IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Revolution Resource Recovery Park Inc. v. Cheam First Nation,* 2023 BCSC 1527

Date: 20230830
Docket: S218427
Registry: Vancouver

Between:

Revolution Resource Recovery Park Inc.

Plaintiff

And

Cheam First Nation, Cheam Landfill Limited Partnership by its general partner, Cheam Landfill GP Ltd., CFN Holdings LP by its general partner, Cheam Enterprises Inc., Headlands Environmental Inc., Justin Louis, Michael John Hofer also known as Mike Hofer, Woodrow Soriano also known as Woody Soriano, Pathstone Equity Inc., Bodan Boggs, Rocky Point Environmental Inc., Copper Raven Limited Partnership by its general partner, Copper Raven Capital (GP) Corp., John Doe, and Jane Roe

Defendants

And

Cheam Landfill Limited Partnership by its general partner, Cheam Landfill GP Ltd.

Plaintiff by way of Counterclaim

And

Revolution Resource Recovery Park Inc.

Defendant by way of Counterclaim

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for the Plaintiff: R. Deane
H. Parsons

Counsel for the Defendants and Plaintiff by way of counterclaim, Cheam Landfill Limited Partnership by its general partner, Cheam Landfill GP Ltd.:	M.J. Hewitt D. Yaverbaum
Place and Dates of Hearing:	Vancouver, B.C. May 15-16, 2023
Place and Date of Judgment:	Vancouver, B.C. August 30, 2023

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I. OVERVIEW

[1] In the matter before me, the Defendant and Plaintiff by way of Counterclaim, Cheam Landfill Limited Partnership ("CLLP"), by its general partner Cheam Landfill GP Ltd. ("Cheam GP") seeks summary judgment, or alternatively, judgment by way of summary trial, on its counterclaim (the "Counterclaim") against the Plaintiff, Revolution Resource Recovery Park Inc. ("Revolution" or the "Plaintiff").

[2] The underlying action involves a claim by for breach of contract, fraudulent misrepresentation and conspiracy (the "Claim"). Through it, Revolution seeks damages of approximately $75,000,000, plus an accounting and disgorgement of profits earned by the Defendants due to alleged misrepresentations and conspiracy to injure Revolution.

[3] The Counterclaim is for an alleged debt owed by Revolution in the amount of $1,441,131.30. This figure represents amounts allegedly owing from Revolution to CLLP under the same agreement that grounds Revolution's claim. The agreement in turn concerns the same deliveries which Revolution says it was induced to make by the Defendants' misconduct.

[4] The central issue before this Court is whether it is appropriate to grant judgment summarily on the Counterclaim, having regard to Revolution's defence of equitable set-off of CLLP's claim.

[5] For the reasons that follow, the summary judgment and summary trial applications are dismissed.

II. FACTUAL BACKGROUND

[6] The following facts are not in dispute.

[7] Revolution operates licensed material recovery facilities which receive, process and sort recyclable material, including construction and demolition materials ("C&D Material").

[8] Around June 11, 2020, CLLP and Revolution (referred to hereinafter as the "Parties") entered into a Supply Agreement for Revolution to deliver C&D Material to a landfill located at Cheam 1 Reserve in Rosedale (the "CLLP Landfill").[1] As a term of the Supply Agreement, Revolution was granted a right of access onto and across the Cheam 1 Reserve "for the purpose of access and to exercise Revolution's rights and obligations under [the Supply] Agreement" (the "Access Agreement").[2]

[9] The CLLP Landfill is under the ownership or control of the Cheam First Nation ("Cheam FN"). Cheam FN directly or indirectly, owns or controls CLLP and Cheam GP, as well as the defendants CFN Holdings LP, Cheam Enterprises Inc., Copper Raven Limited Partnership, and Copper Raven Capital (GP) Corp. (collectively, the "Cheam Affiliates").

[10] The defendants Headlands Environmental Inc., Justin Louis, Michael John Hofer (also known as Mike Hofer), Woodrow Soriano (also known as Woody Soriano), Pathstone Equity Inc., Bodan Boggs, and Rocky Point Environmental Inc., were all allegedly involved in various capacities in the development or operation of the CLLP Landfill.

[11] The existence and enforceability of the Supply Agreement are not at issue in this action; both parties seek to give effect to the agreement.

[12] Pursuant to Article 2.1, the Supply Agreement was to terminate on the earlier of June 11, 2025 (a period of five years), or:

> (b) the date that the CLLP Landfill reaches design capacity and elevation (the "**Design Capacity Date**"), provided that CLLP has provided Revolution with notice, at least six months before the Design Capacity Date, of the date that CLLP, acting reasonably, expects the CLLP Landfill to reach design capacity and elevation, and provided further that CLLP has provided evidence satisfactory to Revolution, acting reasonably, that the CLLP Landfill has reached design capacity and elevation;

[1] The Supply Agreement is dated June 11, 2020, but may not have been ratified until June 12, 2020: Notice of Civil Claim at para. 43.
[2] Article 3.1(9)(a) of the Supply Agreement, attached as Exhibit A to Affidavit # 1 of J. Louis made March 22, 2022.

(the “Term”)

[13] The Supply Agreement could be extended by mutual agreement of Revolution and CLLP. It could also be terminated on written notice by either party, upon the occurrence of certain events, including if the other party is in breach of a material covenant or term of the Supply Agreement and has not rectified the breach.

[14] The Supply Agreement obligated CLLP during the Term to accept up to 15,000 tonnes per month of C&D Material from Revolution. There was no obligation under the Supply Agreement for Revolution to make any deliveries.

[15] Pursuant to Article 4 of the Supply Agreement, Revolution would pay a “stepped price” based on the volume of C&D Material delivered to the CLLP Landfill. The price ranged from $57.50 to $80.00 per metric tonne (the “Charge”).

[16] Revolution commenced deliveries of C&D Material to the CLLP Landfill not long after the Supply Agreement was entered into.

[17] There is disagreement between the Parties regarding the events that transpired over the ensuing months, as well as the reasons behind certain actions taken by the Parties. It is not necessary for my purposes to delve into the details of the disagreement, or to resolve any conflicts in the evidence on the matter.

[18] Around October 2020, the Parties agreed that Revolution would deliver only shredded C&D Material to the CLLP Landfill. Consequently, the Charge paid by Revolution under the Supply Agreement would be reduced to $50.00 per metric tonne, exclusive of GST.

[19] On January 18, 2021, CLLP provided notice to Revolution pursuant to s. 2.1 of the Supply Agreement (the “Notice”) that the CLLP Landfill would reach capacity by July 2021, and that CLLP would stop accepting C&D Material from Revolution effective July 2021. The Notice was viewed by Revolution as a repudiation of the Supply Agreement.

[20] Revolution continued to deliver C&D Material to the CLLP Landfill from January to July 2021.

[21] Around July 23, 2021, CLLP confirmed to Revolution that it would no longer accept material at the CLLP Landfill because it had reached capacity. As at this date the May and June invoices for the Charges had already been issued to Revolution.

[22] Around July 26, 2021, a few days before the July invoice was issued, Revolution advised CLLP through its legal counsel, that they would not pay CLLP for deliveries made in May, June and July 2021 (the "Deliveries"), as they were asserting a legal or equitable set-off based on "alleged breaches of the Supply Agreement among other wrongs".[3]

[23] The salient portions of the July 26, 2021 correspondence sent by Revolution's legal counsel are as follows:

> We refer to the invoice~ dated 31 May 2021 (Invoice No. 143) and 30 June 2021 (Invoice No. 147), issued by CLLP on account of Charges claimed to be owing by Revolution under the Supply Agreement (the "Invoices").
>
> As CLLP is aware, Revolution has substantial claims against CLLP and others arising from CLLP's alleged breaches of the Supply Agreement, among other alleged wrongs. The damages claimed by Revolution on account of those claims far exceed the amount of the Invoices. Revolution therefore asserts a legal or equitable set-off of its claims as against the Invoices, and any other amounts claimed to be owing by Revolution to CLLP, or which may become owing in the future.
>
> In the circumstances, there is no sum owing by Revolution to CLLP, under the Invoices or otherwise, after making all just discounts, including but not limited to the legal or equitable set-offs noted above.

[24] Revolution commenced this action by filing a Notice of Civil Claim on September 24, 2021 (the "NOCC"). In it, Revolution alleges the following:

a) Around April 2020, representations were made to Revolution (the "Pre-contractual Representations") regarding the opening and capacity of the CLLP Landfill, and a proposed landfill expansion (the "Cheam Landfill

[3] Affidavit # 1 of J. Louis, Exhibit F.

Expansion") which would provide additional capacity to meet Revolution's needs without interruption for at least five years: NOCC at para. 37.

b) In reliance on the Pre-Contractual Representations, Revolution entered into the Supply Agreement: NOCC at para. 40.

c) The Defendants induced Revolution to enter into a five-year Supply Agreement by offering beneficial pricing, terms and the security of guaranteed, uninterrupted, long-term access. These inducements were repeated and the Defendants continued to make false representations to Revolution, upon which Revolution relied to its detriment: NOCC at para. 1.

d) It relied in good faith upon these repeated inducements and representations, all of which turned out to be false. Revolution purchased millions of dollars of equipment to perform its obligations under the Supply Agreement and gave up lucrative opportunities to dispose of C&D Material at other competing landfills. Instead, Revolution delivered its C&D Material to CLLP: NOCC paras. 45–46.

e) Cheam FN, its subsidiaries (including CLLP), affiliates and agents fabricated fictitious breaches of the Supply Agreement, purposely or recklessly mismanaged the initial landfill to frustrate Revolution's rights under the Supply Agreement, and entered into an illegal conspiracy with the other defendants to injure Revolution and gain profit for themselves: NOCC at paras. 5, 50.

f) The Defendants made various post Supply Agreement representations regarding, amongst other things, its relationship with Revolution and other waste disposal companies, capacity at the CLLP Landfill and the Cheam Landfill Expansion: NOCC at paras. 52, 56, 63. These representations were false, and Revolution relied on them to its detriment.

[25] Revolution further alleges that, as part of this improper scheme, the Defendants:[4]

> …laid plans to open the Cheam Landfill Expansion on nearby lands using one or more related and newly-formed entities also owned and controlled by Cheam FN, entered into new supply agreements with other suppliers for the Cheam Landfill Expansion, transferred assets and financial resources into these newly-created entities, and obtained financing to carry out their scheme and to seek to avoid the consequences of their wrongful acts. Again, all of this is alleged to have continued during the very period at issue on CLLP's Counterclaim, and involves an accounting and disgorgement of the wrongful profits and commissions earned by CLLP and other defendants.

[26] The NOCC seeks the following relief:

a) interim, interlocutory and permanent injunctions requiring Cheam FN and the Cheam Affiliates to perform the Supply Agreement and the Access Agreement through to the end of the Term at the Cheam Landfill, the Cheam Landfill Expansion and any additional landfills or cells developed by or on behalf of Cheam FN;

b) declarations that:

   i. Cheam FN and the Cheam Affiliates are barred and estopped from terminating the Supply Agreement on the basis that the Cheam Landfill has. reached its design capacity, or otherwise;

   ii. Cheam FN and the Cheam Affiliates are barred and estopped from denying access to Revolution and its agents to the Cheam Landfill and the Cheam Landfill Expansion through the end of the Term of the Supply Agreement;

   iii. CLLP is the agent of Cheam FN and the other Cheam Affiliates with respect to the Supply Agreement and their dealings with Revolution, and Cheam FN and the Cheam Affiliates are jointly and severally liable to Revolution under the Supply Agreement;

   iv. in the alternative, CLLP is the alter ego of Cheam FN and the other Cheam Affiliates with respect to the Supply Agreement, and Cheam FN and the Cheam Affiliates are jointly and severally liable to Revolution under the Supply Agreement;

   v. Cheam FN and the Cheam Affiliates breached the Supply Agreement;

[4] Written Response Submissions of Revolution at para. 19; NOCC at para. 6.

vi. in the alternative, CLLP breached the Supply Agreement;

vii. Cheam FN, the Cheam Affiliates, Louis, Headlands, Hofer, Soriano, Rocky Point, Pathstone and Boggs, or alternatively some of them, made fraudulent, or alternatively negligent, misrepresentations, and induced Revolution to enter into the Supply Agreement and continue to perform the Supply Agreement;

viii. Cheam FN and the Cheam Affiliates breached their duty of good faith performance of the Supply Agreement and the Access Agreement; and

ix. in the alternative, CLLP breached its duty of good faith performance of the Supply Agreement;

c) further and in the alternative, general and special damages against Cheam FN and the Cheam Affiliates, or alternatively CLLP, for breach of the Supply Agreement;

d) further and in the alternative, general and special damages for the breach by Cheam FN and the Cheam Affiliates, or alternatively CLLP, of their duty of good faith performance of the Supply Agreement;

e) further and in the alternative, general and special damages for the fraudulent, or alternatively negligent, misrepresentations made by Cheam FN, the Cheam Affiliates, Louis, Headlands, Hofer, Soriano, Rocky Point, Pathstone and Boggs, or alternatively some of them;

f) further and in the alternative, general, special and restitutionary damages against the defendants;

g) further and in the alternative, disgorgement of the defendants' unjust enrichment and wrongful gains;

h) further and in the alternative, an accounting of the defendants' profits earned as a result of their wrongful conduct, and judgment for the amount found due on the taking of that accounting;

i) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;

j) special costs pursuant to the *Supreme Court Civil Rules*, or in the alternative, costs; and

k) such further relief as this Honourable Court deems just.

[27] The Counterclaim was filed by CLLP on November 19, 2021. The action is framed in breach of contract. In it, CLLP alleges that on account of the Supply

Agreement, $1,441,131.30 is due and owing by Revolution to CLLP for C&D Material deliveries made in the months of May, June and July 2021.

[28] Revolution filed its initial Response to Counterclaim on December 7, 2021 ("RTCC"). It relied on the facts pleaded in its NOCC. Consistent with the position taken by Revolution in its July 26, 2021 correspondence, Revolution asserted that it was entitled to equitable set-off of any amounts owing to CLLP for the Deliveries, because:

a) Revolution's Claim and CLLP's Counterclaim arise out of the same Supply Agreement;

b) Revolution's Claim and CLLP's Counterclaim arise from the same events and during the same time period; and

c) Revolution's Claim and CLLP's Counterclaim are so clearly connected that it would be manifestly unjust to allow CLLP to proceed to judgment or enforce payment without first adjudicating Revolution's Claim.

[29] Revolution has advanced this same position at this hearing.

[30] On March 28, 2022, CLLP filed this application for summary judgment and summary trial on the Counterclaim.

[31] Revolution filed an Amended Response to Counterclaim on April 8, 2022 ("Amended RTCC"), in which it repeated many of the facts set out in the NOCC. Revolution also raised at para. 47 of the Amended RTCC, what appears to be a further defence to the Counterclaim, of estoppel by representation:

> Revolution reasonably relied on CLLP's representations, and to Revolution's detriment, incurred millions of dollars in expenses to comply with CLLP's requirements. In the circumstances, CLLP is estopped and precluded from enforcing its alleged right under the Supply Agreement to collect amounts owed by Revolution while at the same time disregarding Revolution's corresponding contractual rights.

[32] However, at the hearing of this application, counsel for Revolution did not rely on the estoppel by representation argument as a defence to the Counterclaim. As such, I have only considered the set-off defence that is advanced.

[33] I turn now to the summary judgment application brought by CLLP.

III. SHOULD SUMMARY JUDGMENT BE GRANTED?

[34] The primary relief sought by CLLP in its Notice of Application is an order for summary judgment under Rule 9-6(2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*].

A. Legal Framework

[35] Rule 9-6(2) provides as follows:

> (2) In an action, a person who files an originating pleading in which a claim is made against a person may, after the person against whom the claim is made serves a responding pleading on the claiming party, apply under this rule for judgment against the answering party on all or part of the claim.

[36] The purpose of the summary judgment Rule is to provide a prompt and inexpensive determination of a matter, so that meritless claims or defences are prevented from proceeding to trial: *Balfour v. Tarasenko*, 2016 BCCA 438 at para. 41.

[37] Rule 9-6(5) sets out the powers of the court in a summary judgment application:

> (5) On hearing an application under subrule (2) or (4), the court,
>
> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
>
> (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
>
> (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
>
> (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[38] The test under Rule 9-6 is whether it is clear on the relevant facts and law that there is no genuine issue for trial. The threshold is very high. It is met where the court determines that the opposing party is "bound to lose" or the claim "has no chance of success", should the matter proceed to trial: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48.

[39] In determining a Rule 9-6 application, the court must: (1) assume that the uncontested material facts as plead by the plaintiff are true; (2) refrain from weighing the facts; and (3) view inferences from the facts in a light most favourable to the plaintiff: *Aubichon v. British Columbia (Attorney General),* 2021 BCSC 1183 at para. 21 [*Aubichon*], aff'd *Aubichon v. Grafton*, 2022 BCCA 77 [*Aubichon Appeal Decision*].

[40] Where the court finds that there is no genuine issue to be tried, it must pronounce judgment or dismiss the claim, pursuant to Rule 9-6(5)(a): *Aubichon* at para. 21.

[41] In *Henderson v. Broadhurst*, 2022 BCSC 2235, I noted the following with respect to the burden of proof and the court's role in assessing the evidence on a Rule 9-6 application:

> [13] Where there are disputed facts in the pleadings, the party who seeks either summary judgment or dismissal bears the onus of establishing, through the evidence, that there is "no genuine issue to be tried": *Kerfoot v. Richter*, 2018 BCCA 238 at para. 29.
>
> [14] When assessing the evidence on a Rule 9-6 application, the chambers judge should apply the approach set out in *Canada (Attorney General) v. Lameman,* 2008 SCC 14, *Century Services Inc. v. LeRoy*, 2015 BCCA 120 [*Century Services*], and *McLean v. Law Society of British Columbia*, 2016 BCCA 368 at para. 42.
>
> [15] The *Lameman* approach can be summarized as follows:
>
> a) The defendant who seeks summary dismissal bears the evidentiary burden of showing there is no genuine issue of material fact requiring trial;
>
> b) This requires proof – the defendant cannot rely on mere allegations of the pleadings;
>
> c) If the defendant proves this, the plaintiff must refute or counter the defendant's evidence, or risk summary dismissal;

> d) Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried; and
>
> e) The chambers judge may make inferences of fact based on the undisputed facts before the court, provided the inferences are strongly supported by the facts.
>
> (Lameman at para. 11)

[16] The judge's function on a summary judgment application is limited to determining "whether a bona fide triable issue arises on the material before the court in the context of the applicable law": *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at para. 12, cited with approval in *Kerfoot* at para. 29.

[17] The "material before the court" includes both the pleadings and the affidavit evidence: *Kerfoot* at para. 30.

[18] In considering the evidence, "the court must not weigh it, but is limited to assessing whether it establishes a triable issue": Kerfoot at para. 29. Assuming the uncontested facts are true, a judge must only dismiss an action when they are satisfied that "it is beyond a doubt" that the action will not succeed: *Aubichon Appeal Decision* at para. 27.

[19] The Rule 9-6 procedure "engages evidence but does not assume the character of a summary trial": *Century Services* at para. 32.

[20] In *Beach Estate v. Beach*, 2019 BCCA 277, the Court noted the distinction between Rule 9-5 and Rule 9-6 applications, and the evidentiary considerations that apply at a Rule 9-6 application hearing:

> [48] Rule 9 5 is a challenge on the pleadings. Rule 9 6 is a challenge on a limited review of evidence. A defendant can succeed on a Rule 9 6 application by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case... Such evidence generally is adduced in the form of an affidavit. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed on the Rule 9 6 application... Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect or if the defendant's evidence in support of the Rule 9 6 application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed...
>
> [49] Although an application under Rule 9 6 invokes the court's consideration of evidence, it is not a summary trial.... The judge is not permitted to weigh evidence on a Rule 9 6 application beyond determining whether it is incontrovertible: any further weighing may only be done in a trial...
>
> [citations omitted]

[42] Notably, if the court hearing a Rule 9-6 application needs to weigh and assess the evidence, then the test of 'plain and obvious' or 'beyond a doubt' will not

have been satisfied and the Rule 9-6 application should be dismissed: *Aubichon Appeal Decision* at para. 30, citing *Beach Estate* at para. 67.

B. Positions of the Parties

[43] In bringing this application for summary judgment, CLLP asserts that: [5]

> 5. Revolution has raised no substantive defence to CLLP's [Counterclaim]. Revolution's only answer to the debt claim is to assert an alleged equitable set-off based on allegations of tortious liability and breach of contract.

[44] CLLP further submits that it is "manifestly clear" on the facts that Revolution breached the Supply Agreement and is indebted to CLLP for the full amount of the Counterclaim. In support, it asserts the following:

a) Revolution does not dispute through pleading or evidence, that it breached the Supply Agreement by failing to pay for deliveries in May, June, and July 2021.

b) Revolution has not tendered any evidence to refute CLLP's evidence that Revolution owes CLLP the Debt as a result of its deliveries to the CLLP Landfill in May, June, and July 2021.

c) Revolution's failure to pay for the Deliveries is proven by the uncontroverted evidence of Mr. Louis.

[45] Revolution does not deny that the Deliveries were made to the CLLP Landfill in accordance with the Supply Agreement, that the invoices were delivered, and that the invoices were not paid. However, Revolution submits that it is not required to pay the amount sought in the Counterclaim due its defence of equitable set-off. It is submitted that this defence is sufficient to meet the requirement for a genuine issue to be tried, such that the Rule 9-6 application should be dismissed.

[5] Written Submissions of CLLP at para. 5.

C. Equitable Set-Off

[46] Equitable set-off can be raised where the cross-claim (or main claim, in this case) arises out of the same transaction, or is so closely connected to the other claim that it would be manifestly unjust to allow the other claimant to enforce payment without taking the cross-claim into account: *Surespan Construction Ltd. v. Dawson Recreation & Landscaping*, 2023 BCSC 531 at paras. 25, 38 [*Surespan*].

[47] In *Cam-Net Communications v. Vancouver Telephone Company Limited.,* 1999 BCCA 751 at para. 46, the Court explained that "the doctrine of equitable set-off seeks to…distinguish, on one hand, separable and independent cross-claims from, on the other hand, those which equity and justice cannot countenance separating": cited with approval in *Jamieson v. Loureiro*, 2010 BCCA 52 at para. 37.

[48] In *Cactus Restaurants Ltd. v. Morison*, 2010 BCCA 458 [*Cactus*] the issue on appeal was whether the chambers judge had erred in dismissing an application for an injunction. The injunction application had been dismissed on a finding that the balance of convenience did not favour granting the relief sought because the plaintiffs had not established they would suffer irreparable harm. One of the reasons provided by the chambers judge was that the equitable set-off claimed by the plaintiffs did not apply in the absence of an action being commenced by the opposing party for what is owed for the shares: *Cactus* at para. 4.

[49] Justice Lowry, writing for the Court in *Cactus*, noted that an application for an interim injunction mandates a two-step analysis. In the first step, the court is to determine whether there is a serious question to be tried; in the second step, the court is to determine whether the balance of convenience favours granting the relief sought: *Cactus* at para. 8.

[50] After holding that the equitable right to a set-off should be considered during the first step in the analysis (i.e. whether it raises a serious question to be tried), Justice Lowry explained how equitable set-off can be established:

> [10] .... The elements of an equitable set-off are stated in *Holt v. Telford*, 1987 CanLII 18 (SCC), [1987] 2 S.C.R. 193 at 212 quoting from *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, 1985 CanLII 144 (BC CA), [1985] 6 W.W.R. 14 at 22 (B.C.C.A.):
>
> > 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: …
> >
> > 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: ...
> >
> > 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: …
> >
> > 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: …
> >
> > 5. Unliquidated claims are on the same footing as liquidated claims: …
> >
> > [Some citations omitted.]

[51] The Court of Appeal described equitable set-off as a "substantive right that is held by a debtor that constitutes a charge against a chose in action for [their] debt": *Cactus* at para. 11. The Court went on to cite with approval, the following passage from S.R. Derham's book, *Set-Off*, 2d ed. (Oxford: Clarendon Press, 1996), at 56-58:

> *1.7.4 The substantive nature of equitable set-off*
>
> … However, a characteristic of the form of equitable set-off under discussion which has emerged in recent years is that it operates as a true, or substantive, defence. It may be invoked independently of any order of the court or of arbitrators. It may be set up by a person indebted to another, not merely as a means of preventing that other person from obtaining judgment, but also as an immediate answer to his liability to pay the debt otherwise due. ...

[52] *Cactus* remains good authority, and was relied on by the Court earlier this year in *Surespan*. In *Surespan*, Master Bilawich heard an application to strike a defence of equitable set-off, in which the applicant raised many of the same arguments that are advanced in this case: *Surespan* at paras. 27–31. In dismissing the application, Master Bilawich found that it was not plain and obvious that the defence of equitable set-off was bound to fail: *Surespan* at para. 42.

D. Analysis

[53] Having regard to both the material and applicable authorities before me, I am satisfied that there is a genuine issue for trial with respect to the Counterclaim.

[54] At the outset, I reject CLLP's assertion that Revolution brought the set-off defence in an effort to delay the proceeding. It is clear from the material that the set-off defence was advanced on July 26, 2021 – several months before litigation had commenced.

[55] I also disagree that the set-off defence raised by Revolution is not substantive. It is well established in law – and supported by the circumstances of this case – that equitable set-off is a true and substantive defence to the Counterclaim.

[56] Further, the following principle articulated by I.C.F Spry in *The Principles of Equitable Remedies*, 9th ed. (Again court, Ontario: Carswell) at 182, operates in this case to prevent CLLP from realizing on debt claim until such time as Revolution's Claim is determined:

> So if conduct of the plaintiff is such as to induce the defendant to incur an obligation in favour of the plaintiff, and the conduct itself is fraudulent, negligent or otherwise wrongful so as to give a cause of action to the defendant, the plaintiff is not ordinarily permitted to proceed until he has made good the material claims of the defendant.

[57] In this case, Revolution has alleged that the Supply Agreement which resulted in the debt obligation requiring payment for the Deliveries, was induced by fraud, negligence, or other wrongful conduct by CLLP and/or its co-defendants. Consequently, CLLP should not be entitled to proceed to judgment until Revolution's Claim is determined.

[58] In my view, Revolution has plead all of the necessary elements for the defence of equitable set-off.

[59] I find no difficulty in concluding that the set-off claimed goes to the "very root" of CLLP's Counterclaim. The Counterclaim arises from the same Supply Agreement

and commercial relationship at issue in Revolution's Claim. The two claims spring from the same place and have a common root.

[60] In the Counterclaim, CLLP seeks judgment for breach of the Supply Agreement arising from non-payment for the Deliveries. Revolution has asserted that it was induced through fraud, negligence, or other wrongful conduct by CLLP and others, to enter into the Supply Agreement and make the Deliveries.

[61] CLLP has taken great pains to try to separate its Counterclaim from the Claim advanced by Revolution. By trying to circumscribe the factual matrix that underlies the Notice ending the Supply Agreement, and the Deliveries made which have not been paid for, CLLP attempts to carve out its Counterclaim from the Claim. However, the Counterclaim cannot simply be addressed as a breach of contract claim in isolation – to do justice between the parties it must be considered within the broader context of the matters raised in the Claim.

[62] The allegations made by Revolution are serious and wide-reaching; they go to the heart of the contractual relationship that binds the parties. If Revolution is successful in its claim, CLLP may be required to account for and disgorge the wrongful profits that it earned as a result of fraudulent misrepresentations inducing those deliveries. It remains to be determined if the Counterclaim asserted by CLLP includes any wrongful profits or commissions that ought to be accounted for and disgorged.

[63] I agree with Revolution that it would be contrary to the interests of justice for the Court to order Revolution to pay the amount asserted by CLLP only to later find that CLLP should disgorge some or all of the amount earlier-ordered. It is for precisely this reason that the defence of equitable set-off is made available.

[64] In advancing its argument that there is no defence to the Counterclaim, CLLP relies in part on the affidavits of Mr. Louis, defendant and former director of CLLP. In his first affidavit, Mr. Louis sets out the factual foundation for the breach of contract

claim. In his second affidavit, Mr. Louis challenges some of the evidence of Mr. McRae, the Chairman and CEO of Revolution, in the following manner:

> 3. Many of the statements in the McRae Affidavits are incorrect or inaccurate. This affidavit does not attempt to correct all incorrect or inaccurate statements in the McRae Affidavits.

[65] Presumably, Mr. Louis' affidavit is meant to address only those factual discrepancies which have direct relevance to the summary judgment application. The "inaccuracies" which Mr. Louis refers to in relation to Mr. McRae's evidence, relate to: some communications between he and Mr. McRae around the time of the alleged Pre-contractual Representations; further communications that were had in October 2020; and a meeting on January 19, 2021, the day after the Notice was given. The end result is that Mr. Louis' evidence establishes only that there exists material conflicts in the evidence, which also make this unsuitable for summary judgment.

[66] Missing from Mr. Louis' affidavit material is any attempt to address the facts asserted by Mr. McRae which support the equitable ground raised to protect against CLLP's demands. Mr. McRae provides uncontroverted evidence regarding events and communications between the parties after the Notice was given in January 2021, to when the July 23, 2021 letter was sent by CLLP advising that no further C&D Material would be accepted into the CLLP Landfill. That evidence supports the clear connection between the Counterclaim and the Claim, such that it would be "manifestly unjust" to allow CLLP to realize on its Counterclaim without the Claim being taken into consideration.

[67] As noted elsewhere, the party seeking summary dismissal bears the evidentiary burden of showing there is no genuine issue of material fact requiring trial. CLLP has failed to meet its burden.

[68] Consequently, the Rule 9-6 application is dismissed.

IV. IS THIS MATTER SUITABLE FOR A SUMMARY TRIAL?

[69] The alternative relief sought by CLLP is an order for judgment by summary trial under Rule 9-7.

[70] Rule 9-7 permits the court to grant judgment in favour of any party, either on an issue or generally, unless it determines that it is not appropriate to do so. The relevant factors when considering suitability for summary trial, are set out by the court in *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 28–31.

[71] Rule 9-7(15) sets out the applicable considerations to determine the appropriateness of granting judgment in a summary trial:

> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application….

[72] There are two aspects to the test under Rule 9-7. First, the court must be able to find the facts necessary to decide the issues of fact or law; second, the court must be of the opinion that it would not be unjust to decide the issues: *Brissette v. Cactus Club Cabaret Ltd.,* 2017 BCCA 200 at para. 26; see also *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989),* 36 BCLR (2d) 202, 1989 CanLII 229 (B.C.C.A.).

[73] The decision to proceed summarily is a discretionary one for the trial judge. Our courts have held the following considerations as being relevant in determining suitability for summary trial:

1. the amount involved;
2. the complexity of the matter;
3. its urgency, and prejudice likely to arise by reason of delay;

4. the cost of taking the case forward to a conventional trial in relation to the amount involved;

5. the course of the proceedings;

6. such as whether credibility is a critical factor in determination of the dispute; and

7. whether the application would result in "litigating in slices".

(see *Inspiration Management Ltd.* and *Dahl et al. v. Royal Bank of Canada et al*., 2005 BCSC 1263 at para. 12, aff'd 2006 BCCA 369).

[74] Application of the above factors leads me to conclude that the Counterclaim is not suitable for summary trial. Rather it should be remitted to the trial list to be heard at the same time as the Claim. My reasons are as follows.

[75] First, the amount involved in the Counterclaim is substantial. The total amount claimed exceeds $1.4 million. Second, the defence of equitable set-off adds complexity to the matter, taking it well beyond a "simple" debt claim. Third, there is no urgency or prejudice to CLLP that would require the Counterclaim to be determined in advance of the Claim. Indeed, the evidence suggests that it is Revolution that would be severely prejudiced if the Counterclaim is determined in advance of the Claim. In his first affidavit Mr. McRae raised concerns at paras. 58–62, and 65, about the challenges that Revolution may face in collecting on any judgment should it be successful in its Claim. These are based on the complex legal structure and relationship between Cheam FN and the Cheam Affiliates, as well as the 2021 audited consolidated financial statement of Cheam FN indicating that it had approximately $4 million in liquid cash. In contrast, the damages sought in the Claim approximate $75 million. CLLP has provided no evidence to allay those concerns.

[76] I turn now to the fourth factor. I have no evidence from the parties as to their respective time estimates for a conventional trial of the Counterclaim, whether it is heard with or separately from the Claim. However, based on the pleadings and evidence, and given the amount of money involved, I find this factor to also weigh in favour of remitting the Counterclaim to the trial list. There is no dispute that the parties will have to go to trial on the Claim. There is no real financial advantage to

determining the Counterclaim in isolation, particularly given the close relationship between the Claim and Counterclaim and what will no doubt be overlaps in the evidence.

[77] Regarding the fifth factor, this matter is still in its infancy from a litigation perspective: document discovery is still ongoing; examinations for discovery have not yet been held; and trial dates have not been set.

[78] The sixth factor also weighs in favour of remitting this matter to the trial list. As noted elsewhere, there are material conflicts in the affidavit evidence which can only be addressed upon making findings of credibility, particularly in relation to the equitable set-off defence. Further, the evidence before me is deficient. Mr. Louis' broad statement challenging Mr. McRae's evidence, while failing to address specific portions of the evidence relied on by Revolution to support the equitable set-off defence, prevents this Court from making the findings of fact necessary to address the Counterclaim.

[79] I also am of the view that determining the Counterclaim is akin to litigating in slices, given the close factual nexus between the Claim, Counterclaim, and the defence of equitable set-off.

[80] Having regard to all of the evidence before me, I conclude that it is not possible to make the findings of fact necessary to determine this case. Further, I find that it would be unjust to pronounce judgment on CLLP's counterclaim by summary trial, for the reasons indicated.

[81] The Rule 9-7 application is dismissed, and the Counterclaim is remitted to the trial list, to be heard at the same time as the Claim.

V. COSTS

[82] In the event that the parties are unable to settle the question of costs of this application, they may seek leave from the Court to file written submissions.

"Shergill J."