COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cascade Aerospace Inc. v. Viking Air Limited,* 2024 BCCA 256

Date: 20240703
Docket: CA49933

Between:

Cascade Aerospace Inc.

Appellant
(Defendant)

And

Viking Air Limited

Respondent
(Plaintiff)

Before: The Honourable Justice Skolrood
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated May 15, 2024 (*Viking Air Limited v. Cascade Aerospace Inc.*, 2024 BCSC 841, Vancouver Docket S236674).

Oral Reasons for Judgment

Counsel for the Appellant:	A.J. Winton L.R. Brusven
Counsel for the Respondent:	J.R. Buysen K. Campbell
Place and Date of Hearing:	Vancouver, British Columbia July 3, 2024
Place and Date of Judgment:	Vancouver, British Columbia July 3, 2024

Summary:

The applicant seeks leave to appeal an interlocutory order issued pursuant to Rule 10-1(4) of the Supreme Court Civil Rules requiring it to return an aircraft and associated records in its possession to the respondent. If leave is granted, the applicant seeks a stay of the order pending appeal.

Held: Leave to appeal is granted, but the application for a stay pending appeal is dismissed. The applicant's proposed appeal raises several issues. In particular, the issue of the correct legal test that is applicable on an application under Rule 10-1(4) has merit and is of significance to the practice. It would be in the interests of justice to grant leave and to hear the appeal on an expedited basis. However, the applicant has not demonstrated it will suffer irreparable harm if the stay is refused or that the balance of convenience favours granting a stay. The return of the aircraft is not dispositive of the underlying action and the respondent is already subject to an order to post security. It would not be in the interests of justice to order a stay.

SKOLROOD J.A.:

Nature of the applications

[1] The applicant, Cascade Aerospace Inc. (“Cascade”), seeks leave to appeal an interlocutory order, issued pursuant to Rule 10-1(4) of the *Supreme Court Civil Rules*, BC Reg. 168/2009, requiring it to return an aircraft and associated records in its possession to the respondent, Viking Air Limited (“Viking”). If leave is granted, Cascade seeks a stay of the order pending appeal. Cascade further proposes the appeal be heard on an expedited basis if leave is granted.

[2] Viking opposes both of the applications.

[3] For the reasons that follow, I would grant leave to appeal but dismiss the application for a stay.

Background

[4] The facts underlying this dispute are complex and are reviewed in detail in the reasons for judgment of the Chambers judge. I will briefly summarize the facts that are relevant to this application.

[5] Viking is a company that operates as part of a larger group of aviation companies. Viking manufactures, supports and sells various aircraft and aircraft parts and systems, including the CL-215, CL-215T and CL-415 models used to combat forest fires (the “Waterbomber Aircraft”).

[6] Cascade is a company that provides specialized aviation engineering and aircraft maintenance and upgrade services.

[7] In 2019, Viking launched an avionics upgrade program (“AUP”) to modernize the avionics systems in its Waterbomber Aircraft. For this AUP, Viking retained two main contractors, Cascade and Rockwell Collins. Rockwell Collins, who is not a party to this matter, supplied technology to be installed in Viking’s Waterbomber Aircraft.

[8] In April 2019, Viking and Cascade entered into a fixed-price multi-year agreement (the "Integration Agreement") pursuant to which Cascade was responsible for integrating Rockwell Collins' technology into the Waterbomber Aircraft.

[9] Pursuant to the Integration Agreement, Viking delivered to Cascade a prototype CL-415 aircraft in October 2019 and a prototype CL-215T aircraft in June 2022, along with each of their associated records and components, which are necessary to operate the aircraft.

[10] Work under the Integration Agreement did not proceed as expected. The underlying dispute centers around Cascade's allegation that Viking failed to deliver a certifiable avionics system. Cascade blames Rockwell Collins for providing technology that does not meet certain technical requirements and that requires testing that is outside the scope of the Integration Agreement. Issues around the AUP remain unresolved.

[11] In July 2023, while the parties were discussing the potential termination of the Integration Agreement, Viking asked Cascade to return the CL-415 and also expressed its wish to have the CL-215T returned as well. Cascade returned the CL-415, but in September 2023, Cascade told Viking that it would not release the CL-215T while the parties' dispute was ongoing.

[12] Viking then commenced the underlying action advancing a claim for the tort of detinue. It alleges that Cascade failed to perform the integration services and to follow the timelines described in the Integration Agreement. Viking has not formally terminated the Integration Agreement yet. At the same time, Viking also applied under Rule 10-1(4) of the *Supreme Court Civil Rules* and s. 57(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 for the return of the CL-215T and its associated records.

[13] Cascade counterclaimed against Viking seeking specific performance of the Integration Agreement or the termination fee, which is about US$26 million. Cascade

also claims it delivered several invoices to Viking related to work on the Waterbomber Aircraft that remain outstanding and which total US$1,845,000.

The Injunction Order

[14] Vikings's application was heard by Justice MacNaughton on January 10–11, 2024. On May 15, 2024, the judge ordered the return of the CL-215T and that Viking post US$1,845,000 as security for its return, the sum of the value of Cascade's outstanding invoices: *Viking Air Limited v. Cascade Aerospace Inc*., 2024 BCSC 841 (the "Injunction Order").

[15] The judge observed Viking does not intend to preserve the CL-215T prior to trial as it intends to transfer it to its customer, the Kingdom of Morocco, sometime in 2024: para. 79. The judge found the case of *Midland Walwyn Capital Inc. v. Global Securities Corp*., [1997] B.C.J. No. 2541, 1997 CanLII 1736 (S.C.) is the leading authority on the applicable test under Rule 10-1(4) for the interim return of property: para. 72.

[16] The judge declined to follow the four-part test set out in *Terastream Networks Inc. v. Grossholz*, 2018 BCSC 837, as she found it did not consider earlier authorities such as *Midland* and instead applied the test for a preservation order under Rule 10-1(1): para. 98. The judge found the correct test under Rule 10-1(4) was the three-part test for an interlocutory injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117, [1994] 1 S.C.R. 311. The judge found Viking met this test.

[17] Cascade seeks leave to appeal the judge's order. In the interim, Viking has consented to a stay of the order pending the hearing of this application.

Positions of the parties

[18] Cascade submits the judge failed to apply a line of cases, including *Terastream*, that require evidence of risk of disposition of the disputed property in order to grant injunctive relief. It submits the judge's omission of this factor in her analysis creates inconsistency in the Rule 10-1 framework. Had the judge

considered this factor, Cascade submits she would not have made the order she did. Cascade further submits the judge erred by applying an incorrect legal standard for establishing irreparable harm. Again, Cascade seeks a stay as it submits its appeal would be rendered moot if a stay is not otherwise granted.

[19] Viking submits that Cascade is overstating the nature of the conflicting jurisprudence on the applicable test under Rule 10-1(4). Its main position on the leave to appeal application is that the tests under Rule 10-1(4) and for irreparable harm are well-settled and therefore the appeal lacks merit. Viking says that the judge was correct to reject the *Terastream* analysis which it submits was not a considered decision given that the judge there was not referred to *Midland* and other similar authorities. Viking also submits that the return of the CL-215T is not dispositive of the action and that Cascade is fully secured given the judge's order to post security. Viking objects to a stay on this basis as well.

Leave to appeal

[20] The Injunction Order was made pursuant to Rule 10 of the *Supreme Court Civil Rules* and therefore requires leave to appeal: Rule 11 of the *Court of Appeal Rules*, B.C. Reg. 120/2022.

[21] The test to determine whether leave to appeal should be granted was summarized in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10. The criteria are:

1) whether the point on appeal is of significance to the practice;
2) whether the point raised is of significance to the action itself;
3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
4) whether the appeal will unduly hinder the progress of the action.

[22] The overarching concern is the interests of justice: *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538 at para. 2.

Is the appeal *prima facie* meritorious?

[23] I will first address the merits of the proposed appeal.

[24] Cascade identifies the three issues it would raise if granted leave to appeal:

a) Did the Application Judge err by failing to apply the appropriate test on an application under Rule 10-1(4) and section 57(1) of the Act?

b) Did the Application Judge err by adopting an incorrect standard for irreparable harm on an application for an interlocutory injunction?

c) Did the Application Judge err in principle by misapprehending the evidence before the court on the issue of irreparable harm?

[25] A decision to grant interlocutory relief is discretionary and the judge is entitled to deference: *Yu v. 16 Pet Food & Supplies Inc*., 2023 BCCA 397 at para. 24. Leave to appeal will rarely be granted from discretionary orders: *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, 1998 CanLII 6439 (C.A.) at para. 12.

[26] However, Cascade's proposed appeal mainly engages questions of law, particularly as it relates to the proper test to be applied under Rule 10-1(4). Where an appeal of an injunction alleges errors of law, the standard of review is correctness: *Yu* at para. 25. Where a judge misapprehended the evidence, the standard of review is palpable and overriding error: *Healey v. Chung*, 2015 BCCA 38 at para. 33.

[27] Cascade submits *Terastream* has been followed in many Rule 10-1(4) cases since 2018 and refers to examples of cases in its written argument. Viking, in turn, submits that the *Midland* test is well-established and has been applied before and after 2018 and similarly points to multiple cases in its submissions. Further, Viking submits the court in *Terastream*, which was an application under both Rule 10-1(1) and (4), mistakenly applied the Rule 10-1(1) test to the subrule (4) application, and so have the courts that have followed *Terastream* since.

[28] These submissions illustrate the tension between the two different lines of authority and raise a question of law regarding the correct test under Rule 10-1(4). This Court has found that merit may be established where there is arguably

conflicting case law and no direct appellate authority on the issue: *Chemainus Gardens RV Resort Ltd. v. British Columbia (Attorney General)*, 2020 BCCA 298 at para. 59.

[29] With respect to the legal and factual issues relating to irreparable harm that Cascade raises, these aspects of the appeal are arguably weaker. At para. 204 of her reasons, the judge relied on *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 in that clear proof of irreparable harm is not required and that the potential for harm is sufficient. While Cascade argues that the judge improperly relied on wholly speculative assertions of harm, she made findings of fact based upon the evidence before her. Moreover, the judge was alive to the issues Cascade now raises, for example in respect to the alleged reputational harm to Viking: paras. 209–210. The judge also observed Cascade did not dispute that Viking had sold the CL-215T and its delivery is due in 2024: para. 211. To the extent that Cascade seeks to impugn the judge's assessment or weighing of the evidence in the irreparable harm analysis, this aspect of the appeal will likely be more difficult to successfully argue.

[30] However, the question at this part of the test for leave to appeal is whether the applicant has identified a "good arguable case of sufficient merit to warrant appellate scrutiny" and that threshold has been described as "relatively low": *Wang v. Sullivan*, 2023 BCCA 409 at para. 20. I am persuaded the applicant has established merit in its proposed appeal.

Significance to the practice

[31] In my view, the proposed appeal does have significance to the practice for the reasons I have stated. I recognize that Viking submits that the judge's decision here now clarifies any confusion with respect to the appropriate test under Rule 10-1(4), however, there remains no direct appellate authority confirming such. The resolution of the apparently conflicting case law is a question of law with broad importance for those applying under Rule 10-1(4) for the recovery of property.

Significance to the action itself

[32] Cascade submits the Injunction Order is dispositive of all relief sought by Viking in its underlying tort claim. It submits the proposed issues are therefore central to the appeal and the final determination of this dispute.

[33] I am not persuaded by Cascade's submission. I agree with Viking that the return of the CL-215T is not dispositive of the action and that the judge correctly identified, at para. 224 of her reasons, that the dispute is not about the aircraft, but about where the fault lies for the failed Integration Agreement. I find that this factor does not weigh in favour of granting leave.

Will the appeal unduly hinder the progress of the action?

[34] Both parties accept that an appeal would not unduly hinder the progress of the action. Cascade submits it intends on continuing its counterclaim irrespective of the outcome of the appeal.

[35] Cascade further proposes the appeal be heard on an expedited basis if leave is granted. I will return back to this submission shortly.

Conclusion

[36] In my view, the factors weigh in favour of granting leave to appeal, given the merit of the proposed appeal, significance to the practice and the fact that the parties accept an appeal would not unduly delay the action. I find it is in the interests of justice to grant leave to appeal.

Stay

[37] The test for a stay, as stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117, is well-established:

(1) there is some merit to the appeal;
(2) the applicant will suffer irreparable harm if the stay is refused; and,
(3) the balance of convenience favours granting the stay.

[38] I have already found that there is some merit to the appeal.

[39] I do not find that Cascade will suffer irreparable harm if the stay is refused. As I stated earlier, return of the CL-215T to Viking is not dispositive of the underlying action. Further, Viking submits it will take months for it to ready the aircraft before it is able to be delivered to its customer, the Kingdom of Morocco. Viking also represents, by way of Mr. Cote's affidavit sworn June 24, 2024, that if the stay is not granted and the CL-215T is returned to it, it will undertake to (i) store the property in British Columbia until the appeal is decided on the merits; and (ii) return the property to Cascade in the event the appeal is allowed and the court orders it to do so.

[40] Cascade expressed concerns about losing its intellectual property in the CL-215T. However, as the judge identified at paras. 226–227 of her reasons and as Viking submits again on this application, Cascade did not raise this issue when it returned the first aircraft to Viking which also contained Cascade's intellectual property. Viking is also willing to allow Cascade to remove any items containing its intellectual property from the CL-215T before returning it.

[41] Finally, the balance of convenience does not favour granting a stay. As I have indicated, I do not accept, as Cascade contends, that the action will be disposed of if Viking receives the CL-215T. Further, Viking has been ordered to post security for the amount of Cascade's outstanding invoices.

[42] In the circumstances, I do not find that it is in the interests of justice to grant a stay. However, I do accept that it is appropriate to order that the appeal proceed on an expedited basis.

Disposition

[43] In summary, the application for leave to appeal is granted and I would order the appeal be heard on an expedited basis. I direct that the parties schedule a case management conference before the Registrar to establish a schedule for moving the appeal forward. The application for a stay is dismissed.

"The Honourable Justice Skolrood"