees of Amnis. The plaintiffs have discontinued their action against some of the corporate defendants.
- [4] Ms. Pour in particular claims compensation in the amount of \$43,642.86 for what she alleges are two years of unpaid food services she says she provided Amnis employees at Mr. Ichikawa's request.
- [5] On March 25, 2015, in response to the original action in which Ms. Pour was one of four plaintiffs, the Amnis defendants filed a counterclaim against all four plaintiffs. In their counterclaim the Amnis defendants allege that all the plaintiffs, including Ms. Pour, engaged in a concerted effort to cause them injury.
- [6] The counterclaim alleges that publications which were sent by Amir Yashar Shoolestani with the concurrence of the other plaintiffs were defamatory. Secondly, the Amnis defendants also allege that the legal action commenced by the Shoolestani family, including Ms. Pour, amounted to malicious prosecution and an abuse of process. In light of the Amnis defendants' submissions, the specific language used in the counterclaim is of some significance in this application, as will be made clear shortly. The relevant portions of the counterclaim read as follows:

DEFAMATION

- 8. On Thursday, March 19, 2009 at 6:04 a.m., in an email to Ryan Hanson of Innergex Renewable Energy Inc. with copies to Jean Trudel and Innergex Renewable Energy Inc., Amir Yashr Shoolestani wrote and published a number of statement regarding Glen Ichikawa and Amnis Engineering Ltd., including but not limited to:
 - (a) Glen Ichikawa has been paying only himself while charging the design work of his engineers to the clients including Innergex;
 - (b) Amnis Engineering Ltd. does not have engineers competent to perform the work required for the Innergex project; and
 - (c) Glen Ichikawa will falsely represent the receptionist as a draftsman.
- 9. On March 29, 2009 at 5:52 p.m. in an email to Paul Wearmouth and Dave Clarke of Peter Kiewit Sons Co., Amir Yashr Shoolestani wrote and published a number of statements, including, but not limited to:
 - (a) Glen Ichikawa is destroying evidence and your personal files;
 - (b) Amnis Engineering Ltd. has not correctly calculated the joint efficiency of the out of spec welds; and

- (c) Glen Ichikawa and Amnis Engineering Ltd. have been or will be covering up evidence.
- 10. On or about March 19, 2009 and March 29, 2009 Amir Yashr Shoolestani and Amir Behzad Shoolestani verbally made the same statements described in paragraphs 8 and 9 of this Counterclaim on separate occasions to Ryan Hanson of Innergex Renewable Energy Inc. and Dave Clarke of Peter Kiewit Sons Co.
- 11. The words were false and defamatory of Glen Ichikawa and Amnis Engineering Ltd. in their natural and ordinary meaning including any implied meanings.
- 12. The words meant, were intended to mean, and were understood to mean:
 - (a) Glen Ichikawa was illegally and immorally not paying his engineers;
 - (b) Amnis Engineering Ltd. did not have competent engineers;
 - (c) Glen Ichikawa was a liar and would destroy evidence and cover up evidence; and
 - (d) Amnis Engineering Ltd. has made a critical engineering error with respect to a design it completed.
- 13. The words were published maliciously and were calculated to cause pecuniary damage to Glen Ichikawa and Amnis Engineering Ltd. in respect of their business and employment.
- 14. Although the emails were sent by Amir Yashr Shoolestani, the emails were with the agreement and concurrence of the other Defendants by Counterclaim and the other Defendants by Counterclaim are equally responsible and liable for the emails.
- 15. Although the words were spoken by Amir Yashr Shoolestani and Amir Behzad Shoolestani, the words were spoken with the agreement and concurrence of the other Defendants by Counterclaim and the other Defendants by Counterclaim are equally responsible for the words spoken.
- 16. As a result of the words, Glen Ichikawa and Amnis Engineering Ltd. have suffered and continue to suffer, damage to their business and reputation and the case of Glen Ichikawa damage to his feelings.
- 17. By letter dated March 31, 2009 Glen Ichikawa and Amnis Engineering Ltd., through their solicitor, provided a detailed written complaint and requested a retraction and apology.
- 18. The Defendants by Counterclaim did not publish a retraction or apology.
- 19. The statements made constitute a defamation of the personal and professional reputation of Glen Ichikawa and Amnis Engineering Ltd.

CLAIMS RELATING TO COMMENCEMENT OF THIS ACTION

20. On March 2, 2015 the Defendants by Counterclaim (the "Plaintiffs") commenced this action against the Plaintiffs by Counterclaim and eleven other defendants that were, either directly or indirectly, clients of Amnis Engineering Ltd. (the "Clients").
21. The Plaintiffs allege in their Notice of Civil Claim that there employees of Amnis Engineering Ltd.
22. The Plaintiffs allege in paragraphs 14 to 19 of their Notice of Civil Claim that the clients were clients of Amnis Engineering Ltd. and that Amnis Engineering Ltd. acted as a consultant to the Clients.
23. The Plaintiffs do not advance any claim for relief against the Clients.
24. The Plaintiffs do not describe any basis upon which a legal claim could be advanced against the Clients.
25. There is no basis in law for the Plaintiffs to advance a claim against any of the Clients.
26. The Plaintiffs, and each of them, have conspired to injure Glen Ichikawa, Amnis Engineering Ltd., and Kawa Engineering Ltd. by bringing this Notice of Civil Claim.
27. The Plaintiffs have brought this action against the Clients without reasonable and probable cause and maliciously or with a purpose other than that of carrying the law into effect. The Plaintiffs purpose was to create difficulty in the contractual and economic relations between the Clients and the Plaintiffs by Counterclaim.
28. The Plaintiffs' conduct constitutes malicious prosecution.
29. Alternatively, the Plaintiffs' conduct amounts to an abuse of process.
30. Alternatively, the Plaintiffs' conduct amount to an interference with contractual relations or an interference with economic relations;
31. The Plaintiffs by Counterclaim have and will suffer injury, damage and loss as a result of the interference with relations with the Clients.
32. The Plaintiffs' conduct constitutes a wanton and outrageous disregard of the rights of the Plaintiffs by Counterclaim for the Plaintiffs by Counterclaim are entitled to punitive, exemplary and aggravated damages.

Part 2: RELIEF SOUGHT

1. Damages for defamation;
2. Damages for malicious falsehood;
3. Damages for conspiracy;

4. Damages for malicious prosecution;
 5. Damages for abuse of process;
 6. Damages for interference with contractual relations and economic relations;
 7. Punitive, exemplary and aggravated damages;
 8. Interest pursuant to the Court Order Interest Act, RSBC 1996 c. 79;
 9. Costs.
- [7] In this application, the plaintiff Ms. Pour seeks to have the counterclaim struck out in its entirety.
- [8] In support of her application, Ms. Pour advances five main arguments as to why the counterclaim against her should be struck. Firstly, Ms. Pour claims that the Amnis defendants (the plaintiffs by counterclaim) were out of time when they filed their counterclaim. Secondly, Ms. Pour argues that the counterclaim is not related to the subject matter of her initiating claim. This second factor relates to the limitation argument but also stands on its own to some extent. The third reason why the counterclaim should be struck under Rule 9-5, according to Ms. Pour, is that the pleadings do not reveal a cause of action against her, but only against Amir Yashar Shoolestani and Amir Behzad Shoolestani. The fourth reason is that the claim was not properly pleaded. This relates to the defamation claim and to discrepancies between the email statements as they are cited in the counterclaim and the original emails themselves. The fifth argument Ms. Pour raises in both her oral and written submissions relates solely to the malicious prosecution claim. She argues that a claim for malicious prosecution can only be made once the proceeding which is the subject of that claim has come to an end. Since Ms. Pour's claim is still extant, the defendants cannot raise a claim for malicious prosecution at this time.
- [9] Before turning to each of the specific arguments raised by Ms. Pour, I set out the legal framework for an application under Rule 9-5. Rule 9-5 reads as follows:

Rule 9-5 - Striking Pleadings

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.

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

[10] The grounds for striking pleadings pursuant to Rule 9-5(1) were summarized by this Court in *Gateway Building Management Limited v. Manjit Singh Randhawa*, 2013 BCSC 350:

[16] The test to be applied to determine whether an action should be struck out as disclosing no reasonable claim requires a conclusion that, assuming that the facts as stated or even if amended are true, those facts disclose no cause of action, the pleadings disclose no arguable issue, and it is plain and obvious that the claim cannot succeed. If there is a chance that the action may succeed, then the Petition and the Action should be allowed to proceed: *Hunt v. Cary Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.

[17] In *Dempsey v. Envision Credit Union*, 2006 BCSC 750 (CanLII), Garson J., as she then was, provided the following summary of Rule 9-5 jurisprudence:

In summary, a pleading will be struck out if:

- (a) the pleadings are unintelligible, confusing and difficult to understand (*Citizens for Foreign aid Reform*, [*Citizens of Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 1999 CanLII 5860 (BC SC), 36 C.P.C. (4th) 266 (B.C.S.C.)]);
- (b) the pleadings do not establish a cause of action and do not advance a claim known in law (*Citizens for Foreign aid Reform*, *supra*);
- (c) the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time (*Borsato v. Basra*, [2000 BCSC 28 (CanLII), [2000] B.C.J. No. 84 (S.C.)]);
- (d) the pleadings are not bona fides, are oppressive and are designed to cause the Defendants anxiety, trouble and expense (*Borsato v. Basra*, *supra*);
- (e) the action is brought for an improper purpose, particularly the harassment and oppression of the Defendants (*Ebrahim v. Ebrahim*, 2002 BCSC 466 (CanLII)).

(at para. 17)

[18] Pursuant to Rule 9-5, pleadings that are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met should also be struck out: *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2009 BCSC 473 (CanLII), at para. 36.

[11] A procedural matter relating to the proper interpretation of sub-Rule 9-5(2) was raised early on in this application. Ms. Pour relies on affidavit evidence in support of her application. Counsel for the Amnis defendants, on the other hand, submits that generally no evidence should be admitted on an application under Rule 9-5. Instead the facts alleged in the counterclaim are assumed to be true and a claim will be struck only if it is plain and obvious

that the pleading discloses no reasonable cause of action on its face. In support of his argument Mr. Holeksa relies on this Court's ruling in *Rose v. British Columbia Life & Casualty Company*, 2012 BCSC 1296:

- [3] The recent and leading case of *R. v. Imperial Tobacco Canada*, 2011 SCC 42 (CanLII), [2011] 3 S.C.R. 45, confirmed the following propositions in relation to the former Rule 19(24)(a):
- (i) A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action (at para. 17);
 - (ii) The power to strike claims that have no reasonable prospect of success promotes efficiency in the conduct of the litigation and contributes to more effective and fair litigation (at para. 19); and
 - (iii) The motion to strike is a tool that must be used with care, as the law is not static and actions previously were deemed hopeless may in the future succeed. Therefore, it is not determinative that the law has not yet recognized the particular claim. In its analysis the court must be generous and err on the side of permitting a novel but arguable claim to proceed to trial (at para. 21).
- [4] The foregoing propositions are consistent with the conclusions and statements found in cases such as *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959 at 980, *Odhavi Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 S.C.R. 263 at para. 15, and *Mohl v. University of British Columbia*, 2006 BCCA 70 (CanLII) at paras. 40 and 41.
- [12] Ms. Pour, on the other hand relies on *Operation Dismantle v. The Queen*, [1985] 1 SCR 441, where the Supreme Court of Canada noted at para. 27 that:

We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat*, supra, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

- [13] Respectfully, I think *Operation Dismantle* and the narrow exception to the general principle that pleaded facts are taken as true at this stage do not apply here. In *Operation Dismantle*, the Court was referring to situations where the allegations were incapable of being proven in the sense that the allegation was speculative by nature. The allegation could not be proven because there could be no evidence to show what might happen in the future if the U.S. was allowed to test cruise missiles in Canada. Here the allegations are concrete and refer to actions that the Amnis defendants' allege have already taken place. In this sense the claims as they are set out in the counterclaim are capable of being proven and are not speculative.

[14] With regard to the issue of admissibility of affidavit evidence, I agree with Mr. Holeksa's statement of the law in regard to an application pursuant to sub-Rule 9-5(1)(a), but Ms. Pour also relies also on sub-rules (b), (c) and (d). Mr. Holeksa does not dispute that under these sub-rules some affidavit evidence may be admitted, however, he claims that it can be admitted only for very restrictive purposes. Both the plaintiff and the Amnis defendants rely here on the this Court's ruling (pursuant to Rule 19(24), the equivalent to Rule 9-5 under the old Rules) in 347202 B.C. Ltd. v. Canadian Imperial Bank of Commerce, [1995] B.C.J. No. 449:

18 The question to be resolved is, for what purpose may evidence be considered?

19 In *Coopers & Lybrand v. Jennings*, supra, Huddart J. found that the absence of a restriction on the adducing of evidence on applications under Rule 19(24)(b), (c) and (d) made sense because evidence may be "helpful, even necessary, in determining whether a pleading is 'unnecessary, scandalous, frivolous, or vexatious', or otherwise offends Rule 19 as an abuse of the process of the court" (p. 5). In respect of Rule 19(24)(a) she reasoned that, "(i)f the only question on an application is whether the impugned pleading discloses a reasonable claim, evidence will be superfluous" (p. 5). Similarly, in *McGauley v. Jennings et al.* [1990] B.C.J. No. 2630 (4 December 1990), Vancouver CA012295, Southin J.A. said: "I am quite unable to see what possible purpose evidence has on such an application." (p. 3).

20 If then, evidence by way of affidavit is helpful in determining whether a pleading is unnecessary, scandalous, frivolous, vexatious or otherwise an abuse of the process of the Court, it may be considered. I am led, however, to the practical conclusion that affidavit material which simply asserts facts contrary to those alleged in the pleadings will rarely be sufficient to establish that an action is certain to fail. In other words, a court will not strike out a claim as vexatious or scandalous where affidavit evidence does nothing more than contradict the allegations contained in the pleadings, although the affidavit itself will be admitted and considered.

21 To summarize my conclusions, I find that the "plain and obvious" test applicable to Rule 19(24)(a) applies to subrules (b) and (d). Other considerations are also applicable to applications under subrules (b) and (d). The most obvious example of other considerations is that of evidence adduced by way of affidavit. Such evidence will be considered if it is helpful or necessary in resolving the questions to be answered but, if the evidence does nothing more than contradict the allegations in the pleadings, it would rarely be sufficient to establish that the action is bound to fail.

[15] In deciding whether or not to admit affidavit evidence the inquiry is twofold. First the court asks for what purpose is the affidavit evidence being tendered and the second issue to be considered is the nature of that evidence. Evidence that simply contradicts the facts stated in the counterclaim will not be helpful. However, evidence that may be helpful in determining whether a pleading is "unnecessary, scandalous, frivolous, vexatious or otherwise an abuse of the process of the Court" is admissible and may be considered.

- [16] The dispute here concerns the evidence found in several affidavits that were filed by Ms. Pour as part of her application record. There are five affidavits of Amir Behzad Shoolestani, two of Amir Yashar Shoolestani, and one of Ashraf Razaee Pour.
- [17] In his oral and written submissions, Mr. Holeksa raised a second objection to the admissibility of the affidavit evidence, especially of Amir Behzad Shoolestani, due to what Mr. Holeksa characterized as a tendency to misstate facts and legal principles. Mr. Holeksa added that for this same reason I should not rely on the affidavit material or the factual statements made in the course of submissions in this application because he argued that Amir Behzad Shoolestani, who has been acting as agent for his mother, Ms. Pour, has a history of misleading the Court. However, I do not think that it is appropriate to decide credibility questions, particularly credibility questions of that sort, on this application.
- [18] I have reviewed the affidavit materials and have found that for the most part they are not helpful in deciding this application. Most of the statements in the affidavits, as well as the documents attached to them, relate to other applications and claims in this ongoing litigation. Moreover, most of the affidavit evidence relates to the claims of other plaintiffs and the employment history leading up to the termination of the other plaintiffs from Amnis.
- [19] The only affidavit evidence that relates directly to this application by Ms. Pour to strike the counterclaim is found in Amir Behzad Shoolestani's affidavit #17 dated March 27, 2017 and Ms. Pour's affidavit #1 dated October 26, 2016.
- [20] In her affidavit Ms. Pour states the following:
7. The allegations made by the Defendants in the Counterclaim against me are all false.
 8. I was not involved in and was not aware of any communications between Amir Yashar Shoolestani and Innergex or Kiewit, if any, in 2009 or any other times, as alleged by the Defendants in the Counterclaim. The Defendants have also not produced any evidence in this regard.
 9. The Defendants never raised the allegations made in the Counterclaim to me prior to filing the Counterclaim nor provided me a complaint letter as alleged in the Counterclaim. The Defendants have also not produced any evidence in this regard.
 10. Thus, considering that the Defendants have not plead facts to support a claim against me and have not produced any evidence in support of their allegations against me, I am sincerely seeking from Court to dismiss the Counterclaim of the Defendants with costs.
- [21] Essentially, Ms. Pour denies the allegations in the counterclaim. In this regard, her affidavit evidence does "nothing more than contradict the allegations contained in the pleadings" (Canadian Imperial Bank of Commerce at para. 20). This type of affidavit evidence is not admissible on an application under Rule 9-5(1)(a) and is of limited relevance in considering an application under the other subrules.

- [22] In his affidavit dated March 17, 2017, Amir Behzad Shoolestani attached 22 documents, most of which do not directly relate to this application. However, several documents attached to the affidavit are connected to the defamation claim in the Amnis defendants' counterclaim. The most important documents in this regard are the two emails dated March 19 and March 29, 2009, which form the basis for the defamation claim. The Amnis defendants claim that the statements made in these two emails, along with other verbal statements made on March 19, 2009, were defamatory.
- [23] Ms. Pour says that this evidence is relevant and admissible because the emails arguably could be helpful in determining whether the pleadings in the counterclaim are unnecessary, scandalous, frivolous, vexatious or otherwise an abuse of the process of the Court. Ms. Pour says that the emails support her application by proving that it was Amir Yashar Shoolestani who sent the emails and not Ms. Pour. Furthermore, Ms. Pour points to the imprecision in the paraphrasing and characterization of those statements in the counterclaim as further proof that the pleadings were both deficient and intended to deter her from proceeding with her claim.
- [24] Regardless of whether or not Ms. Pour's conclusions from the emails have validity, I find that this affidavit evidence relating to those emails is admissible for the limited purpose of determining whether the pleadings in the counterclaim are scandalous, frivolous or vexatious.
- [25] With that background in mind, I turn to the arguments advanced by Ms. Pour to strike out the counterclaim.

Is the counterclaim out of time or is it an improper counterclaim not related to or connected with the subject matter of the main action?

- [26] The parties submit that the Limitation Act, R.S.B.C. 1996, c. 266 ("the Act"), is the relevant statute for the purpose of the claims and counterclaims. Ms. Pour argues that the defamation claim in the counterclaim is statute barred under s. 3(2) of the Act, which states that:

After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:

- (c) for defamation;

- [27] The alleged defamatory statements were made on March 19 and March 29, 2009. The counterclaim was filed March 25, 2015, nearly six years after the last statement was published.

[28] However, the Amnis defendants submit that an application under Rule 9-5 is not the appropriate forum to decide a limitation defence. More importantly, even if it was appropriate to consider it in the context of this application, the two year limitation period is not applicable in this case because s. 4(1) of the Act extends the limitation period in the case of a counterclaim that is related to or connected with the subject matter of the original action:

If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

- (a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim,
- (b) third party proceedings,
- (c) claims by way of set off, or
- (d) adding or substituting a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

[29] In *ASM Capital Corp. v. Mercer International Inc. et al.*, 1999 BCCA 353 at para. 17, the Court of Appeal determined that:

Section 4(1) of the Limitation Act permits a defendant to bring a counterclaim against a plaintiff even if the cause of action alleged is statute-barred, provided that the subject matter of the counterclaim is related to or connected with the subject matter of the plaintiff's action.

[See also: *Lui v. West Granville Manor Ltd.*, [1987] 4 WWR 49; 11 BCLR (2d) 273 (C.A.).]

[30] Thus, the initial question here is whether or not the counterclaim relates to or is connected with the subject matter of the original action.

[31] Ms. Pour submits that both the defamation and the malicious prosecution claims are not related to the subject matter of her action. She points to the fact that, according to the counterclaim, the alleged defamatory statements were made and published by Amir Yashar Shoolestani and Amir Behzad Shoolestani and not her. Furthermore, she points to the fact that the alleged defamatory statements relate to the engineering work Amir Behzad Shoolestani and Amir Yashar Shoolestani performed for Amnis and are not related in any way to her specific claim for monies owed for food services.

[32] In regard to the malicious prosecution, Ms. Pour submits that although she was named as a plaintiff in the original action brought against Ichikawa, Amnis and 10 other corporate defendants, it was clear that Mr. Ichikawa was, and has always been, truly the sole defendant in her claim.

- [33] Mr. Holeksa, on the other hand, argued that Ms. Pour was nevertheless a plaintiff in the action against all 12 defendants, which is the basis for the claim of malicious prosecution and abuse of process. More importantly, in relation to both the defamation and malicious prosecution claims, Ms. Pour's action is allegedly a component of a larger wrongful scheme which lies at the heart of the counterclaim. That is that Ms. Pour and the other plaintiffs all conspired and coordinated to cause the Amnis defendants injury by initiating legal action and defaming their names and reputation. Mr. Holeksa's argument in this regard is that Ms. Pour's concurrence in the publishing of the defamatory statements is sufficient to establish liability for the damages that flow from that act.
- [34] It remains of course to be seen if the Amnis defendants can prove the factual elements of the alleged conspiracy. Likewise, the Amnis defendants will bear the onus of convincing the Court that concurrence in the context of both the defamation and malicious prosecution claims can be enough to establish liability. I note once again that the facts alleged in the counterclaim are to be taken to be true for the purposes of this part of the application. In determining the subject application, I express no opinion on the legal and factual strength of the Amnis defendants' counterclaim. At this stage, the only question I must determine is whether or not the Amnis defendants' pleaded theory of the conspiracy as advanced in the counterclaim is related to or connected with the subject matter of Ms. Pour's action.
- [35] Whether or not a claim is related to or connected with an existing proceeding is a fact-specific inquiry. Among the factors to consider are the facts that give rise to the claims, the causes of action and the possible connection between the relief sought by the parties. In *ASM Capital Corp.*, the Court of Appeal provided guidance on this point by stating that:
- [27] On this question, the learned chambers judge simply said:
- [15] I agree with counsel for the defendant that the proposed amendments are claims that are "related to or connected with the subject matter of the original action". I find there is no limitation bar to the proposed amendments sought.
- [28] With deference, I disagree. In my view, the amendments are not related to or connected with the subject matter of the plaintiffs' action. The plaintiffs' claim is for breach of contract in respect of the option agreement made between the parties in the fall of 1990. The amendments seek damages for alleged breaches of trust against two of the plaintiffs in respect of securities purchased and sold for a loss by a number of corporations in which the defendant held a direct or indirect beneficial interest between the fall of 1987 and immediately prior to the date the alleged agreement was made.
- [29] Other than the identity of the parties, the action and the counterclaim are entirely separate and distinct from one another; their causes of action are distinct; their subject matters are distinct; the nature of the alleged damages is distinct; and the periods of time in which the alleged causes of action arose are distinct. Accepting the defendant's allegations as true, the defendant's entire cause of action had matured and crystallized prior to the date on which the plaintiffs allege the agreement was entered into. The defendant denies the existence and

the efficacy of the agreement; it denies its authenticity, the signature of Mr. Smith; and the authenticity of its corporate seal. The subject matter of the proposed amendments as well as the subject matter of the original counterclaim are not related to or predicated on the agreement the plaintiffs allege.

- [30] To prove their case, the plaintiffs will not have to lead any evidence in relation to any of the allegations contained in the counterclaim other than the identity of the parties. Similarly, the defendant will not have to refer to any matters alleged in the statement of claim to prove any of the allegations contained in its counterclaim, amended or otherwise, other than the identity of the parties. The identity of the parties is not a relevant enquiry for determining whether a counterclaim is related or connected to the action because s.4(1) limits the relation or connection between the two proceedings to their subject-matter.
- [31] In sum, the learned chambers judge erred in finding that the subject matter of the proposed amendments was related to, or connected with, the subject matter of the original action.
- [36] Applying this approach to the facts alleged here leads me to conclude that the claims brought in the counterclaim are related to or connected with the subject matter of Ms. Pour's claim.
- [37] According to the Amnis defendants' theory, Ms. Pour's claim, as well as the defamatory statements, are all part of a planned and concerted effort on the part of the Shoolestani family, including Ms. Pour, to apply pressure on the Amnis defendants in order to obtain a settlement and compensation they are not legally entitled to.
- [38] Given the Amnis defendants' theory of the case and the interrelationship between each of the individual claims of the plaintiffs against the Amnis defendants, as well as the plaintiffs' decision to initially advance their claims together in the same action and against all 12 defendants, I find that the counterclaim is related to or connected with Ms. Pour's action.
- [39] I wish to emphasize that this finding has no implication in terms of the likelihood of success or strength of the Amnis defendants' counterclaim. It of course will be up to the Amnis defendants to prove their case at trial.
- [40] In her submissions Ms. Pour referred to *Lui v. West Granville Manor Ltd.*, [1987] 4 WWR 49, 11 BCLR (2d) 273 (C.A.). As I understood the argument of Ms. Pour's agent, it was that the "relation back" theory is applicable here and Mr. Shoolestani suggested it has the effect of overriding s. 4(1) of the Limitation Act. If the counterclaim was taken to have been made at, or relates back to, the time of the original action, it would, he argues, be out of time.
- [41] I cannot accept this argument. The main reason I must reject this argument is that the Court of Appeal itself in *Lui* rejected the "relation back" theory for circumstances such as these and said as follows:

So, based on the wording of s-s 4(1), the terms of the report of the Law Reform Commissioners, and the cases on what started out as s. 80A of the Motor Vehicle Act, I have concluded that the legislative purpose underlying s-s 4(1) was to eliminate any limitation defence in all proceedings described in paras. (a) to (d) of that sub-section. Sub-section 4(1) must be considered to bear the meaning that carries that purpose into effect.

That conclusion provides the answer to the first question I have posed. It also raises the subsidiary issue of how to reconcile s-s 4(1) with s. 9.

In the *Daco* case, Mr. Justice Aikins, for the Court, adopted the "relation back" theory. The effect of that theory is to treat the subordinate proceedings, for limitation purposes, as having been begun on the date that the main action was begun. That theory does indeed reconcile s-s 4(1) with s. 9. But, in the *Daco* case, the question of whether s-s 4(1) completely eliminates all limitation periods was not fully argued. In this case, after full argument, I have concluded that the effect of s-s 4(1) is to eliminate any limitation defence from the subordinate proceedings. If the defence is eliminated, the cause of action cannot be regarded as having been extinguished, and the "relation back" theory is wholly irrelevant. What need is there to have any deemed starting date for the subordinate proceedings, for limitation purposes, if, no matter when the subordinate proceedings were to be treated as having been started, no limitation defence is to be available?

There is another reason why the "relation back" theory is not appropriate to effect the reconciliation between s-s 4(1) and s. 9. It is that the "relation back" theory does not operate correctly in those cases where the running of the limitation period in the main action is postponed throughout a period of minority, or other disability, under s. 7. It may be that when the main action is eventually brought, perhaps long after the normal limitation period has expired, there are essential subordinate proceedings, perhaps a third party claim for contribution or indemnity, that could never have been brought earlier, but which it would be unjust to prevent. Sub-section 4(1) is intended to permit those subordinate proceedings without the raising of a limitation defence. But the "relation back" theory would retain the limitation defence and for that reason would contradict s-s 4(1).

So, in my opinion, it would be inappropriate to adopt the "relation back" theory. Instead, the appropriate principle to apply is that, in cases of legislative inconsistency, the more specific provision should prevail over the more general provision. So, even where s. 9 had gone into effect to extinguish the cause of action that was to be the subject matter of the subordinate proceedings, once those proceedings were begun, without being struck out, the more specific provisions of s-s 4(1) would apply, the lapse of time would cease to be a bar, the extinguishment would cease, and the cause of action would revive.

(at pages 11-2)

[Emphasis added.]

[42] For the purposes of this application, I find that the counterclaim against Ms. Pour is sufficiently related to or connected with Ms. Pour's claim. Accordingly s. 4(1) of the Limitation Act applies and the limitation period is not applicable to the counterclaim against Ms. Pour for defamation.

[43] Accordingly the first two arguments advanced by Ms. Pour to strike out the counterclaim must fail.

Do the pleadings show a cause of action?

[44] Ms. Pour relies on sub-Rule 9-5(1)(a) which stipulates that a pleading that discloses no reasonable claim may be struck. She claims that in respect to both the defamation and malicious prosecution claims, the counterclaim does not disclose a cause of action because the alleged wrongful acts are attributed to the other plaintiffs and the material facts stated in the counterclaim do not relate to Ms. Pour.

[45] In regard to the defamation claim, Ms. Pour points once more to the fact that the emails were drafted and sent by others. With regard to the claim of malicious prosecution, Ms. Pour argues that it was always known to the Amnis defendants that her claim was only against Mr. Ichikawa even if she appeared as a plaintiff in the initial action which named Mr. Ichikawa, Amnis and 10 other corporate defendants. In support of this submission Ms. Pour refers to her Amended Notice of Civil Claim where she states that her claim is only against Mr. Ichikawa. She also refers to my previous decision (indexed as 2017 BCSC 139) to allow her to amend her Notice of Civil Claim, in which I noted that:

[7] In her initial pleading Ms. Pour advanced a claim in contract for monies owing for food services that she said she provided. Although the plea was somewhat imprecise because there was no reference to it in the prayer for relief, it is clear that this claim was advanced by her in contract.

[8] The Amnis defendants acknowledge this. According to their counsel's written submission: "Although the Amended Notice of Civil Claim is not as precise as it should be, the Amnis defendants previously understood the claim was advanced solely against Ichikawa and solely in contract." The Amnis defendants go on to say: "the true amendments are to advance claims for quantum meruit and unjust enrichment."

[Emphasis added.]

[46] Ms. Pour submits that, given that the claim for malicious prosecution is based on the plaintiffs' attempt to apply pressure on Mr. Ichikawa and Amnis by naming their corporate clients in the initial action, the Amnis defendants' admission that they have always understood her claim to be only against Mr. Ichikawa effectively acknowledges that she had nothing to do with the action taken against the other defendants.

- [47] The Amnis defendants' submit that in both the Notice of Civil Claim and the Amended Notice of Civil Claim Ms. Pour articulated her claim as "The Plaintiffs claim against the Defendants". Furthermore, in the Amnis defendants' initial Response to Civil Claim dated March 25, 2015, they claimed that "Pour was never hired by, employed by or had any contractual relationship with Amnis Engineering Ltd. or with any other Defendant in this action". According to Mr. Holeksa, this demonstrates that the Amnis defendants contemplated that, like the other plaintiffs, Ms. Pour's claim was initially against all 12 defendants.
- [48] In any event, Mr. Holeksa urged the Court to consider Ms. Pour's claim within the broader context of the dispute between the Shoolestani family and the Amnis defendants. He claims that when considered in this context, Ms. Pour's claim is one component of what the Amnis defendants allege is a larger scheme of the Shoolestani family to unlawfully force the Amnis defendants to settle.
- [49] In *Watson v. Bank of America Corporation*, 2014 BCSC 532, the Court summarized the test for striking out a claim for not disclosing a cause of action:
- [60] Subsection (a) requires that the pleadings disclose a cause of action. This requirement is assessed on the same standard as on a motion to strike pleadings under Rule 9-5(1)(a). Accordingly, the plaintiff satisfies this requirement unless it is plain and obvious that the claim cannot succeed: *Hollick* at para. 25; *Microsoft* at para. 63. For this analysis, the Court must assume that all the pleaded facts are true unless they are patently unreasonable or incapable of proof. Further, a claim must not be struck merely because it is novel or complex: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980.
- [50] A similar approach was applied in an earlier case under the old Rules:
- [34] To succeed on an application under Rule 19(24)(a) it must be established that it is "plain and obvious" that the pleading discloses no reasonable cause of action: *Hunt v. Carey Canada*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959 (S.C.C.). If there is any doubt it should be resolved in favour of permitting the pleadings to stand: *McGauley v. British Columbia* (1989), 1989 CanLII 2809 (BC CA), 39 B.C.L.R. (2d) 223 (B.C.C.A.). The court should proceed on the assumption that all the facts pled are true: *Helman v. Brown* (1966), 57 W.W.R. 608 (B.C.C.A.). The only question then is whether the facts disclose a cause of action: *Minnes v. Minnes* (1962), 1962 CanLII 350 (BC CA), 39 W.W.R. 112 (B.C.C.A.); *McNaughton v. Baker* (1988), 1988 CanLII 3036 (BC CA), 25 B.C.L.R. (2d) 17 (C.A.). In other words, as long as the pleadings disclose a triable issue, either as it exists, or as it may be amended, then the issue should go to trial. The mere fact that the case is weak or not likely to succeed is no ground for striking it out under the provisions of Rule 19(24): *Minnes*, supra.
- (*Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] CarswellBC 2111; [1999] BCJ No 2160 (QL) (S.C.))

[51] Applying this test to the subject case, I cannot find that it is "plain and obvious" that the Amnis defendants' pleadings disclose no reasonable cause of action or a triable issue. As stated in *Watson*, a claim ought not to be struck merely because it is complex or novel. The Amnis defendants advance a factual and legal theory in their counterclaim that Ms. Pour was involved in a conspiracy aimed at applying pressure on the Amnis defendants through a concerted effort in collaboration with the other plaintiffs. This alleged scheme consisted of publishing defamatory statements about Mr. Ichikawa and Amnis and initiating improper legal action against all defendants including the clients of Amnis. The counterclaim states this to be the factual and legal basis of the Amnis defendants' claim. In relation to the defamation claim, the counterclaim reads as follows:

14. Although the emails were sent by Amir Yashr Shoolestani, the emails were sent with the agreement and concurrence of the other Defendants by Counterclaim and the other Defendants by Counterclaim are equally responsible and liable for the emails.
15. Although the words were spoken by Amir Yashr Shoolestani and Amir Behzad Shoolestani, the words were spoken with the agreement and concurrence of the other Defendants by Counterclaim and the other Defendants by Counterclaim are equally responsible and liable for the words spoken.

In relation to the malicious prosecution claim the counterclaim states:

26. The Plaintiffs, and each of them, have conspired to injure Glen Ichikawa, Amnis Engineering Ltd., and Kawa Engineering Ltd. by bringing this Notice of Civil Claim.

In this last paragraph the Amnis defendants are referring to the original Notice of Civil Claim in which Ms. Pour's claim was raised along with the claims of the other plaintiffs and was one component of the alleged malicious prosecution and abuse of process.

[52] While the Amnis defendants may be raising a complex claim which possibly includes an element of legal novelty, that is not a sufficient reason to order that the pleadings be struck. Assuming the truth of the material facts that are pleaded, i.e. that Ms. Pour participated in the conspiracy and was actively involved in both the publication of the alleged defamatory statements and the initiating of the claim against all the defendants, including clients of Amnis, for an improper purpose, the counterclaim reveals a triable issue. Ms. Pour's argument under this head must fail.

Is the claim properly pleaded in the counterclaim?

[53] The fourth argument raised by Ms. Pour to strike the counterclaim relates to discrepancies between the alleged defamatory emails and their characterization and paraphrasing in the counterclaim. Ms. Pour argues that the Amnis defendants ought to have cited the emails precisely and that this failure further shows that the counterclaim is "scandalous, frivolous or vexatious". According to Ms. Pour, the Amnis defendants' failure to accurately quote the emails also constitutes a fundamental deficiency in the pleadings and the Amnis defendants should not now be permitted to amend the claim.

- [54] Mr. Holeksa conceded that in the counterclaim the emails were not accurately quoted but argues that in an attempt to be concise he chose to simply paraphrase the contents of those emails. More importantly, Mr. Holeksa submits that the paraphrasing of the emails in the counterclaim is a fair reading of their contents and the ideas they were meant to express.
- [55] While I agree that the Amnis defendants should have accurately quoted the emails, I do not think that their failure to do so is fatal to the counterclaim. Striking a pleading is a draconian remedy that should not be granted where the deficiency can be cured through an amendment or other less severe orders (see *Sahyoun v. Ho*, 2015 BCSC 392 at para. 144, appeal dismissed 2017 BCCA 96; see also *Royal Bank of Canada v. Roberts*, 2014 BCSC 1797). I find that the failure of the Amnis defendants can be cured through a more proportionate remedy which is to allow the Amnis defendants to amend their counterclaim and properly quote the emails. I grant the Amnis defendants leave to amend their pleadings in that respect.

Does the subsequent discontinuance by Ms. Pour of the original claim constitute termination of the proceedings for the tort of malicious prosecution?

- [56] The fifth argument Ms. Pour raised in both her oral and written submissions relates to the malicious prosecution claim. Ms. Pour argues that a claim for malicious prosecution can only be made once the initial proceeding which is the subject of the claim for malicious prosecution has terminated. Since Ms. Pour's claim for monies owing to her is still being advanced, she argues that the Amnis defendants cannot raise a claim for malicious prosecution at this time.
- [57] Although the tort of abuse of process which is asserted in this case does not require that the proceeding commenced for an improper purpose be terminated (311165 B.C. Ltd v Canada (A.G.), 2017 BCCA 196), the tort of malicious prosecution requires that the proceedings be terminated in favour of the claimant for there to be a cause of action. In support of her submission, Ms. Pour relies on *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at para. 42, where the Supreme Court of Canada set out the four necessary elements for a successful malicious prosecution claim:

There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:

- a) the proceedings must have been initiated by the defendant;
- b) the proceedings must have terminated in favour of the plaintiff;
- c) the absence of reasonable and probable cause;
- d) malice, or a primary purpose other than that of carrying the law into effect.

(See J. G. Fleming, *The Law of Torts* (5th ed. 1977), at p. 598.)

- [58] Ms. Pour points to the fact that her claim was ongoing when the counterclaim was initiated, and is still ongoing, and therefore element (b) is not met.
- [59] Mr. Holeksa suggests that the fact that Ms. Pour discontinued her initial claim against some of the defendants originally named in the action constitutes "termination" of that proceeding for the purposes of the malicious prosecution cause of action.
- [60] Clearly when the counterclaim was initiated the Amnis defendants did not have a cause of action for malicious prosecution.
- [61] I understood Mr. Holeksa's position to be that if there was no cause of action when the counterclaim was filed, that was rectified when Ms. Pour filed a notice of discontinuance on May 3, 2016 in which she discontinued her action against all of the defendants except Mr. Ichikawa. I disagree.
- [62] If the discontinuance by Ms. Pour was to make it clear that her claim, that she is still pursuing, is against Mr. Ichikawa rather than his related corporate entities, I do not think that discontinuance is a "termination" of the proceeding "in favour of the plaintiff" for the purposes of this tort.
- [63] I have concluded that there was no cause of action for malicious prosecution when the counterclaim was initiated and that defect has not been cured.

Conclusion

- [64] Accordingly, Ms. Pour's application is dismissed with the exception that paragraph 4 of the prayer for relief seeking "Damages for Malicious Prosecution" is struck from the counterclaim against her.
- [65] Costs of this application will be in the cause.

"The Honourable Mr. Justice Sigurdson"

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Prepared on 26 October 2026 · Esheria