COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Air Palace Co., Ltd. v. Rotor Maxx Support Limited,* 2023 BCCA 393

Date: 20231027
Docket: CA48896

Between:

Air Palace Co., Ltd.

Appellant
(Defendant)

And

Rotor Maxx Support Limited

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Bennett
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated February 6, 2023 (*Rotor Maxx Support Limited v. Air Palace Co., Ltd.*, 2023 BCSC 170, Vancouver Docket S183230).

Counsel for the Appellant:	S. Bae
Counsel for the Respondent:	W.S. Taylor D.M. Field
Place and Date of Hearing:	Vancouver, British Columbia September 14, 2023
Place and Date of Judgment:	Vancouver, British Columbia October 27, 2023

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Hunter

Summary:

The appellant appeals orders dismissing its application for leave to amend its response to civil claim and to file a counterclaim and granting the respondent's application to strike parts of the appellant's existing response to civil claim under the doctrine of res judicata or as an abuse of process. The appellant's claim against the respondent, in a separate action it commenced in Korea over the same events, had earlier been dismissed. Held: Appeal dismissed. There is no need to address issue estoppel or abuse of process as the chambers judge's findings on cause of action estoppel were dispositive of all of the defences or claims the appellant sought to advance. The Korean court's decision was final and addressed the same issues and defences the appellant wished to raise in the current proceeding. The chambers judge correctly applied the legal framework for an equitable setoff when she struck that pleading. Finally, the appellant's claim for breach of fiduciary obligation did not disclose a reasonable claim or defence.

Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] This appeal arises out of cross applications that were brought by the respondent Rotor Maxx Support Limited ("RMS") and the appellant, Air Palace Co., Ltd. ("AP"), respectively. In late 2016, RMS repaired a helicopter engine owned by AP. AP did not pay RMS for those repairs and for other expenses, and RMS commenced an action. AP's response to the claim raised various issues and defences that RMS, in its application, argued should be struck under the doctrines of abuse of process and *res judicata*. The judge agreed.

[2] AP, in turn, brought a motion to file an amended response and counterclaim. The judge dismissed the motion, with leave to re-apply. The judge dismissed AP's application on the basis that its draft amended response and draft counterclaim failed to conform with the requirements of a proper pleading. She also determined that AP could not rely on distant (from 2010) and unrelated events to ground an equitable setoff. Finally, she concluded that AP's pleading of an alleged fiduciary relationship with RMS, in both its response and its counterclaim, should be struck because both pleadings failed to establish a cause of action or defence. She ordered that AP could not, in any redrafted response or counterclaim, plead either an equitable setoff or a breach of fiduciary duty by RMS.

[3] AP accepts the judge's finding that its pleadings were defective in multiple respects. However, it appeals each of the other orders made by the judge. For the reasons that follow, I would dismiss AP's appeal.

General Background and the Judge's Reasons

[4] RMS is an extra-provincial company incorporated pursuant to the laws of Canada. It disassembles, maintains, and repairs aircraft parts. AP is a Korean company that operates a commercial aircraft business in South Korea. RMS and AP have had a commercial relationship since at least 2010.

[5] In March 2015, RMS removed an engine on a helicopter owned by AP and transferred it to British Columbia to be overhauled. In October 2015, the engine was returned to AP in Korea. A fuel leak incident occurred, which AP asserted was caused by failures in three fuel components (the "Fuel Components"). RMS repaired one of the components and it had a third party repair the other two components.

[6] On September 23, 2016, employees of RMS installed the repaired Fuel Components into the engine in Korea. The engine was then installed in the helicopter by employees of AP. The helicopter was taken out for a test flight and there was an overtemperature event (a "Hot Start Event") which damaged the engine. The damaged engine was returned to RMS for assessment and it leased AP a rental engine while repairs were being undertaken. RMS alleges the parties agreed that it would perform the required repairs. AP denies any such agreement.

[7] In 2017, AP commenced an action in Korea alleging that RMS caused the Hot Start Event (the "Korean Action"). AP was unsuccessful at trial and the two successive appeals it brought in the Korean courts were dismissed.

i) The abuse of process and *res judicata* issues

[8] The judge identified the legal principles that governed the doctrines of abuse of process, issue estoppel and cause of action estoppel. She found that the trial decision in the Korean Action had been made by a court of competent jurisdiction,

that the decision was final and that it would not be unfair to preclude AP from raising defences that had been decided by the Korean courts.

[9] The judge then considered whether the Korean court had "dispose[d] of all the issues AP seeks to raise in its defence [to RMS's Claim]". She reviewed the issues raised in the Korean Action at length and summarized the conclusions of the Korean trial court as follows:

> [26] The District Court found that, while RMS employees installed the fuel components in the engine, it was AP's employees who installed the engine in the helicopter. The Court stated:
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> > …The plaintiff's engineers connected the helicopter airframe of this case and the emergency throttle support when reassembling the engine of this case back into the helicopter airframe of this case. During the connecting work, they did not perform any readjustment or fitting work. The emergency throttle rack takes the role of opening and closing the emergency fuel valve. Then the emergency fuel valve was left open because of the failure of performing the readjustment or the fitting work with the emergency throttle rack.
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> [27] The District Court determined that AP had not established that RMS's engineers "committed negligence or conducted poor performance such as failing to perform readjusting or fixing the emergency throttle rack while replacing the temporary fuel control unit of this case with the fuel control unit of this case". Further, the District Court found that it was AP's engineer who failed to secure the emergency throttle rack when installing the engine in the helicopter, and this failure was the cause of the Hot Start Event and loss to AP.
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> [28] The District Court finally concluded that the repair costs to the engine for work performed by RMS after the Hot Start Event and the rental fees for the helicopter engine AP leased from RMS were to be determined in the action commenced by RMS in B.C., i.e., the action before me.
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> …
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> [43] The Korean court considered all of the issues above and found that AP had not proven that RMS's engineers "committed negligence or conducted poor performance such as failing to perform readjusting or fixing the emergency throttle rack while replacing the temporary fuel control unit". The court determined that AP's allegation that RMS negligently replaced the fuel control unit was unfounded.
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> [44] The Korean court also concluded that, after the components had been repaired and installed in the engine, it was the responsibility of AP's engineers to reinstall the engine in the helicopter. When AP's own engineers reinstalled the engine in the helicopter, they failed to properly connect the

> emergency throttle support and emergency throttle rack, which was the ultimate cause of the Hot Start Event and subsequent damage to the helicopter. The court found that emergency throttle support and emergency throttle rack were part of the helicopter and not the engine. On this issue, the Korean court concluded that all responsibility for the emergency throttle support and emergency throttle rack lay with AP and not RMS.
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> [45] The Korean court noted that the engine repair costs and the rental fees under the lease agreement for the alternate helicopter engine were being addressed in this B.C. action. The Korean court found that AP's claim against RMS to recover repair costs and rental fees for the alternate helicopter engine was baseless, given that those costs resulted from the work of AP's own engineers.

[10] The judge addressed each of issue estoppel, cause of action estoppel and abuse of process. Under the heading "Does issue estoppel apply?", she found AP was barred from raising defences "put into issue" in the Korean Action which "include[d] breaches of contract and negligence in the performance of any maintenance or repairs to the engine, from 2015 to 2016".

[11] Under the heading "Does cause of action estoppel apply?", the judge found AP was barred "from raising any and all claims against RMS arising out of RMS's maintenance of AP's helicopter engine from 2015 to 2016, including claims for breach of contract, breach of fiduciary duty, breach of duty of good faith, constructive trust, unjust enrichment, or any of the myriad of defences raised or sought to be raised, or asserted by way of equitable setoff or otherwise".

[12] Under the heading "Are any of AP's defences an abuse of process?", the judge concluded it was "in the interests of justice that all such defences and claims be struck from the response to civil claim…" and she ordered that all "defences and claims contained in the proposed amended response to civil claim [be] disallowed".

ii) The equitable setoff issue

[13] AP's draft amended response to civil claim and counterclaim also raised issues relating to a different engine component. It pleaded that in 2010 RMS negligently repaired the main gear box on its helicopter. This alleged negligence

extended, for example, to the use of defective parts, the use of unskilled employees and the failure to warn AP the gear box was unsafe.

[14] AP accepted that the main gear box was properly repaired in 2011 and that there were no further difficulties with that component. However, AP now alleged that it should be able to setoff the cost of the repairs to the main gear box that it paid in 2010 and 2011 against any amounts it might be found to owe RMS.

[15] The judge described the relevant legal framework and concluded:

> [71] The issues raised in relation to the gearbox in 2010 and 2011 bear no relationship to the issues with the fuel components in 2015 and 2016. Other than the fact the parties are the same, there is no factual or legal connection between the two. The claims in relation to the 2010 and 2011 events do not go to the very root of RMS's claim in the B.C. action. Indeed, the earlier gearbox issue was fully resolved and has absolutely nothing to do with RMS's claim to recover rental fees and repair costs following the 2016 Hot Start Event. I do not agree that AP has shown an equitable ground to be protected against the claims of RMS that would allow it to raise the events of 2010 and 2011 in response.

iii) The breach of fiduciary obligation claim

[16] The judge observed that she had already found that "any claims of fiduciary breach in relation to the Hot Start Event [were] barred by the doctrine of *res judicata*…". She then turned to consider whether AP's draft amended pleadings disclosed a reasonable defence. The judge again started her analysis with the relevant legal framework. Relying on *Galambos v. Perez*, 2009 SCC 48 at paras. 67 and 69, she accepted that an "important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances" and that "a critical aspect of a fiduciary relationship is an undertaking of loyalty: the fiduciary undertakes to act in the interests of the other party".

[17] She also correctly observed that "[f]iduciary duties do not arise in ordinary commercial relationships, where what is truly being alleged is that one party failed to meet the obligations assigned to it pursuant to the agreement".

[18] Having carefully reviewed the various allegations made by AP in its draft pleadings, the judge concluded that AP had failed to plead the material facts required to advance a claim for breach of fiduciary duty. More importantly for present purposes, she found that AP's pleadings could not be amended to properly advance that claim.

Analysis

i) The abuse of process and *res judicata* issues

[19] As noted, the judge concluded that each of issue estoppel, cause of action estoppel and the doctrine of abuse of process prevented AP from raising the defences or claims it sought to advance in its draft amended response and counterclaim respectively. To be clear, she found that issue estoppel prevented AP from alleging breach of contract or negligence "in the performance of any maintenance or repairs to the engine, from 2015 to 2016". She found that cause of action estoppel prevented AP from advancing any claims or defences based on RMS's maintenance of the helicopter engine from 2015 to 2016. This included a broader set of defences including defences based on contract, breach of fiduciary obligation, constructive trust, unjust enrichment or any "of the myriad of defences raised or sought to be raised…". The judge's findings on abuse of process were, in a sense, an alternative basis for arriving at the same conclusion.

[20] Thus, the judge's findings on cause of action estoppel were dispositive of all of the defences or claims AP sought to advance in its draft pleadings. There is no need on this appeal to address the judge's findings on either issue estoppel or abuse of process.

[21] The legal framework that governs cause of action estoppel is well-established. There are three broad aspects to that framework, each of which is relevant to the present appeal.

a) The purposes served by res judicata

[22] *Res judicata* refers to "something that has clearly been decided" such that a litigant is "estopped" by a prior proceeding from bringing another claim: *R. v. Duhamel*, [1984] 2 S.C.R. 555 at 561, 1984 CanLII 126. *Res judicata* has two forms: issue estoppel and cause of action estoppel. The rationale behind the doctrine of *res judicata* was explained in *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 25, citing George Spencer Bower & KR Handley, *Res Judicata*, 4th ed (London, UK: LexisNexis, 2009) [Spencer Bower & Handley]:

> Two policies support the doctrine of *res judicata* estoppel: the interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause. Maugham L.C. said:
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> > The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action…. it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

See also Donald J Lange, *The Doctrine of Res Judicata in Canada*, 4th ed (LexisNexis, 2014) at 4–10 [Lange].

[23] In *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 at para. 18, Binnie J., for the majority, said "[t]he law rightly seeks a finality to litigation… It requires litigants to put their best foot forward…. when first called upon to do so. A litigant…. is only entitled to one bite at the cherry".

[24] A further purpose of cause of action estoppel is to prevent contradictory findings of fact or law. It is a doctrine that "prohibits contradiction": Spencer Bower & Handley at 267.

b) The rules that govern the application of cause of action estoppel

[25] Cause of action estoppel is a common law doctrine that prevents a litigant from pursuing litigation by installments: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 22–23; *Danyluk* at para. 63; *Ahmed v. Canna Clinic Medicinal Society*, 2018 BCCA 319 at para. 23.

[26] The doctrine finds its early expression in the well-known case *Henderson v. Henderson* (1843), 3 Hare 100 at 114–115, 67 E.R. 313 (Eng. V.-C.):

> In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, in which the parties, exercising reasonable diligence, might have brought forward at the time.

[27] These principles have been applied by this Court on numerous occasions. In *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.,* [1980] 19 B.C.L.R. 59 at 64–65, 1980 CanLII 393 (C.A.), Carrothers J.A. explained:

> …the maxim *res judicata* does not apply to distinct causes of action…., But it does apply with the second action arises out of the same transaction, in the same subject matter, as the adjudicated action, although based on a different legal conception of the relationship between the parties…. It also applies not only to points on which the court in the first action was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belongs to the subject of the first litigation in which the parties, exercising reasonable diligence, might have brought forward at the time…

See also *Sood v. Hans*, 2023 BCCA 138 at para. 39; *Pereira v. Dexterra Group Inc.,* 2023 BCCA 210 at para. 23. And see *Cliffs Over Maple Bay (Re)* at para. 15; Lange at 131 for a more complete discussion of the individual elements of cause of action estoppel.

[28] Cause of action estoppel can arise in different contexts. It can be engaged, as was the case in *Danyluk*, when an unsuccessful plaintiff brings a second action, arising out of the same key or material facts, but now based on a different legal theory. It can, as was the case in *Henderson*, be engaged in circumstances where an unsuccessful defendant in an earlier action seeks, as the plaintiff in a subsequent action, to raise an issue that undermines the integrity of the earlier decision. Or, as

in this case, cause of action estoppel can be engaged when an unsuccessful plaintiff in an earlier action seeks to raise a defence in a subsequent action which it could have and should have raised as plaintiff in the first action: see for example *Erschbamer v. Wallster*, 2013 BCCA 76 at para. 17.

c) Limitations on the application of cause of action estoppel

[29] Fraud in an initial proceeding operates as an exceptional circumstance to the doctrine of *res judicata*: *Dhillon v. Dhillon*, 2006 BCCA 524 at para. 30. New evidence can similarly constitute an exceptional circumstance that prevents the operation of an estoppel: *Grandview v. Doering*, [1976] 2 S.C.R. 621 at 638–639, 1975 CanLII 16. What constitutes new evidence is narrowly circumscribed: Lange at 288. This Court has concluded that the court has a limited residual discretion regarding the application of cause of action estoppel; see the various authorities at fn. 97 of Lange at 246.

d) Application of these principles

[30] AP's position on appeal, on this first issue, devolves to a few narrow questions. AP contends that the "cause of action" it advanced in the Korean Action is distinct or different from the "cause of action" it seeks to advance in the present action. Specifically, it contends that in the Korean Action it argued that the Hot Start Event occurred because RMS had negligently installed a part known as the emergency throttle rack. It says the issues it now seeks to advance, in its existing response and in its draft amended response and counterclaim, relate to the negligent repair of the Fuel Components. It also says the Korean Court only dismissed its claim against RMS.

[31] In my view, none of these central submissions has any merit. First, both AP's claim and the Korean court's findings in the Korean Action were broader than AP is prepared to recognize. The judge reviewed that claim in some detail. She found, in part, that in the Korean Action "AP alleged that RMS was negligent in performing its maintenance, repair and installation work which caused the hot start and damage to the engine" and that "AP alleged the negligence of RMS occurred in March 2015,

October 2015 and September 2016". The earlier 2015 dates necessarily relate to periods when the engine, including the Fuel Components, was being repaired and had nothing to do with the installation of the emergency throttle rack.

[32] My own review of AP's pleading, or "Written Complaint", in the Korean Action is consistent with the judge's finding. A significant aspect of AP's claim was based on the allegation that the "poor maintenance" of the Fuel Components became a "direct cause" of the damage to the helicopter's engine. The claim also alleges that AP's loss was "due to violation of a series of obligations" of the maintenance agreement it had with RMS, including repair of the components of the engine.

[33] Second, the judgment of the Korean Court, dated August 29, 2019, is broader than AP contends. When the court determined Korean law should govern the contract between the parties it did so, in part, because the "accident [in] this case occurred not because the fuel control unit…was repaired in Canada in a faulty way but because the required readjustment or fitting work was not properly performed on the emergency throttle rack in The Republic of Korea…". The court described AP's tort claim as being based on "professional negligence during the replacement and reassembling process of the temporary fuel control unit of this case". When the court summarized AP's submissions it said that AP had argued, in part, it was "due to the negligence committed by the defendant's engineers during the process of maintaining the helicopter and engine… the major parts of the engine… were destroyed or damaged".

[34] Finally, and importantly, the court in the Korean Action did more than simply dismiss AP's claim as "baseless". It determined that the damage to the helicopter engine was caused by the improper assembly of the emergency throttle rack and it ascribed responsibility for that improper assembly to AP.

[35] Thus, AP's submission that the claims in the Korean Action were based on different "causes of action" from the causes of action it seeks to advance in its draft pleadings is not accurate. That initial claim was advanced in contact and tort and it

was based on allegations of various difficulties relating to the maintenance and installation of different engine parts including the Fuel Components.

[36] Even if, however, AP's claim in the Korean Action had been as narrow as it contends, the submission that its present claims and defences are based on a "distinct cause of action" is without merit.

[37] AP is correct that separate and distinct causes of action, brought in separate proceedings, are not governed by cause of action estoppel: *Cliffs Over Maple Bay (Re)* at para. 28; *Lehndorff* at para. 16; Lange at 131, 147–152.

[38] What constitutes a "cause of action" for present purposes was addressed by the court in *Danyluk*:

> [54] A cause of action has traditionally been defined as compromising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgement of the court.… Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common [Citations omitted].

See also *Mohl v. University of British Columbia,* 2006 BCCA 70 at para. 24; *Fournogerakis v. Barlow*, 2008 BCCA 223 at para. 22.

[39] However, the question of whether two causes of action are the same "does not depend upon technical considerations but upon matters of substance", that is, "whether they are in substance identical": Lange at 147–48; Spencer Bower & Handley at 95.

[40] In the Korean Action, AP sued RMS in contract and in tort for damage that it alleged RMS had caused to its helicopter engine. AP says that in the Korean Action it advanced a particular theory of how the Hot Start Event occurred (the installation of the emergency throttle rack) while in this case it asserts the Hot Start Event was caused by the improper maintenance or repair of the Fuel Components. In my view, that distinction does not give rise to a difference in substance. The two matters involve the same parties, the same event, the same damage and the same ultimate

issue. AP, even on its narrow description of the Korean Action, does no more in its draft pleadings than advance a different theory of causation for its loss.

[41] If AP were correct, it would be able to bring a series of actions, all arising out of the Hot Start Event, by simply asserting in successive actions that RMS had failed to properly maintain or repair or install a different part.

[42] AP's submission also fundamentally offends the various objects served by *res judicata*. It offends the principles of finality and of protecting litigants from repeated suits arising from the same cause. It offends the rule against "contradiction" in that it seeks to advance a theory that is inconsistent with the findings of the Korean court on what caused the Hot Start Event as well as who was responsible for that event. It offends the principle of litigating in installments.

[43] One last point is relevant. When asked whether it had any evidence that RMS had negligently maintained or repaired the Fuel Components, AP candidly admitted it did not. That reality reinforces the important role played by *res judicata* in the administration of justice. It prevents litigants from advancing multiple claims based on conjecture or specious grounds.

ii) Equitable setoff

[44] AP relies on the expenses it incurred when RMS, allegedly negligently, repaired the main gear box on the helicopter in 2010 and 2011 to ground its pleading of equitable setoff in its draft pleadings.

a) *Standard of review*

[45] RMS applied to strike portions of AP's draft pleadings, including its pleading of equitable setoff, under R. 9-5(1)(b) and (d) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. The decision of a chambers judge made under R. 9-5(1)(b) and (d) is discretionary and generally owed deference; *Mercantile Office Systems v. Worldwide Warranty Life Services Inc.,* 2021 BCCA 362 at para. 6; *Lamb v. Canada (Attorney General)*, 2018 BCCA 266 at paras. 46–47.

[46] AP accepts the judge properly identified the relevant legal issues before her but contends the judge misapplied those considerations. The application of a set of correct legal principles to the facts is a question of mixed fact and law and is subject to a deferential standard of review: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 28–29, 33. Further, the specific question of whether the claim advanced by a defendant, by way of equitable setoff, goes to the "root of the plaintiff's claim", is also a question of mixed fact and law and again subject to a deferential standard of review: *R. Home Supply Centre Ltd. (Re)*, 2015 BCCA 500 at para. 16 and the further authorities that are referred to.

a) *The legal framework*

[47] The judge relied on *Holt v. Telford*, [1987] 2 S.C.R. 193 at 212, 1987 CanLII 18, where the court cited with approval the principles summarized in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd. and Tsang*, [1985] 6 W.W.R. 14, 1985 CanLII 144 (B.C.C.A.):

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.,* [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
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> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: . . . [*Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
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> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*.
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> 5. Unliquidated claims are on the same footing as liquidated claims: *Nfld. v. Nfld. Ry. Co.,* [1888] 13 App. C. 199 (P.C.)].

See also *Wilson v. Fotsch*, 2010 BCCA 226 at para. 71; *Jamieson v. Loureiro*, 2010 BCCA 52 at para. 35.

b) ***Application of these principles***

[48] AP correctly identifies that the issue the judge had to consider related to the third question in the *Telford* framework, which is whether the defendant's cross-claim is so closely connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to seek payment without taking the cross-claim into account. The judge recognized, though not expressly, that this issue raises two questions. The first deals with the question of "close connection" and the second with "manifest injustice": *918339 Alberta Ltd. v. 569244 British Columbia* Ltd., 2005 BCCA 371 at para. 18; *Jamieson* at paras. 40–43.

[49] AP contends the judge misapprehended both questions. In relation to the "close connection" issue, it argues that the repairs RMS made to the main gear box in 2010 took place between the same parties for the same helicopter and out of the same contract, or at a minimum, the same series of interrelated contracts as the 2016 repairs arising out of the Hot Start Event.

[50] The judge did not agree and, as noted earlier, found that "[t]he claims in relation to the 2010 and 2011 events do not go to the very root of RMS's claims in the B.C. action. Indeed, the earlier gear box issue was fully resolved and has absolutely nothing to do with RMS's claim to recover rental fees and repair costs following the 2016 Hot Start Event". This finding was open to the judge on the record before her.

[51] AP also emphasizes that at one point the judge said "[t]he difficulty for AP in the application of the defence of equitable set off, is that the set off must relate to the same event which is being sued upon by the plaintiff". I accept this language, without more, would describe the question before the judge too narrowly. However, it is clear, looking at her reasons as a whole, that she understood the principles that guided her decision. Thus, elsewhere the judge properly said "[i]n each case the court will look to whether the contracts or claims are so interrelated that it would be unjust to allow the plaintiff to proceed without recognizing the competing claim of the defendant".

[52] In my view, the judge properly understood and applied the legal framework she was required to follow. In particular, she understood that a defendant's claim "will not be viewed as an equitable set-off unless it is closely or intimately connected with, or directly impeaches, the plaintiff's claim": *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751 at para. 44. The fact that AP can point to different cases where different judges came to different decisions in different circumstances is of no relevance. I see no error in this aspect of the judge's decision.

[53] On the second question the judge found, for several reasons, that the equities did not favor AP's claim for a setoff. She noted that in the Korean Action, AP had admitted that RMS had "well managed its maintenance work on the helicopter from 2010 to the present, subject to the express complaints raised in 2015 and 2016" and that it "would not be fair or equitable for AP to raise allegations which contradict the position it took in litigation in Korea".

[54] AP submits that its position in the Korean Action only pertained to the proper maintenance of the "helicopter's engine" and not the "helicopter's [main gear box]". Respectfully, this is an unreasonably technical interpretation of the judge's reasons. Those reasons were broader and extended to AP having "recounted the long history of maintenance done by RMS, and… that it had no complaints with RMS's work…." These comments were clearly directed at AP seeking to advance a concern in its draft pleadings, relating to work done in 2010 and 2011, that had played no part in the Korean Action and that was at odds with its general position in that action.

[55] AP also argues, relying on *Langret Investments S.A. v. McDonnell*, [1996] 21 B.C.L.R. (3d) 145 at paras. 43–51, 1996 CanLII 1433 (B.C.C.A.), that the judge erred when she found that "it would be prejudicial for AP to raise the 2010 claims in the claim before me because of the lengthy passage of time…". AP contends it was not enough for the judge to rely on "potential prejudice" arising from the lengthy passage of time since the 2010–2011 repair of the main gear box. Instead, it was necessary for her to find that RMS would suffer "actual prejudice".

[56] I do not agree. *Langret* addressed the amendment of a pleading. Though AP's draft pleadings were an issue in the application before the judge, the narrow question she considered in this part of her judgment pertained to whether it was manifestly unfair for RMS to enforce its claim without accounting for AP's cross-claim. It was not wrong for the judge, when weighing the equities between the parties, to consider that more than a dozen years had passed since RMS had done the work AP now complained of.

[57] Next, AP argues the judge misapprehended aspects of the evidence when she found that RMS might encounter difficulty in locating witnesses and records relevant to the 2010–2011 events. I agree the judge may have misunderstood aspects of the evidence before her, but I do not consider this misapprehension as "overriding" in the sense that it was "determinative of the outcome of the case" (*Salomon v. Matte-Thompson,* 2019 SCC 14 at para. 33) or that it can be "shown to have affected the result" (*H.L. v. Canada (Attorney General)*, 2005 SCC 25 at para. 55).

[58] In my view, none of the issues raised by AP has merit and I would not accede to this second ground of appeal.

iii) Breach of fiduciary obligation

a) *Standard of review*

[59] The judge appears to have relied on R. 9-5(1)(a), (b) and (d) when she determined i) that AP had not pleaded the material facts necessary to advance a claim for breach of fiduciary and ii) that that claim could not be amended. It is the second aspect of her ruling that is at issue. This second issue appears to have been decided under R. 9-5(1)(a), which allows a judge to strike a pleading that "discloses no reasonable claim or defence…". This is a question of law and subject to a correctness standard of review (*Muldoe v. Derzak*, 2021 BCCA 199 at para. 27, citing *Kindylides v. Does*, 2020 BCCA 330 at para. 19, *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at para. 44, leave to appeal to SCC ref'd, [2018] S.C.C.A. No. 25).

b) *Analysis*

[60] AP contends the judge made two errors in this part of her analysis. The first alleged error arises from the following conclusion expressed by the judge:

> [78] I have already found that any claims of fiduciary breach in relation to the Hot Start Event are barred by the doctrine of *res judicata*, and AP may not assert any claims of fiduciary breach in relation to the events of 2010 and 2011 as an equitable set off.

[61] AP seeks to challenge these conclusions by revisiting its earlier submissions. Specifically, it again argues that cause of action estoppel is not properly engaged for the 2016 Hot Start Event and it again asserts that the 2010–2011 repair of the main gear box should ground an equitable setoff. For the reasons described earlier, I do not consider that either position has merit. This first issue is dispositive of this ground of appeal.

[62] The second issue raised by AP is, however, similarly without merit. It argues that the particular circumstances of its commercial relationship with RMS were sufficient to ground an *ad hoc* fiduciary relationship. In particular, it contends, relying on *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 405–410, 1994 CanLII 70, that factors such as trust, confidence, complexity of subject matter and inherent vulnerability support the existence of a fiduciary relationship. It emphasizes that RMS trained its staff and it seeks to distinguish its circumstances from other commercial relationships by arguing that helicopters are not comparable to other machines “because any small defect can endanger the lives of people”.

[63] The judge correctly identified that fiduciary relationships rarely arise in commercial relationships: see for example *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership,* 2009 BCCA 34 at para. 57; leave to appeal to SCC ref’d, [2009] S.C.C.A. No. 176; *Litwin Construction (1973) Ltd. v. Pan*, [1988] 29 B.C.L.R. 88 at 104, 1988 CanLII 174 (C.A.).

[64] In *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, at paras. 27 and 36, the court identified a number of factors a claimant “must show” to create an *ad hoc* fiduciary duty. Those factors are not engaged in this case. Even if AP’s draft

pleadings are accepted at their highest, the relationship between RMS and AP was a commercial relationship between a helicopter repair facility and a helicopter operator. The fact that RMS trained some of AP's staff or that AP was "vulnerable" because RMS possessed greater expertise with respect to the services it offered is not enough: *Elder* at para. 36; *Galambos* at paras. 67–71. As the judge observed, "[t]he fact that the RMS engineers had specialized expertise to perform maintenance, and AP relied on them to perform their work competently, is not sufficient to create a fiduciary relationship. If it was, fiduciary relationships would be established in all contracts where one party is hired because of their specialized expertise. This cannot be the case".

[65] This is a case of two commercial parties, with different interests, who entered into one or more agreements at arm's length and whose relationship was defined by those agreements. In my view, the judge was correct in concluding that AP's draft pleading of a breach of fiduciary duty did not disclose a reasonable claim or defence.

Disposition

[66] In my view, AP's appeal should be dismissed.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Hunter"