IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rhema Health Products Ltd. v. Martin & Pleasance North America Inc.,* 2024 BCSC 1896

Date: 20240919
Docket: S237636
Registry: Vancouver

Between:

Rhema Health Products Ltd.

Plaintiff

And:

Martin & Pleasance North America Inc., formerly known as Pauling Labs Inc.

Defendant

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	M. Turcott
Counsel for the Defendant:	F. Finn G. Hardwicke-Brown, Articled Student
Place and Date of Hearing:	Vancouver, B.C. September 19, 2024
Place and Date of Judgment:	Vancouver, B.C. September 19, 2024

[1] **THE COURT:** When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.

[2] The plaintiff brings this application seeking two orders, one that certain identified provisions in the defendant's response to civil claim relating to a setoff be struck; and secondly, that the trial of the main claim and the counterclaim be severed.

Background

[3] By way of brief background, the plaintiff develops and manufactures dietary supplements. The parties entered into a memorandum of understanding in or around April 2021 (the “MOU”) in respect of a purported agreement whereby the plaintiff would manufacture and provide to the defendant the product, primarily “Ener-C” effervescent drink powder sachets (the “Product”), and the defendants would resell the Product to the general market.

[4] After the MOU, the parties executed a supply to forecast agreement in or around November 2021 (the “STFA”). The STFA set out the specific terms for the production and delivery of the Product on terms that there would be three months of purchase orders issued in advance, and six months of forecasted orders then being provided.

[5] The MOU had a specific provision by which the defendant was to purchase any finished goods, raw material, and packaging acquired for the manufacturing of the Product which were unused (the "Stranded Inventory Clause”) in the event of any changes in either the Product or the business relationship, such as a termination of that relationship.

[6] The plaintiff's claim arises from the Stranded Inventory Clause. In particular, the plaintiff alleges that there was a termination of the business relationship by the defendant in early 2023, after which the plaintiff issued an invoice under and pursuant to the Stranded Inventory Clause on February 23, 2023, and after applying

an adjustment as a result of a final inventory count claimed in that respect, the plaintiff alleges that the amount remaining due and owing is $787,023.75 as of June 9, 2023, plus interest thereafter.

[7] The plaintiff's claim is framed as one in simple liquidated debt pursuant to the Stranded Inventory Clause, and issued the invoice on that basis. However, there is also an alternative claim for damages for "breach of contract."

[8] In the notice of civil claim, the plaintiff refers to both the MOU and the STFA, specifically noting that the defendant contracted for the inputs or materials necessary to produce the Product in accordance with both the MOU and the STFA. In addition to pleading the terms of the invoice itself as a basis for its claim in debt, for example, in respect of the interest claimed on the amount stated to be due and owing based on the inventory count.

[9] In its response, the defendant pleads that the STFA superseded the MOU, with the MOU being nothing more than an agreement to agree, and that under its terms, the Stranded Inventory Clause was no longer valid. That position is fully particularized at paras. 1 to 5 of the response to civil claim.

[10] With respect to the parties' performances under the STFA, the defendant also pleads that the plaintiff continuously failed to meet its obligations, including meeting delivery timelines as stipulated in the purchase orders. Further, the defendant pleads that it was the plaintiff who, in July 2022, informed the defendant that it would no longer be procuring the packaging components needed to manufacture the Product and as a result of that advice, the defendant gave notice that it would be terminating the STFA, giving six months' notice as required under its terms. Thus, it pleads, it had no obligation to purchase any stranded inventory under either the Stranded Inventory Clause, or for any other reason.

[11] Further, it pleads that to the extent there may have been stranded inventory, it was as a result of, among other things, the plaintiff's poor and disorganized ordering and inventory management, including that some or all of the materials were beyond

"used by" dates. The plaintiff claims to have suffered damage as a result of the plaintiff's failures to manufacture and deliver the Product as agreed to.

[12] The paragraphs in the response to civil claim that the plaintiff seeks to have struck strike are as follows.

> 8. In breach of the STFA, Rhema consistently failed to meet the delivery times contemplated by the POs. All or substantially all of the products delivered by Rhema were delivered after substantial delays as compared to the delivery dates contemplated by the POs, causing significant ongoing and recurring supply management problems for M&P.
>
> 23. Rhema's consistent failure to manufacture and deliver products in a timely way as agreed pursuant to the STFA caused M&P to lose sales and associated revenues and that were otherwise available to it but for product shortages.
>
> 30. If Rhema is found entitled to any relief against M&P, which is specifically denied, M&P claims a right to set off for those losses that it has incurred due to lost sales as a result of Rhema's failure to manufacture and deliver products on a timely basis as agreed.

[13] On the same date that it filed its response to civil claim, the defendant filed a counterclaim seeking damages for the plaintiff's alleged breach of the STFA. The counterclaim largely repeats and relies upon the facts pled in the response to civil claim, including paras. 8 and 23 as reproduced above, and pleading further as follows:

> 3. Rhema breached the STFA by consistently failing to meet its production obligations, including with respect to the agreed timing for delivery of products manufactured by Rhema.
>
> 4. As a direct consequence of Rhema's breaches, M&P was repeatedly and regularly left with inadequate supply of product such that it was unable to fulfill orders that had been placed with M&P by its customers.
>
> 5. As a result of the inability to fulfill orders that had been placed by its customers, M&P suffered loss and damages, including loss in revenue and profit, missed sales, and loss of reputation as a reliable supplier and consequent loss reduction of future and ongoing business.

[14] In the counterclaim, the defendant seeks damages for breach of contract and a declaration that the defendant is entitled to set off its damages against any amount claimed by the plaintiff.

[15] After pleadings were closed, the plaintiff approached counsel for the defendant as to their views of resolution by summary trial. While the defendant did not appear to completely foreclose the idea, there was some scepticism expressed as to suitability. In any event, dates were secured in July 2024 for a summary trial application. However, after further ongoing correspondence between the parties in which it became clear that they could not come to an agreement as to the suitability for a summary trial application, specifically in respect of both the claim and the counterclaim matters, this subject application to strike and sever the claims was brought by the plaintiff instead of proceeding with the summary trial.

[16] The July hearing date that had initially been set aside for a summary trial was repurposed for this application. Unfortunately, the parties were bumped, and this matter was then reset for today.

[17] Since that time, the parties have now secured ten days for trial in February 2026. Discoveries of the defendant's representatives have been conducted, with it being stated on the record today by plaintiff's counsel that those discoveries were in respect of both the claim and the counterclaim. There has been some exchange and discovery of documents, however, there is a dispute as to whether that document disclosure has been sufficient.

Preliminary Issues

[18] With respect to the issue of document disclosure, there was some suggestion made by the defendant that the plaintiff brought this application to frustrate or delay the plaintiff’s disclosure obligations in respect of the counterclaim.

[19] Both counsel sought to take me through the full history of correspondence between the parties in that respect.

[20] I did not entertain those submissions to a great deal. Although perhaps relevant to the issue of costs, it was not necessary to consider the communications between counsel, both as to the suitability of a summary trial determination, the

scheduling of the July summary trial date, or of the document disclosure all done in furtherance of the litigation, when considering the merits of the application itself.

[21] In addition, given that the two orders being sought are interrelated, it was not obvious which issue ought to be determined first, namely the application to strike, or sever. To some extent, the issues guide each other, and it becomes circular, particularly when the practical result of the orders that may be made are considered.

[22] For example, even if the setoff claim is not a proper setoff, it may still be a proper claim in the counterclaim and will have will be determined at some point. If the counterclaim and the notice of civil claim are not severed, then it will be determined at the same time, and if the defendant is successful, those damages will, practically speaking, be set off.

[23] In any event, the parties proceeded with the issue as to the striking of the setoff pleas in the response to civil claim first, then the severance application. I will do so as well.

Striking Portions of the Response

[24] While the plaintiff's notice of application indicated that it was seeking to strike the provisions of the response under R. 22-7, and in the alternative under R. 9-5(1)(a), I agree with the defendant that there is insufficient evidence of any non-compliance by the defendant that would give rise to a striking of pleadings under R. 22-7.

[25] For the most part, the plaintiff's arguments during its submissions did not in fact rest on that basis, but rather on the appropriateness of the pleading and whether or not they gave rise to a proper cause of action such that they ought to stand, particularly as to the failure, the plaintiff alleges, to properly plead all the necessary elements of a setoff claim. In this respect, the plaintiff relies on R. 3-7(9) as to the requirements for such pleadings in the first instance, and on R. 9-5(1)(a) as a basis to strike and the argument that the pleadings do not disclose sufficient facts for each of the elements for such a claim of setoff as a defence.

[26] As a preliminary point in that regard, the plaintiff argued that the claim for damages is not a true defence, relying upon *Anenda Systems Inc. v. AL13 Systems Inc.*, 2020 BCSC 2077 ("*Anenda*"), at para. 23:

> [23] In my view, the facts pleaded in paragraphs 15-30 do not disclose a reasonable defence known to law to the Plaintiff's allegation that the Defendant owes it $600,000 for unpaid invoices. In *Royal Bank of Canada v. Rizkalla* (1984), 1984 CanLII 396 (BC SC), 59 B.C.L.R. 324 at 327 (S.C. Chambers), Madam Justice McLachlin (as she then was) held that the mortgagors in that case had failed to raise a defence, but rather had made an independent claim for damages. In doing so, she explained:
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> > A defence is a contention that the plaintiff's claim is not established. It adopts one or more of the following positions:
> >
> > i. An objection on grounds of jurisdiction;
> >
> > ii. A denial of the plaintiff's allegations (traverse);
> >
> > iii. A submission that if the plaintiff's allegations are true they disclose no cause of action (demurrer); and
> >
> > iv. A submission that if the plaintiff's allegations are true there are facts which provide a legal justification for the defendant's conduct (confession and avoidance).
> >
> > A counterclaim, on the other hand, is an independent action raised by a defendant, which, because of the identity of the parties, can conveniently be tried with the plaintiff's claim. While a counterclaim frequently (although not necessarily) arises from the same events as the plaintiff's claim, and while it may result in reduction of the plaintiff's claim, it is in principle an independent action.

[27] As such, it is necessary in order for paras. 8, 23, and 30 to withstand a review under R. 9-5(1)(a) and R. 3-7(9) that the setoff has been properly pled, with all necessary facts to support the defences raised. Further, as noted in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (CanLII), [2011] 3 SCR 45, at para. 22, bald assertions and conclusory statements are insufficient for that purpose.

[28] However, the analysis of any application such as this must ultimately focus on the whole of the pleadings themselves, not just the sections being questioned or brought into issue. In other words, I am not to look at paras. 8, 23 and 30 in a vacuum. In this respect, I am also to employ a generous reading of the pleadings, as

noted in *Lee v. G.Y. Lee & Associates Ltd.*, 2014 BCCA 400, at para. 14, and proceed on the assumption that the facts plead are true.

[29] The plaintiff argues firstly that it is not clear which form of setoff is being claimed, i.e., contractual, legal, or equitable, arguing that there is clearly no legal right or, for that matter, a contractual one given that the claims are for damages versus liquidated debt, and there is no contractual provision for it.

[30] As to equitable setoff, the requirements for equitable setoff has been set out in various decisions a more recent one being *Surespan Construction Ltd. v. Dawson Recreation & Landscaping*, 2023 BCSC 531 ("*Surespan*"), at para. 25:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands …
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed …
>
> 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 …
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract …
>
> 5. Unliquidated claims are on the same footing as liquidated claims …

[31] At para. 26 of *Surespan*, the court referred to *Cactus Restaurants Ltd. v. Morison*, 2010 BCCA 458, where it was noted that an equitable setoff is a substantive right that constitutes a charge against a *chose in action* for debt. Thus, as equitable setoff has developed, it operates as a true or substantive defence as an immediate answer to the liability to pay the debt. Specifically, if there is an entitlement to an equitable setoff the creditor, in this case the plaintiff, as a matter of equity is not entitled to treat the debtor, in this case the defendant, as being indebted to the extent claimed.

[32] In *Jamieson v. Loureiro*, 2010 BCCA 52, the court described the principle as follows at para. 37:

> [37] This Court summarized the area of equitable set-off in *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226:

> [46] …the doctrine of equitable set-off seeks to perform in essence a single task: to distinguish, on one hand, separable and independent cross-claims from, on the other hand, those which equity and justice cannot countenance separating.

[33] The defendant argues that taking the whole of paras. 8, 23 and 30 of the response to civil claim, when read with the rest of the response to civil claim, it is clear that the elements of equitable setoff have been met out, despite not specifically describing it as "equitable". Specifically, the defendant argues that para. 30 makes it clear that they are seeking equitable setoff, and paras. 8 and 23 set out the conduct being relied upon as a basis for that equitable relief. Namely, the defendant states that the pleadings are sufficient clear to particularize that the plaintiff's own breach of the agreement and/or inability or failure to adequately perform under the terms governing the parties' performance had the effect of either nullifying the obligations under the Stranded Inventory Clause, even assuming it is found to be operative, which they deny.

[34] The defendant relies upon *Surespan* in this respect, as the facts are similar to those herein, although rather than there being a counterclaim, there were two actions filed. In *Suprespan,* Surespan had filed a claim seeking damages for misappropriation of confidential information and conspiracy amongst the other defendants who had worked with Surespan, to use that information that they had obtained to enable them to compete with Surespan's business.

[35] Only one of those defendants filed a separate claim in debt on invoices it had rendered as against Surespan. In the response filed by Surespan to the other action, Surespan claimed a setoff in respect of the damages for the misappropriation of confidential information and conspiracy as plead in its own action. The court dismissed the application to strike those provisions, noting as follows:

> [37] Looking to the elements set out in *Holt* and *Coba*, I am satisfied that Surespan has pled equitable grounds for being protected against Heavy Haul's debt claim. It has alleged relationships among itself, DRL/ Mr. Leer and Heavy Haul which establish a connection between the two claims. It would not be equitable to require Surespan to pay Heavy Haul for its sub-contractor services if Heavy Haul was taking improper advantage of that

relationship to conspire to misappropriate Surespan's confidential and proprietary information and use it to improperly compete with it.

[38] One of the authorities that Surespan referred to in argument is *Canada Southern Railway Co. v. Michigan Central Railroad Co.* (1983), 1983 CanLII 1884 (ON SC), 45 O.R. (2d) 257, 6 D.L.R. (4th) 324, in which Justice Osler noted the need for a generous approach to defining circumstances in which equitable set-off will be applied:

> In numerous cases, we are cautioned against defining too closely the circumstances in which the equitable doctrine will be applied. The one requirement that would appear to be necessary is that the opposing claims should flow from the same transaction or relationship between the parties. For example, in *Government of Newfoundland v. Newfoundland R. Co. et al.* (1888), 13 App. Cas. 199, a case in which claims flowed from a contract not carried out, it was said to be essential that the claims should be "flowing out of and inseparably connected with [his] previous dealings and transactions with the firm" [p. 213]. …

… In Spry, The Principles of Equitable Remedies, 2nd ed. (1980), the principle is described, at p. 168, in the following terms:

> To decide that there is an equitable set-off is to decide that, on grounds which are considered hereafter, it would be unjust and unreasonable to order the specific enforcement of a particular obligation without lessening or reducing it by reference to a related obligation of the plaintiff to the defendant or making specific enforcement conditional upon performance of that related obligation.

And, at pp. 170-1:

> What generally must be established is such a relationship between the respective claims of the parties that the claim of the defendant has been brought about by, or has been contributed to by, or is otherwise so bound up with, the rights which are relied upon by the plaintiff that it would be unconscionable that he should proceed without allowing a set-off.

[39] While Surespan's equitable set-off defence did not arise from the specific invoiced services involved in Heavy Haul's debt claim, it does arise from the same relationship between Surespan, DRL / Mr. Leer and Heavy Haul.

[36] In my view, taking the whole of the pleadings into account, I come to the same conclusion in this matter.

[37] Notwithstanding that the equitable setoff did not arise from the specific invoiced services, it arises from the same relationship, the same transactions, the

same contracts, and it will involve the same underlying facts, such that they are so clearly connected that it would be manifestly unjust to allow the plaintiff to enforce payment without considering those claims.

[38] Put another way, it goes to the root of the claim, particularly when taken in the context of the defence that the conduct of the plaintiff may have been such that the clause was not, in fact, triggered, even if it is enforceable, such that the conduct of the plaintiff as alleged by the defendant, namely the performance or lack thereof by the plaintiff, which is alleged to have caused the ultimate termination of the STFA, provides an equitable reason for the defendant to be protected from the plaintiff's claims until both of their claims can be determined on an evidentiary record.

[39] As such, I dismiss the application to strike.

Severance of Claims

[40] Turning, then, to the application to sever the main claim from the counterclaim, the plaintiff relies on R. 3-4(7.1) which allows the court to order that a counterclaim be struck out or tried separately, or make any other order the court considers will further the object of the Rules.

[41] The plaintiff places emphasis on that latter provision of the Rule, namely that the object of the rules being to secure just, speedy, and inexpensive determination of the proceeding on its merits, which includes conducting the proceeding in ways that are proportionate to the amounts involved and the issues in dispute. In this respect, it is of note that the debt claim is approximately $800,000, based on the invoiced amount under the Stranded Inventory Clause. Although a dollar value it is not specifically pled in the counterclaim, counsel advises that the quantification of the damages making up the counterclaim could be approximately $1.5 M, or almost double the initial invoiced claim.

[42] Nonetheless, as the defendant notes, the presumption is that these two claims will be heard together. As such, the plaintiff bears the onus of establishing that it is in the interests of justice that they be heard separate and apart.

[43] In *Anenda*, the court severed a counterclaim from a third-party claim, noting as follows:

> [37] Turning to Rule 22-5, the Court of Appeal endorsed the following non-exclusive summary of the key considerations relevant to an application to sever under Rule 22-5 in *Johnston Estate v. Johnston*, 2017 BCCA 59 [*Johnston*]:
>
> > [46] I would endorse the judge's non-exclusive summary of the key considerations relevant to an application to sever and the general principles governing severance:
> >
> > > [68] The key factors engaged in a general sense on an application to sever were canvassed in *Schaper v. Sears Canada*, 2000 BCSC 1575 [*Schaper*] at para. 19:
> > >
> > > > 1. ...the party making the request must show that hearing the claims together would unduly complicate, delay the hearing, or otherwise be inconvenient. If a party applying does not meet this threshold, the court need not go further in any analysis and the application should be dismissed.
> > > >
> > > > 2. Have the actions of any party in the proceeding been unreasonable and have they contributed to the complication, the delay, or the inconvenience alleged by the party applying? If this found [sic], that would strengthen the argument to sever.
> > > >
> > > > 3. Are the issues between the plaintiff and defendant and the issues between the defendant and the third party sufficiently distinct so as to allow them to be tried separately? If so, that strengthens the argument to sever off third party proceeding.
> > > >
> > > > 4. Is the relief claimed by, or the potential obligation of, any party best determined by hearing the evidence of all parties at one hearing? If so, that weakens an application to sever.
> > > >
> > > > 5. Does the prejudice to the party applying, prejudice based on undue complication, delay or inconvenience, outweigh any benefit of matters being heard together, or outweigh any considerations related to the overall objective of the rules to ensure a just, speedy and inexpensive determination of every proceeding on its merits, including the avoidance of a multiplicity of proceedings for the benefits of litigants and having concern to congestion in the courts generally?

[44] The plaintiff relied on various decisions where an order to sever was made. The defendant sought to, generally, distinguish those decisions on the basis of the

differences between the two separate claims that were in issue in those cases, emphasizing the differences between those and the claims before the court today.

[45] In the interests of time, I am not repeating or summarizing those various cases. Ultimately, each decision must be determined on its own facts with the court being guided by the factors summarized in *Anenda,* and the question of whether or not it is in the overall interests of justice for a fair determination on the merits to have the matters determined separately, including the extent of the interconnection between the matters, overlap in the evidence, the risk of inconsistent results on similar facts, and the overall object of the rules, namely to reach a timely determination on the merits in an efficient way.

[46] Here I have already commented on how these matters are interrelated. Both claims arise from the same agreements. Both claims arise from much of the same facts, even if not all the same facts. Both claims arise from the same general transaction. Both claims will require the same sets of witnesses, although I suspect that there will be more witnesses with respect to the counterclaim.

[47] There is not, in my view, any benefit to having these matters severed other than the arguable benefit to the plaintiff that they *may* obtain judgment first, and I emphasize the word *may* as suitability will be an issue before the court on a summary judgment application, something that I am not making any finding or expressing any opinion on whatsoever.

[48] As a practical matter, even if there were a severance, and the plaintiff was able to satisfy the court that its claim is suitable for a summary determination in advance of the counterclaim, given interrelation of the claim and the counterclaim it is reasonably foreseeable that the enforcement of any judgment on the claim would be stayed pending determination of the counterclaim, meaning that no practical benefit would result.

[49] A speedy resolution of one part of this claim does not result in a speedy resolution of the whole of the dispute between the parties, as that objective of the Rules is generally considered.

[50] Instead, it is arguable that the severance could provide a strategic advantage to one party over the other. In considering the object of the Rules, the court should be wary of applying them in a way that provides a potential strategic advantage. Here, in the absence of a stay of execution, the plaintiff could be in a position where they could take steps to realize upon the fruits of their judgment, before the defendant could be in a position to have their counterclaim, which could exceed the value of the main claim, determined on the merits.

[51] Further, I cannot see any time savings by the severance, with the claim being determined in a two-day summary trial, as opposed to having both matters heard for trial together for ten days. Even if the main claim proceeded by a two-day summary trial, no more than two days would then be shaved off of the trial date such that there would be no time savings.

[52] There is also the risk of inconsistent findings, given that both matters will involve findings as to facts regarding the plaintiff's performance or lack thereof of its obligations under MOU or STFA as may be applicable, a matter that was specifically commented upon by the court in *Anenda* at para. 46, although finding no such concern.

[53] Finally, as to the overall concept as proportionality as set out in the Rules, a point that was emphasized by the plaintiff, in *Canadian Federation of Students v. Simon Fraser Student Society*, 2010 BCSC 1816, the court noted as follows:

> 37. … Proportionality is intended to enhance, and should never inhibit or curtail, the determination of a proceeding on its merits.

[54] A severance of this case may result in just that, an inhibition or curtailment of the determination of at least the defendant's claim on its merits, while it redirects its

efforts to defending the claim on much of the same factual basis as that which it will be advancing in it is counterclaim.

[55] Balancing the overall interests of justice and prejudice of the parties, it is not in the best interests of justice to have these matters severed. As such, I dismiss that claim as well.

Summary

[56] The plaintiff's application is dismissed.

[57] I will hear quick submissions as to costs.

(SUBMISSIONS ON COSTS).

[58] THE COURT: I do not find anything inappropriate with the application being brought. It was not misguided. I did consider some of the correspondence going back and forth between the parties on the issue of costs. The defendant was ultimately successful. The defendant has its costs in the cause.

[59] Thank you.

“Associate Judge Robertson”