COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Keltic (Brighouse) Development Ltd. v. Yi Teng Investment Inc.,* 2023 BCCA 375

Date: 20231011
Docket: CA48087

Between:

Keltic (Brighouse) Development Ltd.
(formerly known as YYH Development Ltd.)

Appellant
(Defendant)

And

Yi Teng Investment Inc.

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Saunders
The Honourable Justice Marchand
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia dated January 12, 2022 (*Yi Teng Investment Inc. v. Keltic (Brighouse) Development Ltd.*, 2022 BCSC 33, Vancouver Docket S-187981).

Counsel for the Appellant:	J.K. McEwan, K.C. E.A. Kirkpatrick
Counsel for the Respondent:	I.G. Nathanson, K.C. A.N. MacKay
Place and Date of Hearing:	Vancouver, British Columbia February 6, 2023
Place and Date of Judgment:	Vancouver, British Columbia October 11, 2023

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Justice Marchand
The Honourable Madam Justice Horsman

Summary:

Keltic appeals an order granting leave for Yi Teng to file a further amended notice of civil claim and related pleadings. In its original pleadings, Yi Teng claimed a present unconditional interest in a portion of Keltic's unsubdivided property pursuant to an alleged agreement, and claimed damages for breach of contract. Yi Teng's amendments allege that subdivision was a condition precedent to the requested conveyance, that Keltic was required to pursue subdivision in good faith, and that it was entitled to damages for breach of contract. Held: Appeal dismissed. While the particulars of the agreement and timing of the property interest alleged have been modified, a finding of abuse of process requires more than a finding of inconsistency: it requires an aspect of diametric opposition in the pleadings and a degree of injustice. Whether there is an inconsistency is a question of fact. Whether the inconsistency amounts to an abuse of process warranting judicial intervention to strike the action is an exercise of judicial discretion. The judge committed no reversible error in finding that such an abuse of process had not been established.

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] By the order appealed, the respondent Yi Teng Investment Inc. obtained leave to file a further amended notice of civil claim, an amended response to counterclaim, and an amended reply. The appellant Keltic (Brighouse) Development Ltd. contends that the judge erred in allowing amendments that are fatally inconsistent with its prior pleadings.

[2] The underlying action concerns an alleged agreement, with $50,000 already paid, for the purchase by Yi Teng Investment Inc. of custom office and retail space in a large development under construction on unsubdivided property owned by Keltic (Brighouse) Development Ltd.

[3] In its original pleadings, Yi Teng alleged that Keltic, under its former name, had informed Yi Teng that it did not consider itself bound by the agreement and did not intend to proceed with the sale. In response, Yi Teng advanced a claim for a present unconditional interest in a portion of the unsubdivided lot, and filed a certificate of pending litigation against the entire unsubdivided property. Madam Justice Baker struck the certificate of pending litigation on August 12, 2019 on the basis that a claim for a portion of unsubdivided property did not create a registrable

interest in land. By that time Yi Teng's notice of civil claim had already been amended once.

[4] Keltic's application to strike the certificate of pending litigation relied upon s. 73 of the *Land Title Act*, R.S.B.C. 1996, c. 250:

> 73 (1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of
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> (a) transferring it, or
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> (b) leasing it, or agreeing to lease it, for life or for a term exceeding 3 years.
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> (2) Except on compliance with this Part, a person must not subdivide land for the purpose of a mortgage or other dealing that may be registered under this Act as a charge if the estate, right or interest conferred on the transferee, mortgagee or other party would entitle the person in law or equity under any circumstances to demand or exercise the right to acquire or transfer the fee simple.
>
> (3) Subsection (1) does not apply to a subdivision for the purpose of leasing a building or part of a building.
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> (4) A person must not grant an undivided fractional interest in a freehold estate in land or a right to purchase an undivided fractional interest in a freehold estate in land if the estate that is granted to or that may be purchased by the grantee is
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> (a) a fee simple estate on condition subsequent, or
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> (b) a determinable fee simple estate
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> that is or may be defeated, determined or otherwise cut short on the failure of the grantee to observe a condition or to perform an obligation relating to a right to occupy an area less than the entire parcel of the land.
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> (5) Subsection (4) does not apply to land if an indefeasible title to or a right to purchase an undivided fractional interest in
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> (a) a fee simple estate on condition subsequent in the land of the kind described in subsection (4), or
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> (b) a determinable fee simple estate in the land of the kind described in subsection (4)
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> was registered before May 30, 1994.
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> (6) An instrument executed by a person in contravention of this section does not confer on the party claiming under it a right to registration of the instrument or a part of it.

[5] On August 21, 2019, Keltic filed an application to strike Yi Teng's amended notice of civil claim. Before the application was heard, Yi Teng filed an appeal of the August 12, 2019 order striking its certificate of pending litigation.

[6] On October 22, 2019, this court dismissed Yi Teng's appeal: 2019 BCCA 357 ("*Yi Teng #1*"), describing Yi Teng's claim as a claim for an unconditional interest in a portion of an unsubdivided lot, and holding that such a claim could not serve as a basis for registering a certificate of pending litigation. Madam Justice MacKenzie explained for the court:

> [40] This Court's decision in *International Paper Industries Ltd. v. Top Line Industries Inc. (1996)*, 20 B.C.L.R. (3d) 41 at para. 1 (C.A.) [*Top Line*], unequivocally said s. 73 of the *Land Title Act* prohibits the subdivision of land except in compliance with Part 7 thereof. ...
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> [41] The appellant's claim is for an unconditional interest in land pursuant to an agreement to transfer a portion of an unsubdivided lot. As stated in oral argument, the appellant described the "true nature" of its claim as specific performance of a contract for the sale of "an interest in land to be subdivided in accordance with the laws of British Columbia". The claim on its face is for a portion of an unsubdivided lot — precisely what is prohibited by s. 73(6) of the *Land Title Act* as discussed in *Top Line*.

[7] In her reasons for judgment Justice MacKenzie distinguished *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072, on the basis that *Dynamic* addressed a contract that was conditional upon subdivision approval. She observed that in *Dynamic*, "[i]f the approval were not obtained despite the vendor's best efforts, the parties would be released from their contractual obligations and no party would have a right to damages for breach of contract".

[8] After this court's reasons for judgment were released, Yi Teng obtained leave to amend its pleadings, and applied to include amendments that:

- allege that its agreement with Keltic concerning the custom space included implied terms stipulating that the property's subdivision by Keltic was a condition precedent to any conveyance of the space, and that Keltic was required to pursue subdivision of the property in good faith using its best efforts;

- abandon its request for a certificate of pending litigation;
- seek specific performance in the form of an order directing Keltic to take steps to apply for the subdivision of the property and if obtained, to complete the conveyance of the custom space to Yi Teng; and
- in the event subdivision was not available, seek specific performance in the form of an order directing Keltic to apply for subdivision for a substitute space and, if obtained, to complete the conveyance of that space to Yi Teng.

[9] The proposed amendments did not allege a term similar to that in *Dynamic* providing that the parties would be released from the contract in the event approval was not obtained, and that accordingly, there would be no claim for damages.

[10] Keltic opposed Yi Teng's application on the basis that the proposed amendments were inconsistent with its earlier claims, and therefore constituted a fatal abuse of process. Specifically, it said that Yi Teng had originally claimed an unconditional interest in the property, but now sought to claim a present contingent interest in that same property.

[11] In his reasons for judgment allowing the amendments application, Mr. Justice Mayer, referring to the further amended claim as both a claim for a present *contingent* interest and as a claim for present *conditional* interest in land, found that Yi Teng's changes in position between the amended notice of civil claim and the proposed further amended notice of civil claim were not inconsistent (or fatally inconsistent), were not an abuse of process, and were not prejudicial.

[12] Keltic appeals the order allowing the amendments. It says that the judge erred in three ways, by holding that:

1. the claim pursuant to a contract conferring a "present, conditional interest in land" is a cause of action known to law;

2. Yi Teng's position on the proposed amendment was not an abuse of process by reason of inconsistency with Yi Teng's original pleadings; and

3. Keltic bore the burden of establishing that Yi Teng's proposed amendments were an abuse of process.

[13] I agree with Keltic that the claim described by the judge as being for a present contingent interest in land is not a claim for an enforceable property interest. However, in my view, the amendments do encompass an *in personam* claim in contract which should be allowed to proceed.

The Reasons for Judgment

[14] As a touchstone for my discussion of the issues raised by Keltic, I set out, rather compendiously, key portions of the judge's reasons for judgment.

[15] The judge first addressed the law relating to inconsistent pleadings as an abuse of the process of the court. At para. 42, the judge recognized the principle applied in *Concord Pacific Acquisitions Inc. v. Oei,* 2019 BCSC 1190 at para. 399 that, in general, "[l]itigants are not permitted to assert inconsistent rights in different proceedings". He then referred to the recent decision of this court in *Illingworth v. Evergreen Medicinal Supply Inc.*, 2019 BCCA 471 at paras. 67–69:

> [67] In *Este v. Esteghamat-Ardakani,* 2018 BCCA 290, leave to appeal ref'd, [2018] S.C.C.A. No. 477, it was explained that:
>
> > [93] Cases concerning inconsistent pleadings fall along a spectrum. At one end are cases in which the courts find that, properly interpreted, no inconsistency exists: *Stewart v. Clark*, 2013 BCCA 359 at para. 48, 49 B.C.L.R. (5th) 1; *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5 at para. 26, 29 B.C.L.R. (5th) 211. In the middle are cases in which an inconsistency is found, but the court declines to characterize it as an abuse of process because it was not advanced "deliberately or with full knowledge of the facts": *Walsh v. Mobil Oil Canada*, 2013 ABCA 238 at para. 94, 364 D.L.R. (4th) 508. At the other end are cases in which a party knowingly took inconsistent positions:

> *Pepper's Produce Ltd. v. Medallion Realty Ltd.*, 2012 BCCA 247 at para. 28, 34 B.C.L.R. (5th) 226. ...
>
> [68] There is no question that taking inconsistent positions may result in a finding of abuse of process. However, such is not automatically the case. As noted by Willcock J.A., writing for the Court in *Glover v. Leakey,* 2018 BCCA 56, "an abuse of process does not arise from inconsistent prior pleadings alone; there must be something more giving rise to an injustice" (at para. 32).
>
> [69] Judges have an inherent and residual discretion to prevent an abuse of the court process; however, use of that doctrine is circumscribed. The doctrine is contextually applied and whether an abuse sufficient to warrant judicial intervention occurs is determined case-by-case. Generally, a court will not intervene unless the impugned conduct is contrary to the interests of justice, oppressive, or vexatious and/or the court is satisfied that continuing with the proceedings would bring the administration of justice into disrepute: *Glover* at paras. 33–36, relying on *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 35 and the cases cited therein.
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> [Emphasis added.]

[16] In applying these principles, the judge then said:

> [45] A party advancing an abuse of process claim bears a heavy onus and must show that the abuse is plain and obvious. Only egregious conduct will warrant dismissal of an action: *Hare v. Lit,* 2013 BCSC 33 at paras. 24-25.
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> ...
>
> [46] This is not a situation where Yi Teng seeks to advance a different position in a different proceeding or to advance a new and inconsistent position within a single action while seeking to maintain the original position. The abuse contended to by Keltic concerns Yi Teng's change of position in this action, from claiming a present interest in the Property to a present, contingent interest.
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> [47] Yi Teng concedes that the current proposed amendments are required as a result of the Court of Appeal's decision that its pleadings as they stood at that time did not support a claim for a present contingent interest in land, in the nature of that found to exist in *Dynamic*. ...
>
> [48] Yi Teng submits that contrary to the submissions of Keltic, Yi Teng's pleadings, as they were before Baker J. and the Court of Appeal, did not plead that they did not know about the statutory prohibition against unsubdivided land or knew about it but nevertheless intended to defer its proprietary interest entitlements into the future. They say that the existing amended notice of civil claim and proposed further amended notice of civil claim are not inconsistent. Having reviewed Yi Teng's previous pleadings I agree with Yi Teng's submission.
>
> [49] Keltic's allegations regarding abuse of process focus on the submissions made by counsel before Baker J., the Court of Appeal and Walker J. In summary, Keltic contends that Yi Teng's counsel submitted that

> Yi Teng had a present interest in the Property which is inconsistent with Yi Teng's position in the current proposed further amended notice of civil claim in which it essentially claims a present, contingent interest.
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> [50] Yi Teng submits that to the extent of any inconsistency between previous submissions of counsel and the current version of the proposed further amended notice of civil claim, which it does not fully accept, there is no case authority that inconsistent submissions by counsel give rise to an abuse of process. That is, Yi Teng submits that its counsel's legal submissions are not pleadings of fact which, should they conflict with pleadings, give rise to an abuse of process. In my view this submission has merit.
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> [51] I agree with the submissions of Yi Teng that advancing a tenuous claim before Baker J. and the Court of Appeal, that the current amended notice of civil claim gives rise to an interest in land, does not in and of itself constitute abuse of process, sufficiently egregious to disallow the requested amendments.
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> [52] I do not consider that the procedural history of this case, including positions taken by counsel before Baker J., the Court of Appeal and then Walker J., conflict markedly. I accept that Yi Teng has changed its position to now seek to plead a contingent interest in land – in light of the decision of the Court of Appeal – which is consistent with the evidence of Dr. Chen. I do not find that doing so constitutes an abuse of process.
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> ...
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> [54] In this case the question of relitigation of issues that were previously decided does not arise. What has been decided by the Court of Appeal is that Yi Teng's pleadings, as they stood in August 2019, did not give rise to an interest in land.
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> [55] If the amendments sought are granted, the question of whether Yi Teng is entitled to a present, contingent interest in land will be decided upon a review of the evidence at trial ...
>
> [Emphasis added.]

[17] The judge rejected Keltic's submissions that Yi Teng's change in position was tactical and that the new pleading lacked sufficient merit to warrant the action continuing. In conclusion the judge said:

> [63] In order to refuse a pleadings amendment on the basis of prejudice, the prejudice that must be shown is prejudice to a party's ability to bring or defend an action: *Ledinski v. Chestnut*, 2015 BCSC 373, at para. 34.
>
> [64] I do not find that Keltic has demonstrated that it will suffer prejudice that cannot be remedied through a costs award if the amendments sought by Yi Teng are granted. As was found by Walker J. at para. 81 of his reasons released in October 2019 "a review of Keltic's prior submissions in this Court and before the Court of Appeal suggest that [Keltic] was alive to the possibility Yi Teng might seek to amend its claim to remedy defects in its

> pleading." Keltic has been aware of the current proposed amendments sought by Yi Teng since approximately January 3, 2020 and was aware that Yi Teng sought to argue a contingent interest in the Custom Space by at least October 2019.
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> [65] In conclusion, Keltic has not met the heavy onus of showing an abuse of process which is plain and obvious. I do not find that Yi Teng's application to file the further amended notice of civil claim, amended response to counterclaim, and amended reply are contrary to the interests of justice, oppressive, or vexatious or, if allowed, will would bring the administration of justice into disrepute.

Discussion

[18] In writing these reasons, I have kept in mind the deferential approach this court must bring to its considerations in all matters except those engaging issues of law or principle, as to which we must ask whether the judge was correct: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[19] The first issue raised by Keltic is whether a claim for a present contingent interest in land is a cause of action known to law. This is a question of law to be considered on a standard of correctness.

[20] The further amended notice of civil claim's "Statement of Facts" relates several pages of additional facts, salient points of which are summarized above. They include under the heading "Damages" an allegation that damages have been sustained through a loss of the opportunity to obtain the custom space including its value, loss of profits, and loss of the $50,000 already paid to Keltic.

[21] Under "Relief Sought" the amendments claim:

> i. An order that Keltic act in good faith and take reasonable steps to apply for subdivision of the Property in accordance with the IBI Plan, and if successful in obtaining subdivision, to complete the sale and conveyance of the Custom Space to Yi Teng;
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> ii. In the alternative, an order that Keltic act in good faith and take reasonable steps to apply for subdivision of the Property in accordance with the GBL Plan, as may be modified to meet the requirements of the City of Richmond, or such alternative plan presented to the City by Keltic, and if successful in obtaining subdivision, to complete the sale and conveyance of the Substitute Custom Space as elected by Yi Teng, with abatement of the purchase price as applicable; [AR 68]

[22] The amendments also claim damages in lieu of specific performance, damages for breach of contract, and damages in accordance with a stipulated remedy clause of the contract.

[23] Under “Legal Basis” the amendments allege that the contract pleaded is binding, that obtaining lawful subdivision of the property is a condition precedent to conveyance of the custom space, that failure to act in good faith in respect of its obligations is a breach of contract, that unenforceable terms of the contract are severable, and that the remainder of the contract after any severance is “binding and enforceable, including the stipulated remedy clause”.

[24] In my respectful view, the amendments seeking an order, conditional on future subdivision, conveying the custom space or undefined substitute space, should not have been allowed for the reason that there is no right of performance of the transfer of title until the condition precedent has been met: the claim is based upon an inchoate entitlement. To put it another way, the interest claimed relies upon a true condition precedent, a condition that depends upon an uncertain future event, performance of which is within the control of a third party, as discussed in *Turney v. Zhilka*, [1959] S.C.R. 578; *Barnett v. Harrison*, [1976] 2 S.C.R. 531. See also Anne Warner La Forest, *Anger & Hornsberger Law of Real Property*, 3rd ed (Toronto: Thompson Reuters, 2019) (loose-leaf updated October 2020), vol. 3 at 23-31–23-33; Victor di Castri, *The Law of Vendor and Purchaser*, 3rd ed. (Toronto: Thompson Reuters, 1989) (loose-leaf updated May 2018) vol. 2 at para. 790.

[25] The application of this proposition to this appeal is plain on the authorities, and double stamped by the amendments contemplating a conveyance of undefined substitute property.

[26] The condition pleaded by Yi Teng – approval of the subdivision – is dependent on a third party. This is a true condition precedent: the proposed amendments advancing a claim to a future property interest on satisfaction of the condition precedent do not assert a justiciable claim *in rem*.

[27] Yi Teng says that by the amendments it does not advance an *in rem* claim. Rather, it says, it advances an *in personam* claim under the contract, a character well known to the judge throughout the hearing.

[28] Keltic contends that the judge's references to a present contingent (or conditional) interest demonstrate an error in reasoning, and show that he considered the claim as one *in rem* that can proceed. It says that the amendment application should have been dismissed because "the claim disclosed no reasonable cause of action", and that the *in personam* claim is inconsistent with the claim previously advanced by Yi Teng.

[29] I agree that it is was a misdescription for the judge to characterize Yi Teng's claim as one for a present contingent interest in land (para. 46 of the reasons) or a contingent interest in land (para. 52 of the reasons), or to say that whether there is a present contingent interest will be decided upon a review of the evidence (para. 55 of the reasons). Those descriptions inherently refer to a claim *in rem*. Yet we are advised by counsel that Yi Teng's position on the amendments was that they presented a claim *in personam*. Treating this as so, I will set aside the *in rem* aspects of the amended pleadings set out in para. 21, and proceed as if this is only a claim *in personam*, a claim that is consistent with the authorities noted above.

[30] The first question then is whether, ignoring any *in rem* aspects of a claim for an interest in land that are dependent on a true condition precedent, there remains a justiciable *in personam* claim in contract.

[31] The further amended notice of civil claim pleads both a claim to a potential post-subdivision property interest, and an *in personam* claim in contract. The claim in contract does not have the same frailty as an *in rem* claim in this case.

[32] This brings me to the nub of the appeal – should the action be struck for abuse of process on the basis that Yi Teng's current justiciable claims are inconsistent with the claim it first advanced? Keltic contends vigorously that it should.

[33] Yi Teng's original pleadings alleged a present unconditional interest in land. That claim failed because, in law, the land did not exist, there having been no subdivision of the larger parcel. Those pleadings also asserted a claim for damages for breach of contract, but the contract alleged was described without reference to the requirement of subdivision, or the possibility of acquiring substitute space. The amendments allowed by the order appealed contain particulars of the alleged contract including as to the requirement of subdivision and the possibility of acquiring a substitute space.

[34] The judge did not expressly address the claim for damages for breach of contract, and kept his analysis to the pleadings relating to an interest in land. Still, the essence of Keltic's submission is that the "deal" initially advanced by Yi Teng is inconsistent with the "deal" now particularized, and that this inconsistency is a fatal abuse of process.

[35] The proper approach to an allegation of inconsistent pleadings amounting to abuse of process is set out in this court's decision in *Illingworth*, referred to by the judge in the passages replicated above, incorporating references to *Este v. Esteghamat-Ardakani*, 2018 BCCA 290.

[36] Whether there is an inconsistency is a question of fact, understood in the context of the record before the court. Accordingly it is a question that engages the deferential standard of review for facts described in *Vavilov*.

[37] Whether any inconsistency amounts to an abuse of process warranting judicial intervention to strike the action involves the exercise of judicial discretion. Accordingly, it is a question that engages the standard of review applicable to questions of judicial discretion, a highly deferential standard that is different from that applicable to questions of fact.

[38] It is useful here to direct attention to the difficulty sometimes encountered in distinguishing a finding of fact from an exercise of judicial discretion. The first is to be assessed on a comparison of the record to the fact found. In order for this court to

interfere, any mistake found must be palpable and overriding. The second is an exercise of judgment. In *Kish v. Sobchak Estate*, 2016 BCCA 65, applied in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holdings Inc.*, 2017 BCCA 346, Madam Justice Newbury discussed the distinction between findings of fact and the exercise of judicial discretion:

> [33] The line between the exercise of judicial discretion and the finding of facts is not easy to enunciate. For purposes of this case, I respectfully adopt Lord Bingham's description of judicial discretion given in *The Business of Judging: Selected Essays and Speeches* (2000):
>
> > According to my definition, an issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual judge's assessment (within such boundaries as have been laid down) of what it is fair and just to do in the particular case. He has no discretion in making his findings of fact. He has no discretion in his rulings on the law. But when, having made any necessary finding of fact and necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies he then exercises a discretion. *It is only when he reaches the stage of asking himself what is the fair and just thing to do or order in the instant case that [he] embarks on the exercise of a discretion*.
> >
> > I believe this definition to be broadly consistent with the usage adopted in statutes. ...

[39] Justice Newbury went on to discuss deference as applied to discretionary decisions:

> [34] The standard of review applicable in Canada to the exercise of judicial discretion is found in *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3. There La Forest J. wrote for the majority:
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> > Stone J.A. cited *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713 (C.A.), which in turn approved of the following statement of Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130, at p. 138:
> >
> > > The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. <u>But if the appellate tribunal reaches the clear conclusion that</u>

> there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

That was essentially the standard adopted by this Court in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, where Beetz J. said, at p. 588:

> Second, in declining to evaluate, difficult as it may have been, whether or not the failure to render natural justice could be cured in the appeal, the *learned trial judge refused to take into consideration a major element for the determination of the case*, thereby failing to exercise his discretion on relevant grounds and giving no choice to the Court of Appeal but to intervene. [At 76-7; emphasis by underlining added.]

This standard was affirmed and supplemented more recently in *Penner v. Niagara (Regional Police Services Board)* 2013 SCC 19, where the Court stated:

> A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada* … [At para. 27.]

[40] In this case the judge recognized the change of direction taken by Yi Teng after it received the reasons for judgment in *Yi Teng #1*. However, the judge attributed this change to a combination of counsel's submissions, an appropriate shift after *Yi Teng #1* was released, and evidence before him from the principal of Yi Teng. The judge's conclusions are expressed in paras. 48, 51 and 52 of his reasons for judgment replicated above.

[41] I understand the judge to have acknowledged a degree of inconsistency (although in one passage he finds no inconsistency) between the original and amended claims that centred on the parties' agreement in respect to the need for subdivision to complete the intended transaction. Put another way, the fulcrum of the inconsistency identified was not the intended outcome of the transaction, but the timing of Yi Teng's acquisition of an interest in the property in relation to the necessary subdivision. I cannot say that there is a basis to interfere with the judge's conclusion that the inconsistencies are not "sufficiently egregious to disallow the requested amendments".

[42] A finding of abuse of process requires more than a finding of inconsistency as explained in the jurisprudence noted above. It needs, in the least, an aspect of diametric opposition in the pleadings and a degree of injustice. I cannot say the judge erred when, considering the claim to be one of the *in rem* variety, he held that any inconsistency was not sufficiently egregious to refuse the amendments. Removing the *in rem* aspect to leave a claim only *in personam,* in my view, does not aggravate the seriousness of that inconsistency. Sufficient consistency exists between the two pleadings alleging a contract in respect of the custom space, to avoid diametric opposition or creation of injustice. I would not disturb the conclusion that abuse of process has not been established.

[43] Keltic also contends that the judge erred in finding that it bore the burden of establishing abuse of process. While it couches this ground of appeal on a putative finding of the judge, it fairly acknowledges that the judge did not address the issue. I understand Keltic's contention before us as asserting an error on the part of the judge in failing to address its submissions, namely that it was for Yi Teng to demonstrate the propriety of its conduct and that it had not done so through the introduction of positive evidence of its *bona fides*. Keltic complains that it had repeatedly raised questions of the tactical nature of Yi Teng's change of pleadings and its absence of *bona fides*, without receiving an evidentiary response from Yi Teng on the issues to "rebut the clear inference of abuse by inconsistency." Keltic further contends that the judge erred in considering the issue of prejudice when determining whether abuse of process was established.

[44] I would not accede to these submissions. Rather than this being in the main an issue of burden of proof and relevance of prejudice, Keltic takes issue with the adequacy of the reasons for judgment and makes, again, the same submissions it advanced before the judge. The judge did not accept these submissions as a reason to deny the amendments. In my view, he was well within his proper scope of judicial discretion in that approach. On my reading of the reasons for judgment, the judge simply looked at the record before him, and found that any shift in position between

the two versions of pleadings was not so egregious as to warrant refusing the amendments. I see no reversible error demonstrated.

[45] As to the issue of prejudice, the *Supreme Court Civil Rules* provide that the existence of prejudice may be a free standing consideration: R. 9-5(1)(c). The role of prejudice, however, is not confined to that lonely Rule. For example, it was for the judge, considering abuse of process under R. 9-5(1)(d), to weigh the character of the events and determine, amongst other questions, whether the manner of proceeding created an injustice. On that issue, the existence of prejudice is a relevant consideration. I am reminded here of the observation of Madam Justice Rowles in *Langret Investments S.A. v. McDonnell*, [1996] B.C.J. No. 550 (C.A.):

> [34] ... Amendments are allowed unless prejudice can be demonstrated by the opposite party or the amendment will be useless. The rationale for allowing amendments is to enable the real issues to be determined. The practice followed in civil matters when amendments are sought fulfils the fundamental objective of the civil rules which is to ensure the just, speedy and inexpensive determination of every proceeding on the merits. ...

[46] In conclusion, I find no error in the judge declining to refuse the amendments for abuse of process. Accordingly I would dismiss the appeal.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Justice Marchand"

I AGREE:

"The Honourable Madam Justice Horsman"