IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Miro Chembiotech Ltd. v. Houle Electric Limited,* 2023 BCSC 537

Date: 20230405
Docket: S2058710
Registry: Prince George

Between:

Miro Chembiotech Ltd.

Plaintiff

And

Houle Electric Limited

Defendants

Before: Master Harper

Reasons for Judgment

Appearing as representative for the Plaintiff:	O. Miroshnychenko
Counsel for the Defendant, Houle Electric Limited:	T. Galbraith
Place and Dates of Hearing:	Prince George, B.C. October 19, November 18, 2022 and February 8, 2023
Written submissions of the Plaintiff:	November 16, 2022
Written submissions of the Defendant:	February 21, 2023
Place and Date of Judgment:	Prince George, B.C. April 5, 2023

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Introduction

[1] The defendant, Houle Electric Limited ("Houle"), seeks an order pursuant to Rule 9-5(1)(d) of the *Supreme Court Civil Rules* striking out the amended notice of civil claim ("AMNOCC") filed September 28, 2021 on the basis that it is an abuse of process. If the claim is not struck out, Houle seeks an order for security for costs pursuant to s. 236 of the *Business Corporations Act*, S.B.C. 2002, c. 57.

Background

[2] Miro Chembiotech Ltd. ("MCL") is a limited company, wholly owned by Oleksandr Miroshnychenko. Mr. Miroshnychenko is a chemist.

[3] MCL's business is to produce amino acid chelated minerals and zinc lysinate.

[4] MCL hired Houle to connect certain equipment supplied by MCL, specifically a spray dryer and fluidized bed dryer, in premises rented by MCL. MCL alleges Houle breached the contract in that Houle failed to connect the equipment.

[5] Houle's allegation of abuse of process arises from proceedings MCL took against Houle before the Civil Resolution Tribunal (the "CRT").

The CRT Proceeding

[6] The CRT is established under the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [*CRTA*], and may adjudicate claims in relation to the *Small Claims Act*, R.S.B.C. 1996, c. 430 to a maximum amount of $5,000, exclusive of interest and expenses. An initiating party may adjust its claim to fit within the maximum tribunal small claim amount: *CRTA*, ss. 2.1(b) and 118; *Tribunal Small Claims Regulation*, B.C. Reg. 232/2018, ss. 2 and 3.

[7] The CRT may issue final decisions: *CRTA*, ss. 46–53.

[8] An order of the CRT may be enforced by filing it in the Provincial Court. An order filed in the Provincial Court has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Provincial Court: *CRTA*, s. 58.1

[9] The CRT proceeding is described in Part 2: Factual Basis of Houle's Notice of Application (supported by affidavit evidence) as follows:

> 3. On February 20, 2020, MCL filed a dispute notice against Houle in Civil Resolution Tribunal Dispute No. SC-2020-001682 (the "CRT Action") claiming the amount of $2,998.97 with the following claim description:
>
> > I am writing to report damage caused to Mirochembiotech Ltd. due to the fact that on November 1, 2019, electricians from the Houle Electric Prince George branch did not connect the spray dryer and fluidized bed dryer to a power source on 1721 Nicholson Street, Prince George, BC, which jeopardized to fulfill our contractual obligations under the project for the production of amino acid chelated minerals using experimental production. However, as indicated in invoice 181452, all work was carried out in accordance with work order No. 173042. [Emphasis in original.]
>
> 4. On June 10, 2020, a default decision and order (the "CRT Order") was issued in the CRT Action ordering that Houle pay damages to MCL of $2,998.97, plus fees in the amount of $100.00 for a total monetary order in the amount of $3,098.97.
>
> 5. On July 21, 2020, MCL commenced an enforcement action in *Miro Chembiotech Ltd. v. Houle Electric Limited*, Provincial Court of British Columbia (Small Claims Court) Action No. 2058021, Prince George Registry (the "Enforcement Action") seeking to enforce the CRT Order.
>
> 6. On July 30, 2020, a summons to a payment hearing was filed by MCL in the Enforcement Action setting a September 18, 2020, date for that hearing.
>
> 7. On September 18, 2020, the payment hearing was adjourned to October 23, 2020, as a cheque in the amount of $3,211.47 had been prepared by Houle for MCL and was available at Houle's office, and MCL presented additional costs relating to travel and service it wanted paid. Houle issued a payment to MCL in respect of the CRT Order and the Enforcement Action in the amount of $3,211.47 and MCL acknowledged receipt of that payment.
>
> 8. On October 23, 2020, Houle was ordered to pay additional costs of $608.59 to MCL to cover its travel and service costs.
>
> 9. On November 27, 2020, Houle issued a cheque payable to the Minister of Finance for $608.59.

[10] The default decision arose because Houle inadvertently failed to file a response to the CRT claim. Houle decided that it did not make economic sense to apply to set the decision aside. Houle understood that payment of the amount claimed in the Summons to Payment Hearing ($3,211.47) would fully resolve and bring to an end MCL's claims against Houle.

History of Supreme Court Proceedings

[11] MCL and Mr. Miroshnychenko filed the original notice of civil claim on December 8, 2020 claiming against Houle and several individual employees and directors of Houle.

[12] On April 8, 2021, Houle applied to strike the original notice of civil claim, and in reasons given August 6, 2021 (indexed at 2021 BCSC 1531), Justice Tindale struck out all claims against the individual defendants, and all claims against Houle, with leave only to amend the claim against Houle relating to the alleged breach of contract (the "Tindale Reasons").

[13] As noted, MCL filed an AMNOCC on September 28, 2021. Mr. Miroshnychenko personally is no longer a plaintiff because he has no claim in his personal capacity (Tindale Reasons, para. 40). Houle filed an amended response to civil claim on October 14, 2021.

[14] Houle's position is that the claims MCL makes against Houle in the AMNOCC, namely, breach of contractual obligations regarding Houle's alleged failure to connect the spray dryer and fluidized bed dryer, arise from the same factual basis on which MCL obtained default judgment in the CRT proceeding and, therefore, to allow the AMNOCC to proceed would be an abuse of process.

[15] MCL's position, as I understand it, is that MCL claims different types of damages than it did in the CRT proceeding and, therefore, the within proceeding is not an abuse of process.

[16] Houle's application came on for hearing before me in Prince George on October 19, 2002. There was insufficient time to complete the hearing, and so the application was adjourned to be continued by video conference on November 18, 2022. Due to a scheduling miscommunication, that hearing did not go ahead, but was further adjourned to be heard by video conference on February 8, 2023. Mr. Miroshnychenko filed written submissions between the hearings, and I granted Houle leave to file written submissions in reply.

Legal Framework

[17] Rule 9-5(1)(d) provides:

> 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 of part of a pleading, petition or other document on the ground that:
>
> […]
>
> (d) it is otherwise an abuse of 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.

[18] The doctrine of abuse of process includes the doctrine of *res judicata* which has two branches: issue estoppel and cause of action estoppel. Issue estoppel prevents a litigant from raising an issue that has already been decided in previous proceedings while cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding: *Erschbamer v. Wallster*, 2013 BCCA 76 at para. 12.

[19] The requirements for a defence based on issue estoppel are:

(a) that the same question has been decided;

(b) that the judicial decision which is said to create the estoppel was final; and

(c) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies*: Erschbamer* at para 13.

[20] The requirements for a defence based on cause of action estoppel are:

(a) there must be a final decision of a court of competent jurisdiction in the prior action [the requirement of “finality”];

(b) the parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of “mutuality”];

(c) the cause of action in the prior action must not be separate and distinct; and

(d) the basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence: *Erschbamer* at para. 15

[21] The doctrine of abuse of process is discretionary, flexible, and intended to preserve the integrity of the court's process. It is concerned with fairness and the proper administration of justice and precludes re-litigation where one or more of the requirements of issue or cause of action estoppel are not met, but where allowing the litigation would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice: *Lamb v. Canada (Attorney General),* 2017 BCSC 1802 at paras. 79–81; aff'd 2018 BCCA 266; leave to appeal dismissed 2018 CanLII 119134 (S.C.C.).

Analysis

Claims MCL Made in the CRT Proceeding

[22] Mr. Miroshnychenko turned his mind to the losses MCL suffered due to Houle's alleged breach of contract before he commenced the CRT proceeding. In an email to a Houle representative dated February 7, 2020, Mr. Miroshnychenko describes the costs MCL has incurred due to Houle's "negligence or carelessness" as follows:

> […] $525 for equipment relocation, $2,662.32 for reinstalling equipment, and $2,699.42 for a Chinese engineer's business trip. An electrical inspector from Richmond was also ready to come to check the equipment, because not all parts are CSA certified, but most critical items were replaced by the time the Chinese engineer arrived. And the electrical inspector agreed to check the equipment after important electrical parts were updated.
>
> To complete our project, instead of using our equipment, we rented a spray dryer at the University of Alberta. Renting a spray dryer cost us $1,097.25 and shipping a liquid sample for spray drying cost an additional $474.36.
>
> Who will cover our contingencies in the amount of $7,936.71 as a result of your negligence or negligence [*sic*]?

[23] Mr. Miroshnychenko's email makes it clear that he has considered the losses MCL has incurred and MCL has assessed those losses at $7,936.71.

[24] Mr. Miroshnychenko said in an email dated February 10, 2020 to Dean Miller, branch manager of Houle in Prince George, "if we cannot find a solution, I suggest transferring our case directly to the British Columbia Civil Tribunal." In fact, that is exactly what Mr. Miroshnychenko did, although he claimed a lower amount than the $7,936.71 referred to in his February 7, 2020 email, presumably because of the monetary jurisdiction limit of the CRT.

[25] MCL commenced the CRT proceeding by way of a Dispute Notice. The Dispute Notice has a section called "Dispute Information". That section starts with the following standard wording:

> This information has been provided by the person requesting resolution. It shows the claims they are making and what they are asking for.

[26] In the claim summary, Mr. Miroshnychenko on behalf of MCL states:

> I would like to receive a refund in the amount of Can $2,998.97.

[27] The claim description says:

> I am writing to report damage caused to Mirochembiotech Ltd. due to the fact that on November 1, 2019, electricians from the Houle Electric Prince George branch did not connect the spray dryer and fluidized bed dryer to a power source on 1721 Nicholson Street, Prince George, BC, which jeopardized to fulfill our contractual obligations under the project for the production of amino acid chelated minerals using experimental production. However, as indicated in invoice 181452, all work was carried out in accordance with work order No. 173042.

[28] Under the heading "when the person requesting resolution became aware of the claim", Mr. Miroshnychenko put "February 18, 2020."

[29] Under the heading "Requested Resolution", Mr. Miroshnychenko wrote:

> [T]he damage due to the fact that on November 1, 2019, electricians from Houle Electric did not connect a spray dryer and a fluidized bed dryer to a power source on 1721 Nicholson Street".

[30] He sets out the amount claimed as $2,998.97.

[31] MCL further claimed in the Dispute Notice all dispute-related fees and expenses to be determined later in the tribunal process.

Does Issue Estoppel Apply?

[32] I am not persuaded that the doctrine of issue estoppel applies in this case. The order of the CRT was made in default of Houle defending the claim. As a result, CRT was not required to make findings of fact or law. Counsel for Houle was not able to provide any case authorities to support the proposition that a default judgment has the same effect as a judgment made after the court has made findings of fact or law in a defended claim. A consideration of whether a default judgment engages a consideration of issue estoppel will have to await another day.

Does Cause of Action Estoppel Apply?

[33] MCL's defence to the application to strike its AMNOCC is that it is raising new claims in this proceeding that it did not raise in the CRT proceeding. MCL states in its application response:

> [T]he current proceedings seek to answer the question of breach of contract over the entire duration of the contractual period with the Defendant, whereas the original CRT filling was to recoup travel and equipment rental costs due to the fact that on November 1, 2019, Houle electricians refused to connect equipment they had scheduled to connect on that day which resulted in excess expenses for MCBT.

I note "MCBT" is MCL.

[34] Mr. Miroshnychenko's currently-stated rationale for filing the CRT Dispute Notice on behalf of MCL was that he believed Houle would do the work they contracted to do, in other words, that Houle would perform further work that MCL claims Houle did not complete in November, 2019. He says he realized after filing the Dispute Notice that Houle would not complete the work and therefore he has incurred more damages for which he now seeks compensation. This explanation is not persuasive and does not adequately counter the argument in favour of a finding of cause of action estoppel.

[35] MCL's position is contrary to the facts. All work and services provided by Houle to MCL ended in November 2019. On December 23, 2019, Houle submitted its invoice #181452 for $3,436.60 to MCL for its work and services performed up to and including November, 2019 (the "Invoice"). Houle re-sent the Invoice to MCL on February 6, 2020, and requested payment. MCL responded with its complaint that the "main equipment was not connected to a power source", and advised that MCL had incurred costs of $7,936.71 as a result of Houle's "negligence or carelessness". Houle then denied responsibility and advised MCL that if MCL did not make payment, Houle's head office would probably just forward the invoice to collections. MCL responded via an email to Dean Miller on February 10, 2020 with the suggestion of "transferring our case directly to the British Columbia Civil Tribunal".

[36] MCL filed the Dispute Notice in the CRT proceeding on February 20, 2020. Mr. Miroshnychenko must have known by that date that Houle would not be completing the work. There is nothing in the evidence to support Mr. Miroshnychenko's position that by the time he filed the Dispute Notice in the CRT, Houle would perform any further work.

[37] The evidence establishes that prior to commencing the CRT proceeding, MCL (through its principal, Mr. Miroshnychenko) was fully aware of all the relevant facts and circumstances relating to Houle's alleged failure to connect the spray dryer and fluidized bed dryer to a power source; that the alleged failure jeopardized MCL's ability to fulfill its purported contractual obligations; and that MCL had and would suffer damage as a result.

[38] I have determined that cause of action estoppel applies. As stated in *Erschbamer* at para. 12, "cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding" (emphasis added).

[39] MCL was obligated to bring forward its whole case in the same proceeding (*Erschbamer*, para. 14), and not "lie in the weeds" as counsel for Houle puts it, and wait to bring a further claim at a later date in a different court.

[40] The requirements of cause of action estoppel as set out in para. 15 of *Erschbamer* are all met in this case:

(a) There was a final decision of the CRT and of the provincial court in the enforcement action;

(b) The parties to the within proceeding are the same as in the CRT proceeding;

(c) The cause of action in the CRT proceeding is not separate and distinct from the within action;

(d) The basis of the cause of action and this action could have been argued in the prior action if MCL had exercised reasonable diligence.

[41] With specific reference to point (d) above, I acknowledge that MCL could not have brought a claim for damages in excess of $5,000 in the CRT proceeding. However, if he had exercised reasonable diligence, MCL could have waited until it had determined the extent of its alleged losses before suing Houle. If those damages exceeded the CRT jurisdiction (which appears to be the case), MCL could have commenced this proceeding and claimed all his damages, including those it claimed before the CRT. There was plenty of time in terms of the running of the limitation period for Mr. Miroshnychenko to wait until his claimed losses had crystallized. Mr. Miroshnychenko is responsible for the strategic decision he made to sue in the CRT and he must bear the consequences.

[42] I have taken into account on this application that Mr. Miroshnychenko is a layperson. As Mr. Miroshnychenko said in oral submissions, “I am a scientist, not a lawyer”. I have considered whether Mr. Miroshnychenko’s seeming lack of understanding of the elements of abuse of process absolves MCL.

[43] Mr. Miroshnychenko is an experienced litigant. Mr. Miroshnychenko and MCL have pursued at least three prior claims in the CRT. Mr. Miroshnychenko was familiar with the CRT’s rules and processes prior to commencing the CRT proceeding against Houle. Mr. Miroshnychenko knew that the monetary jurisdiction of the CRT was a maximum of $5,000. He knew that if he elected to proceed against Houle in the CRT, he would have to waive recovery of any amount over $5,000.

[44] Mr. Miroshnychenko argues that Justice Tindale did not find him to be intending to make meritless claims and that I ought to make the same finding. At para. 61 of the Tindale Reasons, Justice Tindale says:

> Mr. Miroshnychenko is a self-represented litigant. While there are significant problems with the manner in which the Notice of Civil Claim was drafted I do not find that his intention was to bring meritless claims for an improper purpose or abuse the court's process.

[45] Mr. Miroshnychenko takes that paragraph to be a finding that should apply to the application before me. I do not agree that Justice Tindale's findings in para. 61 are determinative of this application. The application before Justice Tindale was brought by Houle and by individual defendants pursuant to Rule 9-5(1) generally without specifying whether one subrule or another applied. It was an application to strike out the notice of civil claim on the basis that it was so prolix and confusing it is impossible to understand the case to be met (Tindale Reasons, para. 15).

[46] The defendants conceded on the application before Justice Tindale that a claim for breach of contract could be made and that leave to amend the notice of civil claim could be granted for this reason (Tindale Reasons, para. 24). Justice Tindale's conclusions set out at para. 59 of the Tindale Reasons do not reference abuse of process. The reference to abuse of process in para. 61 of the Tindale Reasons is with respect to the defendants' claim for special costs. It has nothing to do with the type of abuse of process alleged by Houle in the application before me.

[47] The abuse of process alleged in this application is about the prior CRT proceeding, not the type of abuse of process the defendants alleged before Justice Tindale which was the pursuit of unmeritorious claims for an improper purpose.

Abuse of Process by Relitigation

[48] If I am incorrect in determining that cause of action estoppel applies here, the doctrine of abuse of process considered broadly as "abuse of process by relitigation", sometimes described as a rule against litigation by instalment applies (*Erschbamer*, para. 30). Houle was and is entitled to rely on the finality of the CRT proceeding, the enforcement action, the related orders and the full payment of those

orders. It would be unfair to Houle to allow MCL to sue it in multiple courts in successive lawsuits for more compensation based on the same facts, circumstances, alleged contract and alleged breach.

Conclusion

[49] To summarize, MCL brought a claim in the CRT and obtained judgment based on the same facts, the same contract with Houle, and the same alleged breach of contract as in the within proceeding. It is an abuse of process for MCL to bring the same claim in the Supreme Court regardless of whether the nature and quantum of damages is different from those claimed in the CRT. Fairness and the proper administration of justice require the AMNOCC to be struck out.

[50] I order that the AMNOCC be struck out. Accordingly, it is not necessary to address Houle's alternative application for security for costs.

[51] Although Houle seeks special costs in respect of the application, in my view, MCL's conduct, although misguided, does not rise to the level of reprehensible conduct that would justify an order for special costs. MCL will pay Houle its costs of the action on Scale B.

[52] Houle may enter the formal order without the signature of Mr. Miroshnychenko on behalf of MCL.

[53] As a housekeeping matter, there are several binders of application materials that will be available in the Vancouver registry for Houle's counsel's agent to retrieve. Mr. Miroshnychenko may then obtain his materials from Mr. Galbraith's office if he wishes to have them back.

"Master Harper"