IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Surespan Construction Ltd. v. Dawson Recreation & Landscaping,* 2023 BCSC 531

Date: 20230405
Docket: S224093
Registry: Vancouver

Between:

Surespan Construction Ltd.

Plaintiff

And

Dawson Recreation & Landscaping dba DRL Ltd., Robert Joseph Brant Leer, Jason Dashney dba Epik Energy and Renewables, Epik Energy and Renewables Ltd., 216 Heavy Haul Ltd. and ABC Company Ltd.

Defendants

- and -

Docket: S02623
Registry: Abbotsford

Between:

216 Heavy Haul Ltd.

Plaintiff

And

Surespan Construction Ltd.

Defendant

Before: Master Bilawich

Reasons for Judgment

Counsel for the Plaintiff in Vancouver Action No. S224093 and the Defendant in Abbotsford Action No. S02623: S. Stephens

Counsel for the Defendant 216 Heavy Haul Ltd. in Vancouver Action No. S224093 and the Plaintiff in Abbotsford Action No. S02623:	W.R. Neufeld
No other appearances.	
Place and Date of Hearing:	Vancouver, B.C. March 21, 2023
Place and Date of Judgment:	Vancouver, B.C. April 5, 2023

Introduction

[1] On May 20, 2022, Surespan Construction Ltd. (“Surespan”) started Vancouver Action S224093 (the “Vancouver Action”) in which it alleges a former consultant misappropriated its confidential information and conspired with the other defendants, including 216 Heavy Haul Ltd. (“Heavy Haul”), to use it to unlawfully compete with Surespan’s business. On June 1, 2022, Heavy Haul filed a response to civil claim.

[2] On July 18, 2022, Heavy Haul started the Abbotsford Action S02623 (the “Abbotsford Action”) in which it claims amounts owing on invoices rendered to Surespan for provision of operators and machinery, including cranes, for several projects. The amount claimed is $495,589.61 plus interest. On August 2, 2022, Surespan filed a response to civil claim disputing the amount claimed, repeating allegations made in the Vancouver Action and claiming the equitable right to set-off any damages it is entitled to in the Vancouver Action against any amount it may be found to owe Heavy Haul in the Abbotsford Action. Surespan says that its claim for damages significantly exceeds any debt alleged by Heavy Haul.

[3] An application in each of the actions came before me essentially as cross-applications. In the Vancouver Action, Surespan applies to consolidate the Vancouver and Abbotsford Actions, or alternatively have them tried at the same time. In the Abbotsford Action, Heavy Haul applies to strike out the portions of Surespan’s response to civil claim which plead the defence of equitable set-off.

[4] At the start of the hearing, counsel advised they had agreed the outcome of Heavy Haul’s application to strike would be determinative of Surespan’s application to consolidate the two actions. If the application to strike is granted, consolidation is no longer appropriate. If the application to strike is dismissed, they agree consolidation of the actions or trial at the same time is appropriate.

Background

[5] In January 2016, Surespan and the defendant DRL Ltd. (“DRL”), through the latter’s principal Mr. Leer, entered into a Consultant Agreement, under which DRL agreed to provide consulting services to Surespan. The agreement included non-solicitation and confidentiality clauses. The parties also entered into a separate confidentiality agreement which had similar provisions. Surespan supplied DRL with a cellular phone and a company laptop.

[6] Surespan says in or about November 2020, it originated and developed a specialized business involving the design, fabrication, supply, installation and removal of temporary sheet piling in support of pipeline construction and related activities. It obtained several substantial contracts for this and had made substantial investments in materials and equipment. This was a lucrative niche market and it initially had a dominant position.

[7] Surespan says DRL and Mr. Leer had limited involvement in its pipeline sheet piling work over the term of the Consultant Agreement and no material involvement in any sheet piling work in the months leading up to the relevant events.

[8] Heavy Haul was a supplier to Surespan, including for its sheet piling work. It had not sought or performed sheet piling work of its own. Its business was limited to transport of heavy equipment and provision of operated crane services.

[9] On March 9, 2022, DRL terminated the Consultant Agreement. DRL and Mr. Leer had not been materially involved in any active projects for Surespan between December 23, 2021 and the termination date. Surespan asked DRL to return all of its equipment and materials. The laptop was returned with the contents of its hard drive deleted and the cellular phone’s memory had been wiped. Surespan retained a forensic consultant to analyze them, who concluded that an external hard drive had been used to save files from the laptop prior to the termination date.

[10] Surespan alleges Mr. Leer downloaded confidential and proprietary files from Surespan’s server to the laptop and then saved them to an external hard drive, in

breach of the confidentiality provisions in the Consultant Agreement and Confidentiality Agreement. This included detailed information regarding its sheet piling contracts, including invoices from third-party suppliers, progress invoices setting out details of labour, equipment and materials used and charged, mark-up on third party costs, project management and coordination charges, and the like.

[11] Surespan says the forensic analysis also revealed that Mr. Leer had stored documents relating to the submission of proposals for sheet piling work on behalf of Heavy Haul. Prior to terminating the Consultant Agreement, Mr. Leer had prepared quotations for sheet piling work on behalf of Heavy Haul.

[12] Investigations also indicated that in February and March 2022, Mr. Leer had forwarded emails which contained or attached Surespan bid documents for sheet piling work on at least four projects from his Surepsan account to his personal account.

[13] Surespan says cellular phone records indicate that in the months prior to the termination date, Mr. Leer was in frequent contact with principals of Heavy Haul. He also used a Heavy Haul email address to communicate with a Surespan client on behalf of a competitor regarding work Surespan was bidding on.

[14] In the Vancouver Action, Surespan alleges that Heavy Haul knowingly participated in breaches of confidence committed by DRL and Mr. Leer, that it induced them to breach the Consultant Agreement, interfered with Surespan's economic and contractual relations, that it used Surespan's confidential information to unlawfully and unfairly compete against Surespan for sheet piling work for pipeline construction, that they all acted in concert and engaged in a conspiracy against Surespan and that the foregoing caused Surespan loss and damage.

[15] On June 1, 2022, Justice Brongers granted Surespan an interim injunction against Heavy Haul enjoining it from directly or indirectly using Surespan's confidential information, and related relief. In making that order, Surespan says Justice Brongers necessarily determined that its claims were *prima facie* meritorious.

[16] Heavy Haul subsequently opted to start the Abbotsford Action to pursue payment of unpaid invoices rather than making a counterclaim in the Vancouver Action.

Applicable Law

Application to Strike Portions of Response to Civil Claim

[17] Heavy Haul's application to strike indicates that it is made pursuant to R. 9-5(1)(b), (c) and (d) of the *Supreme Court Civil Rules* ("*SCCR*"). During argument, one of Heavy Haul's submissions was to the effect that the defence of equitable set-off was not available in the circumstances, which appears to rely on sub-rule (a), so I will include it here.

> **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.

[18] Sub-rule (2) provides that no evidence is admissible on an application under sub-rule (1)(a). The court assumes that the facts alleged are true. Evidence is admissible under the other sub-rules.

Rule 9-5(1)(a) – Discloses No Reasonable Claim or Defence

[19] The Supreme Court of Canada summarized the approach taken under sub-rule (a) in *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 ["*Nevsun*"] at paras. 64 and 66:

> [64] A pleading will only be struck for disclosing no reasonable claim under rule 9-5(1)(a) if it is "plain and obvious" that the claim has no reasonable prospect of success (*R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45,

> at para. 17; *Odhavji Estate v. Woodhouse*, [2003] S.C.R. 263, at paras. 14-15). When considering an application to strike under this provision, the facts as pleaded are assumed to be true "unless they are manifestly incapable of being proven" (*Imperial Tobacco*, at para. 22, citing *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 455).
>
> …
>
> [66] This Court admonished in *Imperial Tobacco* that the motion to strike
>
> > is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed... . Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [para. 21]

Rule 9-5(1)(b) - Unnecessary, Scandalous, Frivolous or Vexatious

[20] In *Willow v. Chong*, 2013 BCSC 1083 [“*Willow*”] at para. 20, Justice Fisher summarized sub-rule (b):

> [20] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. An application under this sub-rule may be supported by evidence.

[21] This is approved in *Nevsun* at para. 65.

[22] Justice Romilly summarized principles applicable to sub-rules (b) and (c) in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (S.C.) at para. 47:

> **47** Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: …. An "embarrassing" and "scandalous" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: …. An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: …. A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: …. A pleading

> that is superfluous will not be struck out if it is not necessarily unnecessary or otherwise objectionable: …. A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: ….
>
> [Citations omitted.]

Rule 9-5(1)(c) - May Prejudice, Embarrass or Delay the Fair Trial or Hearing of the Proceeding

[23] In *Canadian Federation of Students v. Simon Fraser Student Society*, 2010 BCSC 1816 at paras. 40-41, Justice Grauer, as he then was, summarized as follows:

> [40] Rule 9-5(1)(c) and (d) involve a number of considerations. These include whether the pleadings are unintelligible, confusing and difficult to understand, whether they are so irrelevant ("embarrassing" and "scandalous") that they will involve the parties in useless expense and prejudice the trial by involving them in a dispute that strays far from the issues, and whether they do not advance any defence known to law ("unnecessary" or "vexatious"). See, for instance, *Moulton Contracting Ltd. v. British Columbia*, 2010 BCSC 506, and the cases cited therein by Hinkson J., as he then was. These considerations also encompass a pleading that is made for an improper purpose, such as to harass and oppress the other parties, as opposed to raising a *bona fide* defence.

Rule 9-5(1)(d) - Otherwise an Abuse of the Process of the Court

[24] Abuse of process is summarized in *Willow* at para 21:

> [21] Abuse of process under Rule 9-5(1)(d) or the court's inherent discretion is a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice. A claim may be struck where it is a collateral attack on an administrative decision that is subject to appeal or judicial review: …. A claim may also be struck as an abuse of process where it is an attempt to re-litigate an issue that has already been decided: …
>
> [Citations omitted.]

Equitable Set-Off

[25] In *Holt v. Telford*, [1987] 2 S.C.R. 193 [“*Holt*”] at para. 33, the court cited the elements of equitable set-off, as set out in *Coba Industries Ltd. v. Millie’s Holdings (Canada) Ltd.*, [1985] B.C.J. No. 1994, 20 D.L.R. (4th) 689 (C.A.) [“*Coba*”] at para. 23:

> 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 …
>
> [Citations omitted.]

[26] In *Cactus Restaurants Ltd. v. Morison*, 2010 BCCA 458 at para. 11, the court of appeal noted that equitable set-off is a substantive right:

> [11] … An equitable set-off, as distinct from a procedural set-off, is a substantive right held by a debtor that constitutes a charge against a chose in action for his debt. … In his text, *Set-Off*, 2d ed. (Oxford: Clarendon Press, 1996), S.R. Derham discusses equitable set-off proceeding from the following distinction at 56-58:
>
> > *1.7.4 The substantive nature of equitable set-off*
> >
> > We saw earlier that the right of set-off derived from the Statutes of Set-off takes effect only as a procedural defence. By this it is meant that separate and distinct debts remain in existence until judgment for a set-off, and, moreover, the defence has no effect until judgment. Prior to judgment the rights consequent upon being a creditor still attach, as do the obligations and liabilities consequent upon being a debtor. A similar analysis should apply when equity acts by analogy with the Statutes. <u>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</u>. ...
> >
> > Notwithstanding some judicial statements suggesting the contrary, the view that the defence is substantive does not mean that it operates as an automatic extinction of the cross-demands. <u>A proper statement of the principle is that, if there is an entitlement to an equitable set-off, the creditor *as a matter of equity* is not entitled to treat the debtor as being indebted to him to the extent of the debtor's own claims against him.</u> The cross-demands as a matter of law remain in existence between the parties until extinguished by judgment or agreement, though, as far as equity is concerned, it is unconscionable for the creditor even before then to regard the debtor as being in default to the extent of the cross-demand if circumstances exist which support

> an equitable set-off. A court of equity will protect the debtor's position by way of injunction, and it may also be the subject of a declaration.

[Emphasis added.]

Heavy Haul's Position

[27] Heavy Haul argues the Abbotsford Action involves a simple debt claim. Surespan's response is a simple denial plus a defence of set-off base on the allegations previously made in the Vancouver Action. It objects to having the debt claim tied to a complex civil conspiracy claim which involves six defendants. This would mean having a longer trial, coordinating the schedules of seven counsel rather than two, examinations for discovery of more parties taking place, and involving five defendants in a debt claim they had no interest in.

[28] Heavy Haul says that at no time prior to filing pleadings had Surespan indicated it was unhappy with the services it had provided relating to the unpaid invoices.

[29] Counsel argues Surespan's claim in the Vancouver Action does not qualify as either a liquidated or unliquidated claim. Surespan does not allege it lost any specific sheet piling contracts to the defendants. Surespan's claim involves speculations regarding potential future damages. Any prospective loss has effectively been "cauterized" by the unopposed interim injunction granted in the Vancouver Action.

[30] Counsel says the conspiracy claim is separate from the debt claim. Events relating to the debt played no role in the alleged conspiracy. Surespan's claim does not go to the very root of Heavy Haul's claim.

[31] Finally, counsel argues even if Surespan's set-off defence is struck out, it still has the option of applying for a stay of execution on any judgment Heavy Haul obtains in the Abbotsford Action, pending determination of the Vancouver Action.

Surespan's Position

[32] Surespan argues that it has pled all of the necessary elements for a substantive defence of equitable set-off, or at the very least it has an arguable defence if the court views this as being a novel application of equitable set-off.

[33] Surespan argues that Heavy Haul created a multiplicity of proceedings by bringing its debt claim in a separate action rather than via a counterclaim in the Vancouver Action. Its application for consolidation or trial at the same time seeks to address this.

Analysis

[34] Some of Heavy Haul's arguments focus on factors which are arguably more appropriately addressed in relation to the application for consolidation of the actions rather than the application to strike. The need for more trial days, more parties and counsel involved are examples. Counsel did not clearly link those factors to any particular sub-rule under R. 9-5(1).

[35] The primary issue is whether it is plain and obvious that Surespan's equitable set-off defence has no reasonable prospect of success. Heavy Haul's argument largely focused on whether Surespan has properly pled all elements necessary for equitable set-off. This appears to raise considerations under sub-rule (1)(a). Sub-rule (2) provides that no evidence is admissible on an application under sub-rule (1)(a). I am to assume that the facts pled in the impugned paragraphs of Surespan's response to civil claim are true.

[36] In summary, they set out Surespan's agreements with DRL / Mr. Leer and the latter's termination of the Consultant Agreement. It describes Heavy Haul's role as sub-contractor to Surespan, including in relation to the latter's sheet piling work. DRL / Mr. Leer were introduced to Heavy Haul in the course of that relationship. It is alleged that Heavy Haul had not sought out or obtained sheet piling work for itself prior to it connecting to DRL / Mr. Leer. It is alleged that Heavy Haul induced DRL / Mr. Leer to breach their obligations to Surespan and misappropriate its confidential

and proprietary information so it could be used for Heavy Haul's benefit. It alleges Mr. Leer used the misappropriated information to prepare multiple bids for sheet piling work for Heavy Haul. Claims for breach of confidence, inducing breach of contract, unlawful interference with contractual and economic relations and civil conspiracy are pled.

[37] Looking to the elements set out in *Holt* and *Coba*, I am satisfied that Surespan has pled equitable grounds for being protected against Heavy Haul's debt claim. It has alleged relationships among itself, DRL/ Mr. Leer and Heavy Haul which establish a connection between the two claims. It would not be equitable to require Surespan to pay Heavy Haul for its sub-contractor services if Heavy Haul was taking improper advantage of that relationship to conspire to misappropriate Surespan's confidential and proprietary information and use it to improperly compete with it.

[38] One of the authorities that Surespan referred to in argument is *Canada Southern Railway Co. v. Michigan Central Railroad Co.* (1983), 45 O.R. (2d) 257, 6 D.L.R. (4th) 324, in which Justice Osler noted the need for a generous approach to defining circumstances in which equitable set-off will be applied:

> In numerous cases, we are cautioned against defining too closely the circumstances in which the equitable doctrine will be applied. The one requirement that would appear to be necessary is that the opposing claims should flow from the same transaction or relationship between the parties. For example, in Government of Newfoundland v. Newfoundland R. Co. et al. (1888), 13 App. Cas. 199, a case in which claims flowed from a contract not carried out, it was said to be essential that the claims should be "flowing out of and inseparably connected with [his] previous dealings and transactions with the firm" [p. 213]. …
>
> …
>
> In Spry, The Principles of Equitable Remedies, 2nd ed. (1980), the principle is described, at p. 168, in the following terms:
>
> > To decide that there is an equitable set-off is to decide that, on grounds which are considered hereafter, it would be unjust and unreasonable to order the specific enforcement of a particular obligation without lessening or reducing it by reference to a related obligation of the plaintiff to the defendant or making specific enforcement conditional upon performance of that related obligation.
>
> And, at pp. 170-1:

> What generally must be established is such a relationship between the respective claims of the parties that the claim of the defendant has been brought about by, or has been contributed to by, or is otherwise so bound up with, the rights which are relied upon by the plaintiff that it would be unconscionable that he should proceed without allowing a set-off.

[39] While Surespan's equitable set-off defence did not arise from the specific invoiced services involved in Heavy Haul's debt claim, it does arise from the same relationship between Surespan, DRL / Mr. Leer and Heavy Haul.

[40] Counsel for Heavy Haul also argues that Surespan's claim is wholly prospective because it had suffered no actual damage up to the date of filing pleadings due to not having lost a specific contract to Heavy Haul. It says Surespan's claim is thus neither liquidated nor unliquidated. This appears to relate to the fifth element listed in *Coba*, that unliquidated claims are on the same footing as liquidated claims.

[41] Heavy Haul asks the court to conclude that Surespan has not suffered any damage. That would not be appropriate at this stage. I note that at Part 1, Division 2, para. 47, Surespan pleads that it has suffered loss and damage, including loss of direct awards and tender awards for private and public work, loss of opportunity, reduced margins on awards, loss of return on capital investments and loss of goodwill and reputational damage. Those appear to describe unliquidated claims.

[42] Surespan has pled an arguable equitable set-off defence. It is not plain and obvious that this defence has no reasonable prospect of success or is bound to fail. I am also not persuaded that Heavy Haul has made out a basis for striking the impugned paragraphs under any of sub-rules (1)(b), (c) or (d). Heavy Haul's application to strike is dismissed.

[43] As noted, counsel agreed the outcome of Heavy Haul's application would be determinative of Surespan's application to consolidate the two actions. Counsel did not address the merits of consolidation versus trial at the same time in argument. Having reviewed the issues raised in both actions, I am satisfied that it is appropriate

that the Vancouver Action and Abbotsford Action be tried at the same time, by the same judge.

Conclusion

[44] Heavy Haul's application to strike out portions of Surespan's response to civil claim in the Abbotsford Action is dismissed.

[45] By consent:

a) Surespan's application to have the trials of the Vancouver Action and Abbotsford Action heard at the same time and by the same judge is granted;

b) Documents produced and examinations for discovery conducted in each of the actions may be used in either action and the evidence elicited at trial shall stand as evidence in both actions, subject to the directions of the trial judge.

[46] The place of trial for the combined trial will be Vancouver, BC.

[47] Surespan is entitled to costs of the applications from Heavy Haul.

"Master Bilawich"