IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian Construction Materials Engineering & Testing Inc. v. Allied Paving Co. Ltd.,* 2024 BCSC 2242

Date: 20241212
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.

Plaintiff by Counterclaim

On appeal from: An order of the Supreme Court of British Columbia, dated June 20, 2024 (*Canadian Construction Materials Engineering & Testing Inc*. *v. Allied Paving Co. Ltd*.; 2024 BCSC 1224, Vancouver Docket S198503)

Before: The Honourable Justice Maisonville

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. September 27, 2024
Place and Date of Judgment:	Vancouver, B.C. December 12, 2024

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INTRODUCTION

[1] The plaintiff and defendant by counterclaim, Canadian Construction Materials Engineering & Testing Inc. ("CCMET"), appeals the order of the Associate Judge who permitted the amendments sought by the defendants, Allied Paving Co. Ltd. ("Allied") and The Sovereign General Insurance Company (and in French, La Souveraine, Compagnie D'Assurance Generale). The order held that:

1. Allied is permitted to file its amended counterclaim;
2. CCMET's limitation period defence on the fraud claims is preserved for trial;
3. CCMET is entitled to a further three hours of examination for discovery of a representative of Allied on the matters arising from the amendments;
4. If the parties do not agree on the appropriate representative of Allied to be examined for discovery, they have liberty to apply. The Associate Judge was not seized of the matter; and
5. In addition to any time remaining for the examination of Mahdi Ali as a representative of CCMET 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.

[2] CCMET sets out five arguments in appeal:

1. That the Associate Judge was clearly wrong in permitting Allied to amend its counterclaim to include new allegations of fraud and to add punitive damages to the relief sought;
2. In the alternative, that the order raised questions which are vital to the final issues in the case, which results in this appeal in the standard of review being a rehearing;
3. That the Associate Judge erred in failing to apply or by applying incorrectly the principles that must be considered on an application to amend pleadings where the proposed amendments raise new allegations of fraud after the expiry of the applicable limitation period;
4. That Allied was unreasonably delayed in bringing this application and its materials contain no evidence to explain that delay, such that the Associate Judge erred by failing to weigh any evidence in relation to (i) discoverability of the new alleged cause of action and (ii) whether there

was a sufficient explanation of the significant delay in bringing the application for leave to amend; and

5. That the Associate Judge erred in finding the proposed amendments contain sufficient particulars of the alleged fraud.

[3] At the hearing of this matter, all of the materials that were before the Associate Judge were placed before me. The additional materials consisted of a notice of appeal and the arguments on appeal. The arguments all stem from the materials that were in front of the Associate Judge.

FACTS

[4] The dispute arises from work done by CCMET pursuant to its agreement with Allied, the prime contractor for a project of road construction on a highway south of Fort Nelson (the "Project"). Allied had entered into a contract with Public Works and Government Services Canada (the "Crown") on May 8, 2018, to provide pavement replacement services on KM 266.2 to KM 315 of the Alaska Highway in British Columbia (the "Head Contract"). The work was to include full-depth reclamation, including the removal of the existing road, repacking, grading, and paving. In essence, the Project was rebuilding the highway.

[5] The Head Contract required Allied to create a Quality Management Plan (the "QM Plan") for Crown approval before work could commence. The Head Contract further required that Allied appoint a Quality Control Manager (the "QC Manager") and Quality Control Staff (the "QC Staff") who were independent from Allied's organization. The QC Manager and QC Staff were required to be set out in the QM Plan.

[6] Allied retained CCMET to prepare the QM Plan. As part of the QM Plan, it was proposed that CCMET be the independent party responsible for quality management and particular individuals from CCMET were identified as the proposed QC Manager and QC Staff.

[7] The QM Plan was accepted by the Crown. The Crown also accepted the proposal that CCMET be the party who would provide the quality management and quality control aspects of the work for the Project.

[8] On or about June 20, 2018, Allied and CCMET agreed to the terms of a subcontract upon which CCMET would be responsible for the quality management and quality control testing for the materials supplied and used for the Project and the asphalt design mix (the “Subcontract”). CCMET was not the supplier of the aggregate (a technical term for gravel); other subcontractors had supplied CCMET with the product and CCMET was to provide only testing and quality control.

[9] The QM Plan provided that CCMET was to provide a named and approved QC Manager for the Project, as well as a named and approved alternate quality control manager (the “Alternate QC Manager”), who was only to act as QC Manager during approved absences.

[10] Allied claims that CCMET represented and had Mr. Ali perform almost all of the QC Manager work at issue when in fact he was only the Alternate QC Manager. At the heart of the issues between the parties are admissions purportedly made by Mr. Ali at his examination for discovery in December 2023 about the manner in which he performed those services.

[11] Allied has refused to pay CCMET the amounts it claims due for work performed under the Subcontract, which totalled $413,254.74 plus interest and costs. Allied claims set off against CCMET as the basis for its non-payment.

[12] In the counterclaim, Allied alleges that CCMET made errors and, as a result, delayed the Project.

[13] The original causes of action pleaded in the counterclaim are breach of contract, negligence, and breach of the duty of good faith and honest performance.

RELEVANT PROCEDURAL HISTORY

[14] CCMET filed its notice of civil claim on May 16, 2019 in relation to the payment. The response to the civil claim was filed January 24, 2020. Allied filed its counterclaim on that same date. CCMET filed a response to counterclaim on August 20, 2020. CCMET further filed an amended response to counterclaim on December 11, 2023.

Exchange of List of Documents of the Parties

[15] Lists of documents of the parties have been prepared in this matter and CCMET argues that the dates the lists of documents were exchanged are critical to their argument. The exchange dates of the parties' lists' of documents are as follows:

a) CCMET's list of documents was provided to Allied on October 8, 2020;

b) Allied's list of document was provided to CCMET on March 29, 2021;

c) Allied's first amended list of documents was provided to CCMET on May 17, 2021;

d) Allied's second amended list of documents was provided to CCMET on August 31, 2021; and

e) CCMET's first amended list of documents was provided to Allied on August 31, 2023.

Examinations for Discovery

[16] Allied had requested to examine Mr. Ali as a representative of CCMET, however, it was informed by counsel for CCMET that Mr. Ali was no longer an employee of CCMET and his contact information was unavailable. The following examinations then took place:

a) On June 29, 2022 – CCMET examined a representative of Allied, Yuri Wishloff, who is a principal of Allied;

b) On June 30, 2022 – Allied examined a representative of CCMET, Simon Connell. It was during this discovery that Allied learned that Mr. Ali was indeed still with the company; and

c) The discovery of Mr. Ali then took place on December 23, 2023.

[17] In Allied's submission, Mr. Ali's examination for discovery disclosed:

- CCMET knowingly or recklessly provided inadequately skilled personnel;
- CCMET knew or ought to have known that Mr. Ali and CCMET knowingly misrepresented test results and deceived Allied by informing it the testing was in compliance; and
- CCMET improperly and falsely completed daily reports and knowingly provided false oral and written report stating that testing was within the required specifications when they knew it was not.

[18] There are inspection sheets that are to be filled out by the QC Manager. These sheets were to indicate whether the crushed aggregate was within the required specifications after reviewing the daily testing results.

[19] In the daily material inspection report, the "results" portions of the report, however, appeared to be photocopied, were identical, and the quality of the documents deteriorated over the course of multiple copies. Mr. Ali was questioned about these and could not indicate why the checklists, which were his responsibility to be filled out daily, were absolutely identical.

[20] In his examination for discovery, Mr. Ali was asked "I am asking you -- you were aware that the aggregate was out of spec from the very beginning of testing, were you not?" Mr. Ali answered "yes". Allied argues that Mr. Ali was evasive and refused to provide direct answers but rather provided contradictory statements regarding his role.

[21] Allied notes that even Mr. Ali's curriculum vitae which stated his credentials to perform this work was not accurate as indicated in the questions put to him during the examination for discovery.

Summary Trial Application and Subsequent Amendment to Pleadings by CCMET

[22] CCMET filed a summary trial application on July 11, 2023, seeking a declaration that any liability CCMET may have to Allied overall is limited to $50,000 pursuant to the limitation of liability clause in the Subcontract (the "Limitation of Liability Clause").

[23] In response to CCMET's summary trial application, Allied took the position that CCMET could not rely on the Limitation of Liability Clause because although CCMET had already pleaded and relied on the terms of the Subcontract, the express terms of the Limitation of Liability Clause had not specifically been pleaded. CCMET sought to amend its pleadings.

[24] Pursuant to the order of Master Muir (now Associate Judge) dated September 20, 2023 and filed December 11, 2023, CCMET filed an amended response to counterclaim that included language further clarifying CCMET's reliance on the Limitation of Liability Clause by way of adding a direct quotation of that clause.

[25] When the parties attended on December 14 for the one-day summary trial application on the issue of the applicability of the Limitation of Liability Clause, no judge was available. The hearing was adjourned to March 7, 2024. This was a problem because the full trial was scheduled for 15 days commencing February 25, 2024.

[26] On January 18, 2024, Allied requested that CCMET consent to an amendment of Allied's counterclaim to raise new allegations of fraud. CCMET did not consent.

[27] At a trial management conference held January 25, 2024 for the trial set to commence February 26, 2024, CCMET took the position that the trial needed to be adjourned so that the parties could first proceed with the summary trial application which would narrow the issues for trial.

[28] Allied took the position that the trial should proceed as scheduled and that the pending summary trial should not proceed because Allied was intending to plead new allegations of fraud which would effectively render a summary determination of the Limitation of Liability Clause issue moot. The trial date was adjourned by the presiding justice and the trial was rescheduled for 15 days commencing March 24, 2025.

Application to Amend

[29] On February 8, 2024, Allied filed the application to amend its pleadings to add fraud, which is the subject of this appeal. It sought an order permitting an amendment to its counterclaim to plead fraud and to seek punitive damages. The most significant and most detailed amendments are excerpted and underlined as follows:

> 24.[CCMET] knew that the aggregate tests were non-conforming throughout the crush, they failed to report the same to [the Respondent) and deceived [the Respondent] by informing them that the testing was in compliance and by improperly and falsely completing daily reports.
>
> 25. Between July 2, 2018 and September ~~27~~6, 2018, [the Appellant and the Respondent] held daily meetings to discuss the Project and its progress. At no point prior to September ~~27~~6, 2018, did [the Appellant] advise [the Respondent] that the aggregate was non-conforming, instead they fraudulently provided oral and written reports stating it was in compliance.
>
> […]
>
> 32. During the entire course of the Project, [the Appellant]'s work was not in compliance with the QM Agreement and/or was not performed properly and/or was performed negligently and/or was performed to deceive [Allied].
>
> 33. [CCMET] breached the terms of the QM Agreement by, *inter alia:*
>
> […]
>
> (bb) 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.
>
> […]
>
> [Part 3: Legal Basis]
>
> 5. [CCMET] acted fraudulently by knowingly or recklessly providing inadequately skilled personnel, falsifying records, wrongfully reporting test results, failing to properly perform their responsibilities and deceiving [the Respondent] about results which [Allied] relied upon and which caused [Allied] the loss set out herein.

[30] Following the filing of the application to amend the counterclaim, the parties agreed that the summary trial hearing should not proceed on March 7, 2024 and to postpone that hearing until the amendment application (which would be heard instead on March 7, 2024) was heard and determined. That hearing could not proceed on March 7, 2024 and was rescheduled for June 4, 2024.

[31] When the application was heard, CCMET argued that Allied's proposed fraud amendment was purely strategic, had no evidentiary foundation, and was intended primarily to ground an argument that the issues currently set for hearing in the summary trial were unsuitable for a summary determination. Argument was additionally made that the proposed amendments were being made simply to defeat CCMET's argument that the Limitation of Liability Clause applied to limit Allied's counterclaim damages to $50,000.

Oral Reasons for Judgment of the Associate Judge

[32] The application was heard over two days, June 4 and 13, 2024, and the Associate Judge rendered reasons on June 20, 2024. In the reasons indexed as 2024 BCSC 1224 (the "Oral Reasons"), the Associate Judge set out the background of the application, including that CCMET is suing Allied for $413,000 and that Allied counterclaims for $2 million. As noted, the materials and affidavits that were before the Associate Judge have been all placed before me.

[33] The Associate Judge noted a key event in the litigation pre-dating the application by CCMET to amend their response to counterclaim. Before her was the

order of Master Muir made September 20, 2023, which permitted CCMET to plead the Limitation of Liability Clause, limiting CCMET's exposure to $50,000.

[34] At para. 6 of the Oral Reasons, the Associate Judge also noted:

> 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.

[35] In her decision, the Associate Judge went through the above-noted amendments which added the claim of fraud to the legal basis and a claim of punitive damages to the relief sought.

[36] The legal principles and discussion respecting amending pleadings were set out by the Associate Judge, who relied on *Jazette Enterprises Ltd. v. Gould*, 2022 BCSC 2206, affirmed 2023 BCSC 180 [*Jazette Enterprises*] at para. 9:

> [9] The general principles arising on an application to amend pleadings are summarized as follows:
>
> 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.
>
> (*Peterson v. 446690 B.C. Ltd.,* 2014 BCSC 1531 at para. 37.)

[37] The Associate Judge also noted:

> [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.
>
> *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

[38] In connection with the plea for fraud, the Associate Judge noted that in the pleadings which make a claim of fraud, there are additional requirements of particulars.

[39] She then allowed the application and set out her reasoning.

[40] She noted Allied's position is that the amendments arose from the examination for discovery of Mr. Ali. Mr. Ali had been the requested person by Allied to discover but Allied was told was that he was no longer with CCMET and, consequently, another person, Simon Connell, was discovered. The Associate Judge set out that it was during that discovery held on June 30, 2022 that Allied learned that Mr. Ali was indeed still with CCMET. The discovery of Mr. Ali then took place on December 23, 2023. From the information learned at the discovery, Allied sought to amend the pleadings to add fraud as set out.

[41] The Associate Judge then noted that the court is “not to weigh evidence on a pleadings amendment”: Oral Reasons at para. 18.

[42] She additionally set out that the only reason for referring to the examination for discovery evidence was to address the delay in bringing the application to amend, stating “[t]he 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. She held that weighing Mr. Ali’s evidence will be a matter for the trial judge”: Para. 18.

[43] The Associate Judge continued:

> [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.

[44] The Associate Judge accepted Allied’s position that it was not until Mr. Ali’s examination for discovery that the reason to plead fraud arose. CCMET’s right to claim the limitation defence was preserved, consequently, the reasonableness of the discoverability of the so-called fraud remains to be explored and pursued by CCMET.

[45] CCMET argued additionally that full particulars had not been pleaded. The Associate Judge turned to Rule 3-7(18) of the *Supreme Court Civil Rules* which sets out the requirement that, in a claim for fraud, full particulars must be stated in the pleading, with dates and items if applicable.

[46] The Associate Judge noted that while the date frame (between July 2, 2018 and September 6, 2018) proposed in the amendment in paragraph 25 may not be specific enough in respect of dates, Allied was taking the "bold position" that virtually every transaction and every event in the relationship is imbued with the taint of fraud. At paras. 22 to 24 of her Oral Reasons, the Associate Judge noted:

> [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.

[47] In conclusion, the Associate Judge noted it was not "plain and obvious" that the proposed amendments were bound to fail.

POSITIONS OF THE PARTIES ON THE APPEAL

CCMET's Position

[48] CCMET argues that the Associate Judge was "clearly wrong" in ordering that Allied be permitted to amend its counterclaim in the form attached to the notice of application.

[49] CCMET argues that in her Oral Reasons, the Associate Judge acknowledged, but failed to properly weigh, the threshold requirements for granting

leave to amend pleadings to allege fraud as a new cause of action after the expiry of the limitation date. They say it is readily apparent upon review of Allied's application materials and the Associate Judge's Oral Reasons that no explanation was provided to explain the delay. Moreover, they argue the materials showed that no new facts or evidence upon which to ground new allegations of fraud have come to light since Allied filed its counterclaim in the underlying action in January 2020. There is simply no reason they argue why new fraud allegations are being raised so late in the proceedings and so long after the expiry of the limitation date. They further argue the fraud allegations as pleaded do not contain sufficient particulars. CCMET says that the Associate Judge erred by failing to properly consider and apply these factors to the analysis of whether to permit the amendments.

[50] CCMET further says that in exercising her discretion to grant leave to amend the counterclaim, the Associate Judge failed to consider the factors appropriate to the exercise of discretion as required by *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2012 BCSC 1040 [*American Creek*] and *Manterra Technologies Inc. v. Verathon Medical (Canada) ULC,* 2022 BCSC 98 [*Manterra*].

Allied's Position

[51] Allied argues in response that the Associate Judge applied the correct test in exercising discretion granting Allied leave to file the amended counterclaim, pursuant to Rule 6-1 and that the Associate Judge was correct or, in any event, not clearly wrong, in finding an adequate basis and adequate particulars were pleaded in this claim of fraud.

ANALYSIS

Standard of Review

[52] The standard of review applicable to an appeal of an Associate Judge's order was recently reviewed by Justice Morley in *Ningbo Zhelun Overseas Immigration Service Co. Ltd. v. USA-Canada International Investment Inc*., 2024 BCSC 682 [*Ningbo*]. In *Ningbo*, the court confirmed the law set out in *Abermin Corp. v. Granges Exploration Ltd*. (1990), 45 B.C.L.R. (2d) 188 (S.C.), 1990 CanLII 1352 (BC SC)

applies when determining the standard of review for an appeal of an associate judge's order. The standard in a purely interlocutory matter is whether the associate judge's order was "clearly wrong".

[53] However, in the case before Morley J., the matter was not straightforward in that there was an addition of a party following the expiry of a limitation. In that situation, counsel argued that the test must instead be a rehearing given the issues of delay and the limitation period expiring which "raises questions which are vital to the final issue in the case". Justice Morley in *Ningbo* noted this has never been decided by the Court of Appeal, and justices of the Supreme Court of British Columbia have differed. He concluded that the loss of a limitation period is a question vital to the final issue in the case and thus the appropriate standard of review is as a rehearing, which he took to mean "I must exercise my own judgment, even if I see no errors in principle or unreasonableness in how the associate judge exercised his.": para. 7.

[54] That test had previously been set out more precisely by Justice Fenlon, as she then was, at para. 7 in *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holding Ltd*., 2011 BCSC 999, leave to appeal ref'd 2011 BCCA 390 :

> [7] […]
>
> 1) Review of a purely interlocutory decision of a master is a true appeal and the master's decision is not to be interfered with unless it is clearly wrong.
>
> 2) A question of law, a final order or a ruling that raises questions vital to the final issue in the case are reviewed by way of a rehearing on the merits based on the record before the master; even where an exercise of discretion is involved, the judge appealed to may quite properly substitute his or her own view for that of the master.

[55] In *Kondori v. New Country Appliances Inc*., 2017 BCCA 164, the Court of Appeal set out:

> [16] An appeal from a master's order in a purely interlocutory matter should not be entertained unless the order is clearly wrong. Where the ruling of the master raises questions that are vital to the final issue in the case, or results in one of those final orders which a master is permitted to

> make, *Abermin* established that a rehearing in Supreme Court is the appropriate form of appeal.

[56] The Court continued:

> [21] One expression of the standard of review is that in *House of Sga'nisim v. Canada (Attorney General)*, 2007 BCCA 483 [*House of Sga'nisim*], namely, that this Court must be satisfied that the judge erred in the exercise of discretion in that no weight, or insufficient weight, has been given to relevant considerations.
>
> [22] While *House of Sga'nisim* is an appropriate expression of the test, an appellate court should not simply substitute its opinion for that of the chambers judge under the guise that the judge did not give sufficient weight to a relevant consideration. It is incumbent on an appellant to demonstrate an error on the part of the judge: *Garda v. Osborne* (1996), 72 B.C.A.C. 101 at para. 31, 119 W.A.C. 101.

[57] CCMET argues that the Associate Judge's decision "was clearly wrong due to a misapplication of legal principles and failure to weigh relevant evidence…".

[58] In the alternative, CCMET argues the standard should be a rehearing as the decision "raises questions vital to the final issue in the case" by preserving the limitation defence.

[59] I find that the appropriate standard of review is that of a rehearing given *Ningbo* and *Mullett (Litigation Guardian of) v. Gentles*, 2016 BCSC 802 [*Mullett*]. Here, the amendment under consideration involved a limitations defence. Given that consideration, which is vital to the final issues of this matter, the standard of review is that of a rehearing and I may properly substitute my own view for that of the Associate Judge in the event that I find that the Associate Judge did not give sufficient consideration to a relevant factor.

Amendment of Pleadings and Weighing Of Evidence

[60] I turn to the applicable Rules and caselaw considering amendments of pleadings. The relevant rule before the court on this appeal is Rule 6-1(1):

> **When pleadings may be amended**
>
> (1) Subject to Rules 6-2 (7) and (10) and 7-7 (5), a party may amend the whole or any part of a pleading filed by the party, other than to change parties or withdraw an admission,

> (a) once without leave of the court, at any time before service of the notice of trial, or
>
> (b) after the notice of trial is served, only with
>
> (i) leave of the court, or
>
> (ii) written consent of the parties.

[61] The relevant case law with respect to Rule 6-1 is stated in *Jazette Enterprises* at para. 10:

> The proposed amendments are to be considered on their face. No evidence in support of the amendment needs to be filed by the party seeking the amendment, nor is it appropriate for a court to weigh the evidence that relates to the intended amendment in deciding whether to grant the application. (*Hu v. Li,* 2015 BCSC 1347 at para. 13; *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 [C.A.] at paras. 23-24). As Master Scarth said in *Levy v. Petaquilla Minerals Ltd.*, 2012 BCSC 776 at para. 10, "A party seeking an amendment need only plead sufficient facts that, if proved at trial would support a reasonable cause of action."

[62] More recently, in *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311, Justice Abrioux noted generally the principles applicable to amendments at para. 166:

> [166] The applicable principles were reviewed in *Chouinard [v. O'Connor,* 2011 BCCA 121]:
>
> > [13] …The chambers judge referred to *G.A.D. v. BC Children's Hospital*, 2003 BCSC 443, where Madam Justice Ross set out factors to be considered in applications to amend pleadings, at para. 17 as follows:
> >
> > > (a) amendments should be permitted as are necessary to determine the real question in issue between the parties
> > >
> > > …
> > >
> > > (b) the court will not give its sanction to amendments which violate the rules that govern pleadings, including the prohibition of pleadings which disclose no reasonable claim. In considering this question, the court will apply the same tests and considerations as applicable on an application to strike claims already pleaded…
> > >
> > > (c) a party is not required to adduce evidence in support of a pleading before trial…

> (d) on an application to amend the facts alleged are taken as established…
>
> (e) the discretion is to be exercised judicially, in accordance with the evidence adduced and the guidelines of the authorities. Factors to be considered include: the extent of delay, the reasons for delay, any explanation put forward to account for the delay, the degree of prejudice caused by the delay, the extent of the connection between the existing claims and a proposed new cause of action. The over-riding consideration is what is just and convenient….
>
> [Emphasis added.]

[63] CCMET argues the Associate Judge erred in failing to weigh the evidence.

[64] The issue of "weighing" was considered in *Hu v. Li*, 2015 BCSC 1347. At para. 13, Justice Voith, as he then was, set out the principle that it is not appropriate to weigh evidence in support of amendments:

> The case law addressing the requirements for an amendment to a party's pleading is clear and consistent. In particular, no evidence in support of the amendment needs to be filed by the party seeking the amendment. Nor, in a related vein, is it appropriate for a court to weigh the evidence that relates to the intended amendment in deciding whether to grant the application. (emphasis added)

[65] At para. 14, Voith J. elaborated on what weighing was as follows:

> I emphasize this issue because the assertion that relevant evidence does not support a particular amendment, or that no evidence had been filed in support of a particular amendment, or that the evidence in support of an amendment was not "new evidence" but, rather, was evidence that had been available to the claimant at an earlier time, were all pressed with some vigor by the respondents.

[66] I note as an aside that one of the arguments in relation to the amendment to add fraud being made by CCMET is similar to that noted by Voith J. in para. 14 in *Hu*. CCMET submitted that what was learned at the examination for discovery of Mr. Ali was not new and did not support a finding fraud. As I understand the argument, had the Associate Judge reviewed the materials she would have found no relevant evidence to support the amendment. CCMET argues that the court is not

being asked to weigh evidence for the purpose of proving or disproving fraud, rather, it is for the limited purpose of proving or disproving a sufficient explanation for Allied's delay in raising a new cause of action after the expiry of the limitation period.

[67] Justice Voith reviewed the appellate authorities:

> [18] The foregoing legal principles have been confirmed by the Court of Appeal of this province several times, including:
>
> a) *Mayer v. Mayer*, 2012 BCCA 77, where Neilson J.A., for the court, said:
>
> > [184] I agree Mr. Gomery's affidavit was unnecessary. Evidence is not required on applications to amend pleadings or add parties: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 at 25, 28 C.P.C. (2d) 49 (C.A.); *MacMillan Bloedel v. Binstead* (1981), 58 B.C.L.R. 173 (C.A.); *Strata Plan VIS3578 v. Canan Investment Group Ltd.*, 2010 BCCA 329 at para. 45, 323 D.L.R. (4th) 482.
>
> b) *Morriss v.* British *Columbia*, 2010 BCCA 95, where Low J.A., for the court, said:
>
> > [17] In *Hatch v. Kelly Peters & Associates Ltd*., (1988) 30 B.C.L.R. (2d) 52 (C.A.), this Court approved of the statement of the principles governing amendment of pleadings made by McLachlin J., as she then was, in *Victoria & Grey Metro Trust Co. v. Fort Gary Trust Co*., (1988) 30 B.C.L.R. (2d) 45 (S.C.) at p. 46:
> >
> > > Before addressing the proposed pleadings, I refer to the principles which govern the granting of amendments to pleadings. The basic rule, set out expressly in the former rules and no doubt still applicable, is that such amendments should be permitted as are necessary to determine the real question in issue between the parties. Rule 1(5) requires an interpretation of the rules which permit the just and speedy determination of the dispute on its merits. Similarly, the Law and Equity Act, R.S.B.C. 1979, c. 224, s. 10, requires the court to grant all such remedies as any of the parties may appear to be entitled to "so that, as far as possible, all matters in controversy between the parties may be completely and finally determined ..."These provisions arguably support a generous approach to the question of amendments. However, the court will not allow useless amendments: *Gesman v. Regina (City)* (1907), 1 Sask. L.R. 39, 7 W.L.R. 307; *Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd.*, [1899] 1 Q.B. 86 (C.A.). Similarly, it seems to me obvious that the court will not give its sanction to amendments which violate the rules which govern pleadings. These include the requirements relating to conciseness (R. 19(1)); material facts (R. 19(1)); particulars (R.

> 19(11)); and the prohibition against pleadings which disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious (R. 19(24)). With respect to the latter, it may be noted that it is only in the clearest cases that a pleading will be struck out as disclosing no reasonable claim; where there is doubt on either the facts or law, the matter should be allowed to proceed for determination at trial: *Minnes v. Minnes* (1962), 39 W.W.R. 112, 34 D.L.R. (2d) 497 (B.C.C.A.); *B.C. Power Corp. v. A.G.B.C.* (1962), 38 W.W.R. 577, 34 D.L.R. (2d) at 211 (B.C.C.A.) If there is any doubt, it should be resolved in favour of permitting the pleadings to stand: *Winfield v. Interior Engr. Services Ltd.* (1969), 68 W.W.R. 383, 4 D.L.R. (3d) 533 (B.C.S.C.). While these cases deal with striking out claims already pleaded, consistency demands that the same considerations apply to the question of amendment to permit new claims.

[19] Recent expressions of these same principles are found in the following decisions of this court:

a) *Mee Hoi Bros. Company* Ltd*. v. Borving Investments (Canada) Ltd.*, 2014 BCSC 2081, where Master Taylor said:

> [5] *Teal Cedar* states that while in the exercise of judicial discretion, the length of any delay, the reasons for delay and the expiry of the limitation period are all factors to be considered, none of those factors is to be considered in isolation. The overriding question is what is just and convenient. *McNaughton* is clear in its instruction that on an application for amendment, it is not open to the court to consider evidence in support of a pleading, but rather is only to consider whether the pleading discloses a reasonable cause of action.

b) Easingwood *v. Cockroft*, 2014 BCSC 1595, where Fitch J. said:

> [46] As a general rule, such amendments as are necessary to determine the real question in issue between the parties should be permitted. Where possible, and consistent with the generous approach generally taken in applications to amend pleadings, the existence of prejudice should be dealt with by an order for costs. A party seeking an amendment need not adduce evidence in support of the proposed amendment as it is sufficient if the pleading discloses a reasonable cause of action: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.).

[20] Application of these principles militates in favour of allowing the various amendments the claimant seeks. Whether the claimant can marshal the evidence required in support of her claim is a separate question that will be determined at a different stage of the proceedings.

[68] Evidence of a nature that would permit a deeper examination of the basis for the amendments, including affidavit evidence setting out more detailed analysis is, accordingly, not required. Amendments should be permitted as are necessary to determine the real question in issue between the parties: *Morriss v. British Columbia*, 2010 BCCA 95 at para. 17.

[69] Accordingly, I find the Associate judge did not err in failing to weigh the evidence before her in the manner proposed by the appellant. There is no requirement that a court weigh and assess the facts. The facts are accepted on an application to amend barring only the clearest of cases that an accepted prohibition to a pleading exists. No such prohibition exists in the case at bar.

The Limitation Issue

[70] Relying on *Manterra*, CCMET argues that the amendments should be disallowed because "it was clear at the time of the underlying application that [CCMET] has an accrued limitation defense".

[71] Allied responds as follows:

> 34. The application herein was brought pursuant to Rule 6-1 (1)(b)(i) of the *Supreme Court Civil Rules.* Allied did not agree that there was an accrued limitation defence with respect to the fraud allegations, nor was any application brought by CCMET pursuant to the *Limitation Act,* SBC, c 13.There is no application before the court brought pursuant to section 22(5) of the *Limitation Act, supra.*
>
> 35. In circumstances where there is or <u>may be</u> an accrued limitation defence relating to an application to add a new cause of action, the court has the following options: [Footnote omitted.]
>
> a) If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to allow the amendment to be made, notwithstanding the defendant will lose that defence, applying the *Letvad* [*v. Fenwick*, 2000 BCCA 630] non-exhaustive list of factors;
>
> b) if the parties disagree as to whether there is an accrued limitation defence, and the court cannot determine this issue on the application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to allow the

> amendment, even though the result will be the elimination of that defence; and
>
> c) alternatively, when the limitation issue cannot be determined on the application, and the applicant had not established that considerations of justice and convenience justified the extinction of the limitation defence under s.4(1) of the Act, judicial discretion may be exercised to permit the amendment on terms that the limitation defence would be preserved and determined at trial. [Allied's emphasis.]
>
> 36. The learned Associate Judge turned her mind to this very question. The Court determined that on the application before her the limitation issue raised by CCMET could not be determined and chose option (c) above, to exercise her discretion to permit the amendment on the terms that CCMET's ability to raise a limitation defence would be preserved and determined at trial. This was an option available to the learned Associate Judge pursuant to *Manterra* and [*Strata Plan No. VIS 3578 v. John A*. *Neilson Architects* Inc., 2010 BCCA 329] thus her decision is not 'clearly wrong'.

[72] I agree with Allied in this respect, acknowledging that I am assessing the decision on the rehearing standard rather than the "clearly wrong" standard. There was no application in respect of the limitation period before her per se. In these circumstances, the Associate Judge properly found she could not determine it and permitted the amendment on terms that the limitation defence was to be preserved and determined at trial.

Delay

[73] CCMET argues there is unacceptable delay and consequently the associate judge erred in permitting the amendments. Because I have determined that the appropriate standard of review is that of a rehearing, I will now consider the legal principles and factors for this analysis.

Applicable Legal Principles

[74] In *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries* (1996), 19 B.C.L.R. (3d) 282 (C.A.), 1996 CanLII 3033 (BC CA) [*Teal Cedar*] at para. 66, the BC Court of Appeal noted that leave to add a new cause of action should not be refused because the plaintiff's conduct was a "deliberate decision" or was "voluntarily dilatory".

[75] Considerations for whether to allow the amendments are the length of the delay, the reasons for the delay, the presence of prejudice, and the overriding question of what is just and convenient. *Teal Cedar* also considered a contractual limitation period which had expired and, consequently, it considered the issue of prejudice.

[76] The Court of Appeal found that the plaintiff appellant in *Teal Cedar* had deliberately chosen not to include the proposed amendments in the initial pleadings but did not characterize the plaintiff's conduct as dilatory. The court held that such a failure may be a factor, but it would not prevent the court from exercising its discretion in the plaintiff appellant's favour. Consequently, any argument in respect of delay advanced by CCMET here, while a factor to consider, is not decisive.

[77] In *Letvad v. Fenwick*, 2000 BCCA 630, the Court of Appeal noted the guidelines where the discretion to amend is being considered in connection with an amendment after a limitation period has expired. Justice Esson noted:

> [29] My understanding of the phrase "completely unfettered" in this context is that the discretion is not fettered by the relevant legislation, i.e., the Rule and the *Limitation Act*. It is, however, fettered to the extent that, as was held in [*Teal Cedar*], it must be exercised judicially, in accordance with the evidence adduced and such guidelines as may appear from the authorities. It was held in [*Teal Cedar*] that the guidelines to which the chambers judge is required to have regard include these:
>
> - the extent of the delay;
> - the reasons for the delay;
> - any explanation put forward to account for the delay;
> - the degree of prejudice caused by delay; and
> - the extent of the connection, if any, between the existing claims and the proposed new cause of action.
>
> McEachern C.J.B.C., in his concurring reasons, said at p. 300:
>
> [74] Applying the same principles regardless of whether the application is to add new defendants, as in [*Bank of Montreal v. Ricketts (1990)*, 44 B.C.L.R. (2d) 95 (C.A.), 1990 CanLII 1996 (BC CA)] or new causes of action, as in [*Med Finance Co. S.A. v. Bank of Montreal* (1993), 79 B.C.L.R. (2d) 222, 1993 CanLII 1428 (BC CA)], I believe the most important considerations, not necessarily in the following order, are the length of the delay, prejudice to the respondents, and the overriding question of what is just and convenient.

[78] In respect of the issue of delay, this was also reviewed by Voith J. in *Hu*. At para. 19, he set out:

> [19] Recent expressions of these same principles are found in the following decisions of this court:
>
> a) *Mee Hoi Bros. Company Ltd. v. Borving Investments (Canada) Ltd*., 2014 BCSC 2081, where Master Taylor said:
>
> > [5] Teal Cedar states that while in the exercise of judicial discretion, the length of any delay, the reasons for delay and the expiry of the limitation period are all factors to be considered, none of those factors is to be considered in isolation. The overriding question is what is just and convenient. McNaughton is clear in its instruction that on an application for amendment, it is not open to the court to consider evidence in support of a pleading, but rather is only to consider whether the pleading discloses a reasonable cause of action.
>
> b) *Easingwood v. Cockroft*, 2014 BCSC 1595, where Fitch J. said:
>
> > [46] As a general rule, such amendments as are necessary to determine the real question in issue between the parties should be permitted. Where possible, and consistent with the generous approach generally taken in applications to amend pleadings, the existence of prejudice should be dealt with by an order for costs. A party seeking an amendment need not adduce evidence in support of the proposed amendment as it is sufficient if the pleading discloses a reasonable cause of action: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.).

[79] In summary, delay must be explained in circumstances where the court is being asked to exercise its discretion to permit the amendment. However, it is not necessary that it would involve more than a review of all the materials including available evidence filed on the application beyond sufficiency. If the facts in the application materials establish reasons for the delay sufficient to enable the Judge to review the reason and to be able to exercise their discretion, then the facts are sufficient.

[80] While the Associate Judge did indicate that she could not consider "the reasonableness" of Allied's position, she clearly did review the materials. She clearly accepted the facts alleged as established. The Associate Judge has left the limitation defence for the trial judge. There was no application before the court respecting s. 22(5) of the *Limitation Act.* A review of the decision does not lead to the conclusion that she did not consider the facts alleged. In respect of this argument, I find that the Associate Judge properly did not weigh the evidence surrounding the delay allegation as raised by CCMET. While there must be an explanation for the delay, that was in fact before her as noted above.

[81] I find that the materials and evidence in the record pertaining to the delay, as alleged, are sufficient to explain the delay.

Length of Delay

[82] Here, the length of delay is captured in the procedural history. CCMET filed its notice of civil claim in relation to the payment due on May 16, 2019. The response to the civil claim was filed January 24, 2020. Allied filed its counterclaim on that same date. CCMET filed a response to counterclaim on August 20, 2020. CCMET further filed an amended response to counterclaim on December 11, 2023. On December 18, 2023, Mr. Mahdi Ali, as a representative of CCMET, was examined for discovery by counsel for Allied. After completion of Mr. Ali's examination, and a further review of the transcript and the admissions and statements contained therein, counsel for Allied determined that sufficient grounds existed to plead fraud. In January 2024, Allied sought the consent of CCMET to amend to plead fraud. That request was refused and the application to amend was filed February 8, 2024. That delay is approximately 4 years and 15 days. Although this delay is perhaps relatively long, the length of time does not weigh heavily in my exercise of discretion in light of the reasons for the delay as discussed below.

Reasons for the Delay

[83] As noted above, it was not until Allied discovered Mr. Ali that they determined they had the grounds to plead fraud. The reasons for the delay in discovering Mr Ali

was caused by CCMET when they indicated to Allied that they would have to discover another employee of CCMET (Mr. Connell) because Mr. Ali no longer worked there. This was in error. It was only during the examination for discovery of Mr. Connell that Allied learned that Mr. Ali was indeed still with CCMET.

[84] Unlike in *Teal Cedar*, it cannot be said that Allied was aware of all of the facts. Allied did provide a satisfactory explanation for the delay in seeking to amend.

Presence of Prejudice

[85] CCMET argues prejudice arises from permitting the amendment of fraud because it will likely render the ability to have a summary determination of the limitations issue less likely. In that application CCMET would always have faced the issue which arises when determination is only sought on one issue: whether "litigating in slices" is appropriate: *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd*., 2002 BCCA 138. It is important to note that, here, the Associate Judge preserved the limitation defence for CCMET, thereby, effectively reducing the prejudice. It is likely there will be a longer trial and additional work to be done. However, that is part of addressing the claim on the merits. As well, it is important to note that CCMET had not pleaded the limitation defence in its original response to the counter claim. It was not until after their summary trial application was filed and the respondent noted that that defence was not pleaded that CCMET applied to amend its pleadings to set out the limitation defence. In these circumstances I do not find there is actual prejudice as required. In any event, nothing prevents CCMET from bringing that application. There must be actual prejudice demonstrated as alleged by the opposing party. A potential prejudice is not sufficient: *Langret Investments S.A. v. McDonnell* (1996), 21 B.C.L.R. (3d) 145 (C.A.) at 153, 1996 CanLII 1433 (BC CA).

[86] In its Statement of Argument, CCMET also submits that:

> 24. In the alternative, the Associate Judge's ruling raises questions vital to the final issue in the case which justify a rehearing. In particular, and without limitation:
>
> […]

> b. The parties have expended significant time and resources over the course of more than five years of litigation focused on the causes of action plead at the outset of these proceedings. New allegations of fraud at such a late stage in the proceedings will fundamentally change the landscape of the litigation. The Appellant will have to defend a substantially different cause of action as compared to those previously plead by the Respondent, and the Appellant's counterclaim defense will be prejudiced due to the extensive amount of time (more than five years) that has now passed since the purported fraud allegedly occurred.
>
> c. If the Respondent is permitted to plead fraud, then (1) the Limitation of Liability Clause issue may be deemed unsuitable for summary determination; (2) more time will need to be added to the current 15-day trial time; and (3) more time will be required for examinations for discovery.
>
> d. As an engineering firm, providing services that directly contribute to the safe and proper construction of roads, unfounded allegations of fraud carry significant concerns about potential impacts to the Appellant's reputation.

[87] CCMET relies on *Mullett* at para. 32 as well as *Unosi v. Coquitlam (City)*, 2023 BCSC 791.

[88] Prejudice is but one consideration. Importantly, where that can be compensated by costs, that alone will not defeat an application to amend in these circumstances.

[89] Here, the additional expended effort and time spent preparing a defence to the fraud claim will not be overly burdensome given the facts pleaded have not changed, other than to indicate the alleged state of mind of CCMET and its employees. In any case, those efforts can be considered at the costs stage.

[90] Similarly, the potential unavailability of a summary determination on the Limitation of Liability Clause may force counsel to prepare more extensively for the merits trial than it would have otherwise. As noted, the costs of this preparation can be addressed after a decision on the merits.

[91] As to reputational harm, it is not clear that the fraud claim will have a considerable impact on their reputation. As mentioned, the facts underlying the claim have not been drastically altered.

[92] These factors do not weigh heavily in the exercise of my discretion.

Connection Between Existing Claims and Amendments

[93] The proposed amendments are intimately connected with the existing claims. The original claim was that CCMET negligently provided false information about the aggregate testing results; the amended claim is that those results were provided knowingly, recklessly, or with the intent to deceive. While these changes do alter the claim against CCMET, they are not so significant as to constitute a reason against allowing the amendment.

PARTICULARS FOR FRAUD

[94] I turn now to the argument that the Associate Judge erred in permitting the amendment because there were insufficient particulars set out for a pleading of fraud

[95] In relation to the factors that are appropriate for the Associate Judge to consider were whether the amendments pleaded were bound to fail, and whether the amendments were sufficiently particularized pursuant to Rule 3-7(18), which sets out as follows:

> When particulars necessary
>
> (18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

[96] CCMET argues that while the threshold to allow amendments is typically very low, that threshold is heightened when the proposed amendment contain allegations of fraud. CCMET relies on the *American Creek*, in which Master Baker set out:

> [12] As for the pleadings themselves, Mr. Kowalchuk submits that they do not meet the requirements of either the Rules or case authorities. He argues the amendments would offend both Rule 3-7(9) and 3-7(18):

> (9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.
>
> ...
>
> (18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.
>
> The amendments alleging implied terms to the agreement, he argues, are conclusions at law and offend sub-rule (9), and those referring to fraud are lacking by sub-rule (18). Moreover, case authorities […] establish that in the case of fraud, an applicant must establish an "adequate foundation" for the exercise of judicial discretion whether to allow "late amendments setting up fraud" […], that fraud requires deliberate attempts to mislead, and that poor "communications arrangements" are not sufficient […], nor is recklessness without proof of dishonest intention […]. The amendments alleging fraud meet none of these requirements, argues Mr. Kowalchuk. [Footnotes omitted.]

[97] Master Baker further noted:

> [19] The allegations of fraud, however, do not meet the requirements; Rule 3-7(18) requires "...full particulars, with dates and items if applicable..." of any fraud or misrepresentation. Moreover the authorities are clear that there must be a clear allegation of an intention to deceive […] and that pleadings are not sufficient if they only invite the inference of fraud. The proposed amendments (i.e. the references to fraudulent conduct in paras. 16 and 42) do not take the reader beyond inference. Those amendments will therefore not be permitted. [Footnote omitted.]

[98] CCMET also relies on *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Mines and Lands)*, 2012 BCSC 1623. In that case, Master Taylor reviewed Master Baker's decision in *American Creek* and noted that Master Baker relied upon *Casa Roma pizza Spaghetti & Steakhouse Limited v. Gerling Global General insurance Co*. (1994), 87 B.C.L.R. (2d) 60 (C.A.), 1994 CanLII 1724 (BC CA) [*Casa Roma*].

[99] It is of note in *Casa Roma* that the sought-after amendment to allege fraud was brought on the first day of trial. Goldie J.A., for the court, noted nonetheless that the decision on permitting an amendment setting out fraud remains discretionary:

> [13] While it may be so that late amendments setting up fraud are treated more leniently now than in the past, an order in the circumstances of the case at bar remains discretionary. The headnote in *Atkinson v. Fitzwalter and*

> *others*, [1987] 1 All E.R. 483 (C.A.) states the position in terms most favourable to the position taken by the Insurer in the case at bar. I quote the relevant portion from p. 483:
>
> > The general principle to be applied in considering an amendment, however late, was that it should be allowed if justice required it, provided the other party could be monetarily compensated for any inconvenience, and the fact that the amendment alleged fraud was not of itself reason to refuse to allow it to be made.

[100] Justice Goldie noted that the competing consideration was the seriousness of an allegation of fraud, particularly at a later stage in the proceeding, and where that is the case, the court must be satisfied clearly that no prejudice is being caused. The Court found that in that particular matter, an adequate foundation for the exercise of judicial discretion had not been placed before the justice and allowed the appeal.

[101] As to the particulars of the fraud in this case, the Associate Judge sets these out at paras. 21 to 23 of her decision as follows:

> [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.

[102] I agree with the finding of the Associate judge on this issue. While the pleadings are a bare minimum it cannot be asserted that the pleadings do not establish adequate particulars. Here, I find that adequate particulars are set out.

CONCLUSION

[103] Having reviewed all the materials and considered the arguments, I am exercising my discretion to permit the Amendments as set out in Allied's proposed pleading. I find it is just and convenient to permit the amendments.

[104] The appeal of CCMET is accordingly dismissed.

"Maisonville J."