IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian Construction Materials Engineering & Testing Inc. v. Allied Paving Co. Ltd.,* 2024 BCSC 1224

Date: 20240620
Docket: S195803
Registry: Vancouver

Between:

Canadian Construction Materials Engineering & Testing Inc.

Plaintiff/
Defendant by Counterclaim

And

Allied Paving Co. Ltd. and The Sovereign General Insurance Company and in French, La Souveraine, Compagnie D'Assurance Generale

Defendants

And

Allied Paving Co. Ltd.

By Counterclaim

Before: Associate Judge Harper

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff/Defendant by Counterclaim:	V.S. Werden M.C. Rose
Counsel for Allied Paving Co. Ltd.:	H.L. Jones
The Sovereign General Insurance Company and in French, La Souveraine, Compagnie D/Assurance Generale:	No appearance at this hearing
Place and Dates of Hearing:	Vancouver, B.C. June 4 and 13, 2024
Place and Date of Judgment:	Vancouver, B.C. June 20, 2024

[1] **THE COURT:** These are my oral reasons. If a transcript is required, I reserve the right to edit for clarity. I want to thank counsel for their thorough written submissions, on which I have heavily relied in formulating these reasons.

[2] The defendant, Allied Paving Company Ltd. (“Allied”) seeks leave pursuant to Rule 6-1 of the *Supreme Court Civil Rules* to file an amended counterclaim to add a claim of fraud

Background

[3] The underlying litigation involves a dispute about work done by the plaintiff, Canadian Construction Materials Engineering & Testing Inc. (“CCMET”), under its agreement with Allied in relation to road construction work on the Alaska Highway south of Fort Nelson. Allied was the prime paving contractor and it engaged CCMET to perform quality control and testing services.

[4] CCMET sues Allied for amounts it claims Allied owes of approximately $413,000. Allied counterclaims for about $2 million.

[5] A key event in the litigation that predated the application before me was the order of Master Muir made in September 2023 which permitted CCMET to plead the limitation of liability clause, limiting CCMET's exposure to $50,000.

[6] An examination for discovery of a representative of CCMET, Mr. Connell, occurred in June 2022. Later in December 2023, a further examination for discovery of a Mr. Ali, another representative of CCMET, occurred. The second discovery was based on CCMET’s honest but mistaken belief that Mr. Ali no longer worked for CCMET and was not available for the first examination for discovery.

The Application

[7] The amendments to the counterclaim that Allied seeks leave to make are generally captured in the proposed amended counterclaim at paragraphs 24 to 25, and 33(bb). Proposed paragraph 24 states:

> CCMET knew that the aggregate tests were non-conforming throughout the crush, they failed to report the same to Allied and deceived Allied by informing them that the testing was in compliance and by improperly and falsely completing daily reports.

[8] At proposed paragraph 25—I will not read in the existing wording—there is proposed wording at the end of that paragraph as follows:

> […], instead they fraudulently provided oral and written reports stating it [the aggregate] was in compliance.

[9] Further, at proposed paragraph 32, there is an addition to the general allegation that CCMET's work was not in compliance with the quality management agreement and/or that it was performed properly and/or was performed negligently, and here are the new words:

> […] and/or was performed to deceive Allied.

[10] At proposed paragraph 33, CCMET includes the original allegations of breach of the agreement, and there are many subparagraphs outlining the alleged failures. The significant new addition is paragraph 33(bb), which states as follows:

> deceiving Allied with respect to (a) - (aa) herein by knowingly or recklessly providing inadequately skilled personnel, falsifying records, wrongfully reporting test results, failing to properly perform their responsibilities and deceiving Allied about testing and quality control results.

[11] The consequential proposed amendments add the claim of fraud to the legal basis and a claim of punitive damages to the relief sought.

Applicable Legal Principles and Discussion

[12] The test on an application to amend is not controversial. The principles are set out in *Jazette Enterprises Ltd. v. Gould*, 2022 BCSC 2206, affirmed 2023 BCSC 180 at para. 9, and this test is repeated in the submissions of Allied at paragraph 10 of their written submissions:

> 10. The principles applied on an application to amend pleadings are set out in *Jazette Enterprises Ltd. v Gould*, 2022 BCSC 2206, aff'd 2023 BCSC 180 at para. 9:

> (a) Amendment to pleadings ought to be allowed unless pleadings fail to disclose a cause of action or defence;
>
> (b) Amendments are usually permitted to determine the issues between the parties and ought to be allowed unless it would cause prejudice to party's ability to defend an action;
>
> (c) The party resisting an amendment must prove prejudice to preclude an amendment, and mere, potential prejudice is insufficient to preclude an amendment;
>
> (d) Costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy; and
>
> (e) Courts should only disallow an amendment as a last resort.

[13] And further, I agree with the submissions set out at paragraphs 11, 12, and 13 of Allied's written submissions:

> 11. It must be shown that there is an adequate foundation in the plea and that, as in any plea of fraud, fraud is clearly alleged.
>
> 12. A party does not need to file evidence in support of the amendment and it is not appropriate for a court to weigh the evidence that relates to the intended amendment when deciding whether to grant the application, the facts alleged are taken as established.
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> *Jazette Enterprises Ltd. v Gould*, 2022 BCSC 2206, aff'd 2023 BCSC 180 para 10
> *Kwikwetlem First Nation v. British Columbia (Attorney General),* 2021 BCCA 311 para. 166
>
> 13. Amendments to pleadings should be permitted if necessary to determine the real questions in issue, to permit the just and speedy determination of the dispute on its merits, and to grant all such remedies to which any of the parties may be entitled. When there is doubt on either the facts or the law, the matter should be allowed to proceed for determination at trial. Only if it is plain and obvious the plea will fail should it be denied.
>
> *Morris v. British Columbia*, 2010 BCCA 95 at para. 17
> *Jazette Enterprises Ltd. v Gould*, 2022 BCSC 2206, aff'd 2023 BCSC 180 para. 21

[14] There are additional requirements for pleading in this case, because the proposed amendments purport to make a claim of fraud.

[15] I will start with my conclusion. I have concluded that Allied should be permitted to amend its counterclaim, but with CCMET reserving its claim for the limitation defence for trial. I also think that further examinations for discovery on both sides would probably be required, and given the previous disputes over examinations for discovery, I will make orders specifically in that regard.

[16] I will now explain my reasons.

[17] Allied's position is that the evidence obtained at Mr. Ali's examination for discovery shows [and here I am referring to paragraph 46 of Allied's written submissions]:

> (a) CCMET knowingly or recklessly provided inadequately skilled personnel;
>
> (b) CCMET and Mr. Ali knowingly misrepresented test results;
>
> (c) CCMET and Mr. Ali deceived Allied by informing them testing was in compliance;
>
> (d) CCMET and Mr. Ali improperly and falsely completing daily reports and knowingly provided false oral and written reports stating that testing was within the required specifications;
>
> (e) CCMET knew or ought to have known that Mr. Ali did not have the requisite skills, was improperly performing quality management functions, was improperly completing documentation and reports to Allied, knowingly misrepresenting test results, deceiving Allied by informing them testing was in compliance, improperly and falsely completing daily reports and knowingly provided false oral and written reports stating that testing was within the required specifications.

[18] The court is not to weigh evidence on a pleadings amendment. The only purpose for either party to refer to Mr. Ali's examination for discovery evidence is to establish or refute the reason for delay in bringing the application to amend. Weighing Mr. Ali's evidence will be a matter for the trial judge.

[19] The question is whether the evidence provided by Mr. Ali at his examination for discovery adequately explains the delay in bringing this application. Counsel for Allied submits that it was not until the examination for discovery of Mr. Ali that the grounds for pleading a claim of fraud were established. The difficulty with Allied's position is that I am not able to assess the reasonableness of that position without

assessing whether Mr. Ali's evidence can support a plea of fraud. As I stated, the court should not weigh evidence on an application to amend the pleadings.

[20] I am persuaded that I should accept Allied's position that it was not until Mr. Ali's examination for discovery that it determined that it had a reason to plead fraud. I note parenthetically that, because I have preserved CCMET's right to claim the limitation defence, the reasonableness of the discoverability of the so-called fraud remains to be explored and pursued by CCMET.

[21] I now turn to whether the proposed amendments plead full particulars, as required by Rule 3-7(18). CCMET argues that they do not. I have already quoted paragraphs 24 and 25 of the proposed amended counterclaim. Although the date frame in proposed paragraph 25, which is between July 2, 2018 and September 6, 2018, might not be specific enough with respect to dates, Allied is taking the bold, and perhaps one could say, audacious position that virtually every transaction or every event in this relationship is imbued with the taint of fraud.

[22] At paragraph 58 of Allied's written submissions, counsel asserts that the counterclaim includes the required particulars of fraud, and at paragraph 58(b), states at proposed paragraph 24 that CCMET knew they were non-conforming, failed to report the non-conformance, deceived Allied, and improperly and falsely completed daily reports. At proposed paragraph 25, it includes the dates of the transgressions, did not advise at daily meetings, and instead they stated they were in compliance. Proposed paragraphs 26 through 30 set out, in my view, adequate particulars, as summarized Allied’s written submissions. In particular, paragraph 26 sets out the consequences of the actions; paragraph 27 sets out CCMET’s failure to tell Allied of concerns that would prevent top lift; paragraph 28 refers to the first time Allied was informed of the non-conformance; paragraph 29 asserts consequence of the failure to notify Allied; and paragraph 30 refers to CCMET’s provision of improper asphalt mix.

[23] These particulars might not hold up to the scrutiny of the discovery process and, if the matter gets to trial, might not hold up at trial, but for the pleadings

purpose, in my view, the proposes amendments adequately establish, although arguably on a bare minimum basis, adequate particulars.

[24] As I said earlier, proposed paragraph 33(bb) casts the net of fraud over the entire relationship between the parties. Allied is taking a risk by such a broad pleading, but if it fails to prove the fraud it alleges, it may be faced with significant costs consequences. That seems to be a risk that Allied is prepared to take.

[25] To summarize, it is not plain and obvious that the proposed amendments are bound to fail. The proposed amendments will not prejudice CCMET in its defence of the counterclaim as amended. There is sufficient time before trial to prepare. I do not accept that an adjournment of the trial is required and I wish to make it clear to the parties that my decision assumes that the trial, as scheduled, will proceed.

[26] As I said, there may need to be additional examinations for discovery and, if necessary, I will make orders permitting CCMET to further examine a representative of Allied on the new amendments and vice versa.

[27] In summary, it is just and convenient to permit the amendments with the qualifications of my order, as I have mentioned.

[28] With respect to the reservation of the limitation defence, because I have not weighed Mr. Ali's examination for discovery evidence for reasons that I have described, CCMET may have a valid argument to make at trial that Allied knew or ought to have known the material facts that would ground the claim of fraud before the limitation period expired. It is possible that CCMET might establish that the claim of fraud is made purely for tactical reasons; namely, to defeat the limitation of CCMET's liability to $50,000.

[29] CCMET might be able to establish that the reason for the delay in bringing this application had nothing to do with Mr. Ali's examination for discovery evidence, but everything to do with the order made September 2023 permitting CCMET to plead a limitation of liability clause.

[30] Accordingly, I have concluded that CCMET ought to be able to argue a limitation defence at trial.

[31] That concludes the body of my reasons. There are two further issues. First, costs, but before that, I would like to set the parameters of any further examinations for discovery that either party are seeking. I have very little time this morning to consider those further submissions.

[32] So I think, Ms. Werden, you would want to examine a representative of Allied.

[33] CNSL V. WERDEN: Yes, I agree.

[34] THE COURT: What I am proposing to do is to set what might seem an arbitrary number of hours to take a point of dispute away from the parties. I am going to float the idea that three hours maximum for each side would be sufficient. Ms. Werden, would you agree to that?

[35] CNSL V. WERDEN: Yes, I think that's reasonable. It should be quite focused on a couple of issues.

[36] THE COURT: On the amendments, right.

[37] CNSL V. WERDEN: Yes, yeah.

[38] THE COURT: On the new -- on the new issues.

[39] CNSL V. WERDEN: Yes.

[40] THE COURT: And Ms. Jones?

[41] CNSL H. JONES: Our position with respect to the exam of Mr. Ali was that we were not finished the base exam of Mr. Ali, and we still had time with respect to that. We would suggest that with respect to Mr. Ali, that we be able to continue the examination for discovery with perhaps an extra hour for the amendments, but that is all that we would need.

[42] THE COURT: All right, so what I will do then is I will make the following order:

> That CCMET is entitled to a further three hours' examination for discovery of a representative of Allied, restricted to the matters arising from the amendments.
>
> In addition to any time remaining for the examination for discovery of Mr. Ali on the existing issues, Allied is entitled to one extra hour of examination for discovery of Mr. Ali on the matters arising from the amendments.

[43] I think that captures it. I am not adjudicating on the merits of the remaining time. I hope I do not need to do that. But if there is an argument that his discovery was in fact concluded, then you get the one hour. I am not adjudicating the other debate. So I hope the wording that I have come up with is clear in that regard.

[44] CNSL V. WERDEN: Your Honour, in terms of the representative, it's my submission that CCMET should be entitled to examine Don McRae, as he was the Allied representative who was present on site, and that seems to be one of the key issues in terms of the exchange of the documentation that's at issue in regards to the new amendments.

[45] CNSL H. JONES: Don McRae is not an employee of Allied.

[46] THE COURT: I am going to have to cut this short. My attempts to assist the parties in avoiding conflict is going to be limited here. Unfortunately, I am going to have to make a further order that if the parties do not agree on the appropriate representative to be examined for discovery, they have liberty to apply and I am not seized of such application.

[47] CNSL V. WERDEN: Would you be willing to make an order that Allied provide the last known contact information of Don McRae?

[48] THE COURT: I do not know what I am being asked to do. So who is Don McRae?

[49] CNSL V. WERDEN: He is the superintendent who was on site, the on-site representative of Allied during the project, and that was in the examination for discovery excerpts of Mr. Wishloff that were in the record.

[50] CNSL H. JONES: Perhaps it would be appropriate, if my friend would like those things, to request it in the normal course and we can deal with it in the normal course.

[51] THE COURT: Well, the normal course on this file is excessive conflict, and that is unfortunate. I am going to have to leave it at that and you know, if there is a dispute, there is a dispute. I think I have gone as far as I can go with respect to the orders that I have made today.

[52] I am not sure that Allied is in a very strong negotiating position in this matter, given what you could read between the lines of my reasons, but I am going to leave that to counsel.

[53] I have made the orders that I have made and I just want to make it clear that I am not seized of any further application in the discovery disputes. And now I will hear submissions on costs of the application.

[54] CNSL H. JONES: Our submissions would be that we were successful and, as such, we would seek costs in any event of the cause.

[55] THE COURT: Ms. Werden?

[56] CNSL V. WERDEN: That's appropriate, on Scale B, costs in the cause.

[57] THE COURT: I agree. I think it is costs in the cause. There were some additional orders that I made and -- anyway, the order will be costs in the cause.

[58] CNSL H. JONES: And I think, just to be clear, as I understood the order with respect to our examination for discovery was that in addition to any time remaining, Allied was entitled to one extra hour with respect to the amendments.

[59] THE COURT: Right. So that is the way it should be worded, Madam Registrar. Counsel are aware of what that means.

[60] THE CLERK: Okay, thank you.

[61] THE COURT: And also that is -- that order does not -- so you do not have to put this in the formal order, but that order does not imply how much is left on the existing discovery. That is not a debate I can get into today.

[62] THE CLERK: Thank you.

[63] CNSL V. WERDEN: Should a term of the order be that the limitation of liability defence and the limitations defence are reserved for CCMET for trial?

[64] THE COURT: Well, the limitation defence is reserved for trial, but the limitation of the $50,000 has nothing to do with my reasons.

[65] CNSL V. WERDEN: Understood. I just wanted to be clear.

[66] THE COURT: Which also implies summary trial, if that is the way it goes.

[67] So Madam Registrar, that additional term should be included, that CCMET's limitation defence on the fraud claims is preserved for trial.

"Harper A.J."