IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MTU Maintenance Canada Ltd. v. Voss,*
2023 BCSC 1962

Date: 20231109
Docket: S2210259
Registry: Vancouver

Between:

MTU Maintenance Canada Ltd.

Plaintiff

And

Matthias Voss

Defendant

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

Counsel for the Plaintiff:	J. D. Wong T. Behrmann
Counsel for the Defendant:	J. Wu
Place and Dates of Hearing:	Vancouver, B.C. October 30, 2023
Place and Date of Judgment:	Vancouver, B.C. November 9, 2023

Introduction

[1] The plaintiff, MTU Maintenance Canada Ltd. (“MTU”), seeks an order striking the counterclaim filed by the defendant, Matthias Voss, on June 5, 2023.

[2] For the reasons that follow, I grant the application.

Background

[3] The plaintiff is a company incorporated under the laws of New Brunswick and is registered as an extra provincial company under the laws of British Columbia.

[4] In Canada, MTU repairs and overhauls engines and accessories, and performs engine tests based at its location in Delta, British Columbia. MTU Aero Engines AG is an international provider of commercial aircraft engine maintenance services worldwide. MTU Aero Engines AG is headquartered in Germany. MTU Maintenance Zhuhai Co. Ltd. (“MTU Zhuhai”) is a joint venture between MTU Aero Engines AG and China Southern Airlines located in the Zhuhai Free Trade Zone in China.

[5] MTU Aero Engines AG, MTU, and MTU Zhuhai are all separate legal entities.

[6] The Defendant, Matthias Voss, is a current employee of MTU.

[7] On January 1, 2006, Mr. Voss commenced employment with MTU pursuant to a written contract of employment. On or about May 22, 2019, he was seconded to MTU Zhuhai for the period September 1, 2019 to August 31, 2022 (the “Secondment”) pursuant to a written Supplemental Contract (Secondment Contract) dated May, 22, 2019 (the “Secondment Agreement”) and a written employment agreement with MTU Zhuhai.

[8] A portion of Mr. Voss’ compensation during his Secondment included MTU paying him an estimated amount for his estimated Chinese income tax burden.

[9] MTU’s position is that MTU was entitled to recalculate and reduce overall compensation provided to a seconded employee on an annual basis and amend the

Secondment Agreement accordingly where various adjustments to Secondment-related benefits and allowances produce an overall compensation increase.

[10] In or around December 28, 2020, Mr. Voss received a tax subsidy for the 2019 tax year. MTU's position was that on or about May 20, 2021, Mr. Voss and other seconded employees working at MTU Zhuhai were informed that as part of the recalculation of their annual overall compensation, MTU would allow all seconded employees receiving the subsidy to retain a prorated annual allowance equivalent of €10,000 from the subsidy and would require all seconded employees to pay the remainder of the subsidy to MTU.

[11] On June 14, 2021, MTU requested that Mr. Voss pay CNY 82,234.05, which is the balance of the 2019 subsidy owing to MTU, less the equivalent of €3,333 or CNY 26,000, which Mr. Voss was entitled to retain.

[12] In October, November, and December 2021, MTU deducted a total of CAD $16,059.90 (equivalent to CNY 82,234.05) from Mr. Voss' pay (the "Deductions").

[13] On or about May 20, 2022, MTU requested that Mr. Voss pay to MTU the outstanding balance of the 2019 subsidy and the 2020 subsidy which was subsequently received.

[14] MTU's position was that as a result of Mr. Voss' refusal, failure, or neglect to pay the balance of the 2019 and 2020 subsidies, MTU has provided excess compensation to Mr. Voss in 2020, 2021, and 2022, which excess it would not have provided but for Mr. Voss' refusal, failure, or neglect.

[15] On January 26, 2022, Mr. Voss filed a complaint under the Canada Labour Code with Employment and Social Development Canada ("ESDC") regarding the Deductions (the "Complaint"). On March 29, 2022, ESDC informed MTU about the Complaint.

[16] On May 5, 2022, Mr. Voss and MTU resolved the Complaint with MTU making a payment of $16,059.90 representing the full payment of the Deductions. The payment was made without prejudice to MTU's ability to bring a separate action

to recover the balance of the 2019 subsidy, and without prejudice to its position that MTU is provincially regulated.

Litigation history

[17] On December 28, 2022, MTU filed a notice of civil claim ("NOCC") seeking the balance of the 2019 and 2020 subsidies on the basis of breach of contract, negligent misrepresentation, and unjust enrichment.

[18] After unsuccessful mediation, on February 10, 2023, MTU served the NOCC upon Mr. Voss. On March 3, 2023, after the deadline for filing a response to civil claim had passed, counsel for Mr. Voss sought an extension to March 13, 2023, which MTU granted. Counsel for MTU advised MTU would not be agreeable to any further extension.

[19] On March 10, 2023, counsel for Mr. Voss sought a further extension for the filing the response, which counsel for MTU denied. On March 20, 2023, Mr. Voss filed a response to civil claim.

[20] In April 2023, the parties exchanged demands for particulars.

[21] On May 9, 2023, Mr. Voss reserved July 18, 2023 for a chambers application for summary trial. On May 26, 2023, MTU filed a notice of discontinuance.

[22] Between May 26 and 30, 2023, counsel discussed an application by the defendant for special costs due to the discontinuance of MTU's claim.

[23] On May 30, 2023, counsel for Mr. Voss advised he would be filing a counterclaim seeking damages for abuse of process, aggravated damages, and punitive damages for the amount of legal fees incurred to defend MTU's claim.

[24] On June 8, 2023, Mr. Voss served the counterclaim filed June 5, 2023.

[25] Between June 13 and 16, 2023, counsel agreed to have the plaintiff's application to strike heard July 18, 2023 at the New Westminster courthouse. On July 6, 2023, MTU served the application to strike to be heard July 18, 2023.

[26] In response to the Notice of Application dated July 6, 2023 and included in its application response materials, the defendant proposed an amended counterclaim.

[27] On July 18, 2023, the parties attended the New Westminster courthouse for this application but no judge was available. As a result, counsel agreed to have this application heard on October 30, 2023.

Legal basis

[28] The Plaintiff applicant relies upon Rules 1-3(1), 3-4(1) and (7.1), 9-5(1), 9-8(1) and (4), 14-1, and 22-7(2) of the *Supreme Court Civil Rules* (Rules) B.C. Reg. 168/2009.

[29] As the reliance on Rules 1-3(1), 3(4), and 9-8(1) is dispositive of the matter, I will address only that aspect of the application.

Does the Court have jurisdiction to consider the counterclaim given the discontinuance of the notice of civil claim?

[30] Rule 3-4(7) provides as follows:

> **If action stayed or discontinued**
>
> (7) Without limiting subrule (6) of this rule, a defendant's counterclaim in an action may proceed even though the plaintiff's claim in the action has been stayed, discontinued or dismissed.

[31] In this context, the plaintiff submits that “proceed” should be interpreted to mean “carry on” or “continue” the existing counterclaim rather than to “commence”, “bring”, or “pursue” a new counterclaim. The defendant disagrees.

[32] In Rules 3-4(1)-(5), the terms “pursue”, “bring”, and “brought” are used to indicate the commencement of a counterclaim:

> **Counterclaim**
>
> (1) A defendant in an action who wishes to pursue a claim within that action against the plaintiff must, within the time set out for the filing of a response to civil claim under Rule 3-3 (3), file a counterclaim in Form 3 that accords with Rule 3-7.
>
> **Counterclaim against another person**

> (2) If the counterclaim referred to in subrule (1) raises questions between the defendant bringing the counterclaim and a person other than the plaintiff, the defendant may join that other person as a party against whom the counterclaim is brought.
>
> **Identification of parties**
>
> (3) In a counterclaim,
>
> (a) the plaintiff against whom the counterclaim is brought must be identified as the "plaintiff",
>
> (b) each defendant against whom the counterclaim is brought must, along with the defendant bringing the counterclaim, be identified as a "defendant", and
>
> (c) any other person against whom the counterclaim is brought must be identified as a "defendant by way of counterclaim".
>
> **Service of counterclaim**
>
> (4) Unless the court otherwise orders, a defendant who files a counterclaim
>
> (a) must serve a copy of the filed counterclaim on all parties of record within the time set out in Rule 3-3 (3) for the filing and service of a response to civil claim, and
>
> (b) if the counterclaim is brought against a person who is not yet a party of record to the action, must serve that defendant by way of counterclaim by personal service with
>
> (i) a copy of the filed counterclaim, and
>
> (ii) a copy of the filed notice of civil claim
>
> within 60 days after the date on which the counterclaim was filed.
>
> **Response to counterclaim**
>
> (5) A person against whom a counterclaim is brought must, if that person wishes to dispute the counterclaim,
>
> (a) file a response to counterclaim in Form 4 that accords with Rule 3-7, and
>
> (b) serve a copy of that filed response to counterclaim on all parties of record.
>
> [Emphasis added.]

[33] Rule 3-4(7) uses the term “proceed” in contrast to “pursue” or “bring”.

[34] The plaintiff refers me to *Canadian Legal Words and Phrases* (LexisNexis Canada), citing *Wigton v. Ratke* (1984), 9 D.L.R. (4th) 464 at 466, 1984 CanLII 1284 (A.B. K.B.), in which the term “proceed” has been interpreted as continuing a journey provided there was no “discontinuance” of the intended journey:

> The substantive verbal definition of proceeding is, indeed, . . . "the action of going onward: advance onward". That definition, argues, means that when something is stationary it is not proceeding. . .The cases . . . seem to suggest that a vessel-or as here a vehicle-is "proceeding" so long as there is no "discontinuance" of the intended journey. Halting for a proper and reasonable act such as awaiting tides, loading coal or turning left safely does not discontinue a journey. It appears therefore that a vehicle that is halted on a roadway for the purpose of turning left, in law would still be "proceeding" since the journey has not been discontinued.

[35] Consistent with proceed meaning to continue or advance onward in the ordinary sense, Rule 3-4(7) addresses the ability of an existing counterclaim to continue where a claim is discontinued.

[36] More directly of assistance is the holding in *DLC Holdings Corp. v. Payne*, 2021 BCCA 31 [*DLC*] that the Court has limited jurisdiction to make orders where a plaintiff has discontinued an action as a right under Rule 9-8(1). The Court of Appeal noted in that case that “once an action has been discontinued, there is no proceeding left”: *DLC* at para. 50. Following discontinuance, “the [C]ourt is *functus officio* as to the matter in dispute” and “[t]he proceeding is at an end, and only a limited category of exceptional orders may be made”: *DLC* at paras. 50–51.

[37] The Court of Appeal stated in *DLC* as follows:

> [50] … By definition, once an action has been discontinued, there is no proceeding left. As between the parties, it is forever at an end (though the court retains, as discussed above, the ability to intervene as necessary to protect its own process).
>
> [51] I draw an analogy to the situation that exists after a final order has been pronounced and entered, noting that the filing of a notice of discontinuance is equivalent to the entry of a final order. At that point, the court is functus officio as to the matter in dispute. The proceeding is at an end, and only a limited category of exceptional orders may be made after a final judgment has been entered.
>
> …
>
> [55] I turn next to the purpose of discontinuance. As discussed above, before that “certain stage” is reached, it is to allow the plaintiff an escape while it remains dominus litis. As we have seen, that can be a very short time. But, as dominus litis, the plaintiff can be prevented neither from commencing a claim, nor from discontinuing it. In this way, the unfettered right to discontinue furthers the objective of the Rules as set out in Rule 1-3(1): “to secure the just, speedy and inexpensive determination of every proceeding on its merits”. It does so by encouraging plaintiffs to withdraw

> claims that are of doubtful merit, or otherwise considered not worth pursuing, early on in the litigation, thereby freeing up judicial resources, and the time of opposing counsel, for other cases, as well as minimizing expense.
>
> [56] Normally, this unfettered right has only two catches, but they are significant. The first is that the plaintiff will be liable for the costs of the defendant up to the time of discontinuance, regardless of the merits.
>
> …
>
> [61] Accordingly, as I see it, the proper interpretation of Rule 9-8 is one that provides certainty, thereby encouraging an appropriate assessment of the situation by the parties, and discouraging the continuance of doubtful cases or defences.
>
> [62] It follows that the plaintiff contemplating a discontinuance as of right should have certainty as to the consequences. The plaintiff will have to pay the ordinary costs of the defendants in accordance with Rule 9-8(4) and Rule 14-1, but will have the benefit of retaining the ability to pursue the claim should circumstances change (subject, of course, to any applicable limitation period), in accordance with Rule 9-8(8).
>
> [63] Both of those consequences are subject to the proviso "unless" the court should order otherwise, but there is no framework for the court to make such an order given that the action by definition is forever at an end. Accordingly, consistent with the purpose of the rules, those provisos should be interpreted as limited to the situations where the court is given jurisdiction because leave of the court is required under Rule 9-8(2), or as a consequence of terms pronounced in an order setting aside the notice of discontinuance and reinstating the action in the court's inherent jurisdiction, as discussed in *Adam*, *Moon*, *Lye* and *Centre Pacific Management*.

[38] A defendant's existing counterclaim filed before a discontinuance may continue despite that discontinuance; however, the Court has no jurisdiction to allow a defendant to "bring" or "pursue" a new counterclaim in a discontinued and non-existent proceeding absent an application to set aside the notice of discontinuance, which would resurrect the defunct proceeding.

[39] Here, the defendant filed the late counterclaim on June 5, 2023 after MTU discontinued the proceeding on May 26, 2023 pursuant to Rule 9-8(1). It is unclear how the filing was permitted given the discontinuation of the claim, but it remains filed and "active".

[40] Once MTU discontinued the proceeding on May 26, 2023, there was "no proceeding left". Following *DLC*, the defendant has filed a counterclaim in a proceeding that no longer existed. The Court is without jurisdiction to consider the

counterclaim unless the proceeding is resurrected by an application to set aside the notice of discontinuance: *DLC* at para. 66.

[41] On May 30, 2023, counsel for MTU expressly brought the case of *DLC* to the attention of counsel for the defendant. Prior to filing the late counterclaim, counsel for MTU expressly informed counsel for the defendant that such a counterclaim was out of time. The defendant concedes this is the case. The defendant also admits it has not brought an application for leave to set aside the notice of discontinuance and extend the time to file its counterclaim. This, it submits, was a strategic decision made by the defendant. The defendant chooses to pursue the counterclaim so that it does not have to go to the expenses of bringing its own notice of civil claim. This runs afoul of the Rules.

[42] As such, while this Court may be in a position of being *functus officio* but for the limited jurisdiction of deciding costs, the defendant has forced the hand of the plaintiff to make its own application to strike the counterclaim given the defendant's position that it can maintain its counterclaim without bring the necessary applications. This is supported by the general rule of efficiency of proceedings under Rule 1-3(1). Allowing the counterclaim to proceed interferes with MTU's unfettered right to discontinue its proceeding with certainty and is contrary to the objective of the Rules as set out in Rule 1-3(1): "to secure the just, speedy and inexpensive determination of every proceeding on its merits".

[43] The defendant is still entitled to the costs of MTU's discontinued claim.

Conclusion

[44] The counterclaim is struck as the Court does not have jurisdiction to consider it.

Costs

[45] If the parties cannot agree on the matter of costs, they may contact trial scheduling within 30 days to arrange for a hearing.

"Wilkinson J."