

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *427703 B.C. Ltd v. mU3 Investments Limited,*
2025 BCSC 317

Date: 20250226
Docket: S250953
Registry: Vancouver

Between:

427703 B.C. Ltd.

Plaintiff

And

mU3 Investments Limited and Uday Madhukar Kapure

Defendants

Before: The Honourable Justice Latimer

Reasons for Judgment

Counsel for the Plaintiff:

J. West
R. Powell

Counsel for the Defendant, mU3 Investments Limited.:

N. Muirhead
N. Yan

Place and Date of Hearing:

Vancouver, B.C.
February 21, 2025

Place and Date of Judgment:

Vancouver, B.C.
February 26, 2025

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Introduction

[1] This is an application by the plaintiff for the following orders:

- a) enjoining and restraining the defendant mU3 Investments Ltd. ("Mu3"), pending determination of these proceedings, from making demand, including but not limited to the demand made January 22, 2025 (the "January 22 Demand") and the demand made February 11, 2025 (the "February 11 Demand"), on the Letter of Credit No. 530179 dated February 5, 2024 issued by Canadian Western Bank ("Bank") in favour of Mu3 (the "LOC");
- b) restraining and enjoining payment out on the LOC pending determination of these proceedings;
- c) in the alternative, an order that any payment on the LOC be paid into court pending determination of these proceedings; and
- d) costs of this application.

[2] The defendants filed a joint application response in which they oppose the relief sought on the basis that:

- a) The demands for payment made were in accordance with the LOC and were made honestly in accordance with Mu3's interpretation of its rights.
- b) The application for an order enjoining Mu3 from making demand on the LOC is brought too late as demands have already been made. The only order that can now be sought is an order enjoining payment.
- c) There is no legal authority to order payment into court.

[3] Despite having filed a joint application response, at the hearing counsel advised that they were appearing for Mu3 only as the application only seeks relief against Mu3. Mr. Kapure was in the courtroom throughout the application but did not seek to participate in the proceedings. I make this observation given that the lack of

an ability to participate by Mr. Kapure may have raised procedural fairness concerns given that the allegations leveled by the plaintiff include dishonesty in communications authored by Mr. Kapure.

[4] The Bank is not a party in this proceeding. However, the Bank was given notice of this application and the Bank's counsel was present in the courtroom throughout the application. Again, I make this observation given that lack of notice or an ability to seek to participate by the Bank may have raised procedural fairness concerns given that the allegations leveled by Mu3 against the Bank include that it has acted contrary to the terms of the LOC.

[5] I am satisfied that everyone whose interests were potentially affected by this application had notice of it and an opportunity to assess, in their own interests, whether or not to seek to participate.

Background Facts

[6] The plaintiff is part of the Emterra Group of companies. The Emterra Group is a multi-national group of companies with 40 locations and approximately 1,100 employees, providing recycling and waste reduction programs and advisory services across Canada and the United States.

[7] The principal of Mu3, Mr. Kapure, began employment with the Emterra Group in October 2012. He retired on March 28, 2023.

[8] Following his resignation, the Emterra Group wished to retain Mr. Kapure to provide further services to it.

[9] Mu3 and the plaintiff entered into a Consulting Services Agreement dated October 23, 2023 (the "Agreement").

[10] Although evidence has been led about the circumstances that led to Mr. Kapure's retirement and the Agreement, the parties both agree that this background is not relevant to the issues before the Court and I do not intend to discuss it further.

[11] The terms of the Agreement include, in relevant part, the following:

2.1 Services

The Consultant shall provide the Services upon the terms and conditions contained herein, as mentioned in Schedule A.

...

4.1 Payment

The Client shall pay the Consultant in accordance with the provisions of Schedule "B" (Terms of Payment), for the diligent and timely performance of the Services.

[12] The Services set out at Schedule A include a list of services and the following inclusive clause:

(l) Any other assignments as assigned by Ms. Leung and or by her approved delegate in the event of Ms. Leung's prolonged inability / unavailability of more than 4 weeks Both parties agree that the list above is not exhaustive and can be altered from time to time, upon a written change of scope.

[13] The Terms of Payment set out at Schedule B include the following:

1. At the beginning of each calendar month an invoice shall be submitted to the Client by the Consultant in respect of Services provided during the immediately preceding / succeeding month. Each invoice shall, in respect of such month: *[sets out list of requirements]*
2. Subject to the verification of each invoice by the Client and all other terms and conditions of the Agreement, the Client shall pay the Consultant the amount of each invoice 20 days upon receipt of same.
3. In the event nonpayment of any invoice the Consultant shall provide Notice of Draw on the Letter of Credit, with a request of payment within 10 business days. If at the end of 10 business days the invoice is not paid, the Consultant shall proceed with Drawing funds (for the amount of non-payment of invoice) from the Letter of Credit provided. Any payment from the Letter of Credit shall be sufficient receipt of payment for the captioned invoice.
4. Late payment of invoices beyond 20 days of receipt shall be paid with interest at the rate of 1.5% per month (19.56% per annum), being charged on a daily basis.

[14] The Agreement also provides in relevant part as follows:

6.2 Termination for Cause or Default

Either party may forthwith terminate this Agreement by providing written notice of termination to the other, without prejudice to any other right or remedy they may have at any time when the other party;

- a) any change in the control or ownership of the Client or the Consultant, including inter alia the assignment or sale of assets held by the Client or the Consultant,
- b) is adjudged or otherwise becomes bankrupt or insolvent, makes an assignment for the benefit of creditors, if a receiver is appointed for the property of the other party or
- c) the Assigned personnel of the Consultant i.e. Mr. Uday Madhukar Kapure is unable to perform as per Schedule A pertaining to the Client's business, including prolonged ill health, as determined under the Long Term Disability scheme or;
- d) Breach of the term and conditions of this Agreement by the Consultant
- e) Breach of the term and conditions of this agreement by the client.

...

6.3 Payment Upon Termination

The Client shall, in the event of termination of this Agreement pursuant to change of ownership of the Client as per Section 6.2(a) and Breach per section 6.2(e), continue to pay to the Consultant fees at the agreed upon monthly fees including any increases entitled to that the Client would have to pay for the remainder of the contract on a monthly basis. Enforcement of 6.2 (a) will be held in abeyance if 6.2.1 is applicable, and Services of Consultant continue to be provided to the Client. The Consultant shall be able to draw on the Letter of Credit established to safeguard its fiscal interest if the Client fails to pay the monthly fee as per the Agreement as per Schedule B section 3 and 4. The Client shall not contest such a valid draw. In the event of the Client's being adjudged bankrupt or insolvent under Section 6.2(b) the Consultant shall be able to draw the value of the full balance of fees due to the end of the Agreement, unless the Client had other work of similar nature with other Group Companies for the balance of the Agreement. The Client agrees to provide, forthwith, a Letter of Credit to the Consultant for the value of Agreement Amount for balance of the term, from a mutually agreed Company.

In event of termination of this Agreement pursuant to section 6.2(c) and (d), the Client shall pay all amounts for completed work due to the Consultant in accordance with this Agreement plus any monies that were due up to the date of termination, less any amounts which may be owing by the Consultant to the Client as provided for hereunder.

The Client shall have no further liability of any nature whatsoever to the Consultant for any losses or damages suffered or sustained, either directly or indirectly, by the Consultant including, without limitation, loss of profit, as a result of the termination of this Agreement.

(Emphasis Added)

[15] Schedule C of the Agreement sets out certain “special conditions”, two of which are the following:

1. "Agreement Amount" means the sum of Two Hundred and Seventy Two Thousand per annum (\$272,000 per annum. \$22,666.67 per month for upto 185 hours work in the month,) Dollars in Canadian funds.

...

9. The Client will provide the Consultant an Automatically Renewable Letter of Credit in the amount of One million Four Hundred and Twenty -Eight Thousand Dollars (\$1,428,000) to guarantee payment of fees and GST thereon for the first term of the Agreement, The Letter of Credit will be issued by a Schedule A bank doing business in the Province of British Columbia. The Annual renewal of Letter of Credit shall be provided to the Consultant 15 days prior to the end of the Letter of Credit, and the total amount for the Letter of Credit will be reduced each completed year by Two Hundred Eighty Five thousand Six hundred Dollars (\$285,600).

[16] The parties agreed to amend the Agreement in writing, including to modify Schedule C, Article 9 on January 28, 2024 (“Amendment”). The Amendment provides in relevant part:

AMEND Article 9 of Schedule C to read - by way of addition of paragraphs in italics as below:

9. The Client will provide the Consultant an Automatically Renewable Letter of Credit in the amount of One million Four Hundred and Twenty -Eight Thousand Dollars (\$1,428,000) to guarantee payment of fees and GST thereon for the first term of the Agreement, The Letter of Credit will be issued by a Schedule A bank doing business in the Province of British Columbia. The Annual renewal of Letter of Credit shall be provided to the Consultant 15 days prior to the end of the Letter of Credit, and the total amount for the Letter of Credit will be reduced each completed year by Two Hundred Eighty Five thousand Six hundred Dollars (\$285,600).

“Both Parties agree that in the event of Canadian Western Bank (CWB) providing a notice of nonrenewal of the Letter of Credit to the

Consultant, the Client shall provide the Consultant with a new Letter of Credit from any other acceptable financial institution in Canada, with the same terms and conditions, for the outstanding billable amounts, to the end of the Contract term. In the event that the Client does not provide the Consultant with a new Letter of Credit, 15 days prior to the termination of the Letter of Credit in force, the Consultant shall furnish the Client invoices in the value of the balance of billable amounts, including future CPI @ 3%, being for the balance of the term of this Agreement and proceed to draw on the Letter of Credit provided by Canadian Western Bank. The Client shall not contest such draw and shall not be entitled to any credit or offset for such early draw.

The Consultant shall continue to provide its Services till the end of the term of the Agreement without fixed monthly payment.

All subsequent Letters of Credits cancelled by the Financial Institution shall be dealt with, as stated hereinabove, mutatis mutandis."

(Emphasis Added)

[17] On February 5, 2024, the Bank issued the LOC naming Mu3 as the beneficiary. The LOC provides:

IRREVOCABLE LETTER OF CREDIT - AUTOMATIC RENEWAL

DATE: 05 February 202'1

TO: MU3 INVESTMENTS LIMITED
14833 61 Avenue Suite 100
Surrey BC V3S6T6
'The Beneficiary"

L/C No.: 530179

RE: Consulting Services Agreement - 427703 BC Ltd. And mu3 Investments Limited dated 23rd Oct 2023

Pursuant to the request of and for the account of Halton Recycling Ltd dba 427703 B.C. Ltd (the "Customer"), 6362 148 Street, Surrey BC V3S 3C4

CANADIAN WESTERN BANK ("Bank") hereby establishes in your favor and gives to you the Bank's Irrevocable Letter of Credit (the "Credit"), in an amount not exceeding in the aggregate One Million Four Hundred Twenty-Eight Thousand Dollars and Zero cents (\$1.428.000.00) Dollars Canadian.

This Credit shall become operative on the date hereof and shall continue in effect until the earlier of:

- (a) 05 February 2025 and
- (b) the date by which the maximum aggregated amount of this Credit has been drawn upon by and paid to The Beneficiary.

The actual amount be drawn upon is based on outstanding /unpaid invoices.

Notwithstanding the 05 February 2025 expiry date above, this Credit shall be automatically extended for one year without amendment unless at least 60 days prior to any such expiration date, the Bank shall notify The Beneficiary in writing by registered mail that the Bank elects not to extend this Credit for any further period.

Drawings under this Credit shall be made in the form of a written demand for payment by The Beneficiary delivered to the Bank at the above mentioned office of the Bank. Any demand for payment must bear on its face the date and number of this Credit and signed by the officer of The Beneficiary. Partial drawings are permitted. Any Demand must provide documentation as to the outstanding /unpaid invoice(s) to support the amount owing by 427703 BC Ltd to The Beneficiary. A copy of the demand for payment must be delivered to 427703 B.C Ltd address concurrently to the attention of Emmie Leung.

Demands for payment in proper form and presented to the Bank while this Credit continues in effect shall be honored on presentation without inquiry by the Bank as to The Beneficiary's rights to make such demand and without recognizing any claims of the Customer against The Beneficiary.

The Bank's sole obligation under this Credit shall be to pay monies in the circumstances and subject to the conditions described above. The maximum aggregate amount of this Credit will automatically be reduced by the amount of any partial drawings and may also be reduced at any time upon notice in writing by The Beneficiary to the Bank.

This Irrevocable letter is subject to the Uniform Customs and Practice for Documentary Credits 2007 revision, I.C.C. Publication number 600.

[18] Mu3 alleges in this litigation that the plaintiff repudiated the Agreement by breaching its terms in or around July 2024. Mr. Kapure deposes that on or about July 21, 2024 Mu3 issued an invoice dated July 18, 2024 setting out the amounts payable to Mu3 for the balance of the Agreement's term. Mu3's position in this litigation is that it subsequently engaged in good faith negotiations to explore the possibility of continuing the working relationship.

[19] The plaintiff alleges in this litigation that it terminated the Agreement on or around October 9, 2024 for cause, being Mu3's breach of the Agreement's terms.

[20] The question of who breached the Agreement is consequential in the litigation because pursuant to Articles 6.2-6.3, if the Agreement was terminated as a result of the plaintiff's breach of the Agreement, then Mu3 is entitled to continue to be paid at the agreed upon monthly fees including any increases entitled to that the plaintiff would have to pay for the remainder of the contract on a monthly basis, and entitled to draw on the LOC to pay those fees. On the other hand, if the Agreement was terminated as a result of Mu3's breach of the Agreement, then Mu3 would only be entitled to payment of those amounts for completed work due to Mu3 plus any monies that were due up to the date of termination, less any amounts which may be owing by Mu3 to the plaintiff.

[21] The parties did not argue the point on this application and did not ask the Court to determine who breached the Agreement.

[22] By letter dated October 9, 2024, the plaintiff purported to accept Mu3's alleged repudiation and to terminate the Agreement in accordance with article 6.2(d). The plaintiff invited Mu3 to submit for review and payment, in accordance with Schedule B, Mu3's invoices for completed work.

[23] The plaintiff deposes that it advised the Bank that the Agreement had been terminated.

[24] By letter dated December 10, 2024, Mu3's counsel took the position that the October 9 notice of default and termination was without merit and legally untenable. Counsel stated that Mu3 had already accepted the plaintiff's alleged repudiation of the Agreement and terminated the Agreement pursuant to s. 6.2(e) and issued invoices for its purported damages. Counsel further addressed the plaintiff's position that no monies were owing and asserted a claim to the full balance owing under the Agreement for the balance of the term. Counsel stated:

Pursuant to Article 6.3 of the CSA and Section 9 of Schedule C (as amended), the Client is obligated to provide a Letter of Credit for the full value of the Agreement Amount for the balance of the CSA's term. Furthermore, if the LOC is not renewed, the Client must issue a replacement Letter of Credit on the same terms. Failure to do so

entitles the Consultant to draw against the LOC 15 days prior to its expiry for the full balance of the CSA's term, including future CPI increases at 3%. These provisions survive the termination of the CSA under Section 6.5.

[25] By letter dated December 16, 2024, the Bank purported to give notice that the Bank had elected not to extend the LOC past the current expiry date of February 5, 2025.

[26] It is common ground between the plaintiff and Mu3 that this December 16, 2024 letter was sent within the 60-day period required by the LOC.

[27] By letter dated December 18, 2024, plaintiff's counsel reiterated their position that other than sums due and owing as of October 9, 2024, no other monies were due and owing to Mu3, that the Bank had been advised of the termination of the Agreement, and that the Bank had given notice that the LOC would expire February 5, 2025. The plaintiff's counsel therefore stated they were "not in a position to comply with the request contained in your letter of December 10, 2025 [sic]."

[28] By letter dated January 22, 2025, Mu3 made demand for payment under the LOC from the Bank in the amount of \$1,252,298.14 ("Demand"). In doing so, Mu3 attached two invoices dated January 21, 2025 ("January 21 Invoice") and January 22, 2025 ("January 22 Invoice"), respectively.

[29] The January 21 Invoice claimed interest charged for amounts that were owing on invoices issued between August and October, 2024 and which had been paid in December 2024. It also claimed interest charged up to January 21, 2025 for other invoices which remained unpaid issued between October 2024 and January 2025. The total amount claimed in the January 21 Invoice was \$5,384.68.

[30] The January 22 Invoice is substantially the same as the July 18, 2024 except that the January 22 Invoice subtracts certain payments received in December 2024. The January 22 Invoice claimed amounts said to be owing under Articles 6.2(e) and 6.3 of the Agreement. It claimed a monthly rate for periods from August 1, 2024 to October 2024, November 2024 to October 2025, November 2025 to October 2026,

November 2026 to October 2027, and November 2027 to October 2028 less specific payments received on December 20, 2024. The total amount claimed in the January 22 Invoice was \$1,236,913.46.

[31] The Demand asserted that both invoices are owing pursuant to the terms of the Agreement.

[32] Mu3 also said the following:

We wish to note that we are also in receipt of the enclosed letter to the Beneficiary, dated December 16, 2024, which was delivered on January 3, 2025. The letter purports to give notice that the Bank has elected not to extend the LOC past February 5, 2025. As you are aware, the LOC provides that the LOC “shall be automatically extended for one year without amendment *unless at least 60 days prior to any such expiration date*, the Bank shall notify The Beneficiary in writing by registered mail that the Bank elects not to extend this Credit for any further period.” The letter was both dated and delivered within 60 days of expiry. As such, the LOC has been automatically extended for one year in accordance with its terms.

[33] By letter dated January 24, 2025, the plaintiff put the Bank on notice of its view that the Demand was improperly issued, that entitlement to the funds was in dispute, and of its view that the Bank was not obliged or entitled to comply with the Demand and that the funds should not be released.

[34] On February 6, 2025, the plaintiff filed the within notice of civil claim.

[35] On February 14, 2025, the plaintiff sought and obtained short leave for the within application which was filed on the same date.

[36] On February 19, 2025, the defendants filed their response to application.

[37] On February 21, 2025, this application was argued and at the conclusion of the hearing, the Court ordered that the Bank be restrained from making any payment under the LOC pending the delivery of reasons on this application or a further order of the court.

Issues

[38] For the reasons that follow, I have determined that:

- a) The plaintiff has not established a strong *prima facie* case of fraud against Mu3. As a result, no injunction should be issued and I need not resolve what is the proper subject of the injunction (demand or payment).
- b) The application for an order that any payment on the LOC be paid into court pending the determination of these proceedings is dismissed.

Legal Principals

[39] The jurisdiction to grant a pre-trial injunction stems from s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, Rule 10-4 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, and the inherent jurisdiction of the court.

[40] The parties agree that injunctions in respect of letters of credit are governed by a specialized body of law, at the centre of which is the autonomy principle.

[41] The principle of autonomy provides that letters of credit are a bargain between the beneficiary of the letter of credit and a banker imposing upon the banker a near-absolute duty to honour a demand for payment irrespective of any dispute arising in the underlying transaction. The Supreme Court of Canada has articulated the principle of autonomy as follows in *Bank of Nova Scotia v. Angelica-Whitewear Ltd.*, [1987] 1 S.C.R. 59 at para. 10:

The fundamental principle governing documentary letters of credit and the characteristic which gives them their international commercial utility and efficacy is that the obligation of the issuing bank to honour a draft on a credit when it is accompanied by documents which appear on their face to be in accordance with the terms and conditions of the credit is independent of the performance of the underlying contract for which the credit was issued. Disputes between the parties to the underlying contract concerning its performance cannot as a general rule justify a refusal by an issuing bank to honour a draft which is accompanied by apparently conforming documents. This principle is referred to as the autonomy of documentary credits.

[42] Fraud by the beneficiary of a letter of credit provides an exception to the autonomy principle. This exception applies in two possible ways. First, with respect to an issuing bank, it may exercise its judgment not to honour payment on a letter of credit if "fraud was so established to the knowledge of the issuing bank before payment of the draft as to make the fraud clear or obvious to the bank". Second, the court may issue an interlocutory injunction restraining payment under a letter of credit (or prohibiting demanding payment) if a strong *prima facie* case of fraud is established: *Angelica-Whitewear Ltd.* at para. 19. Only the second is engaged in this case.

[43] Thus, it can be seen that the usual *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 standard does not apply to applications for an interlocutory injunction in relation to a letter of credit. Instead, to obtain an injunction the applicant must establish a strong *prima facie* case of fraud. In the highly specialized field of letters of credit, this criterion subsumes all three normal criteria for the issuance of an interlocutory injunction: *SNC-Lavalin Polska SP. ZOO c. BNP Paris Canada*, 2017 QCCS 3694, at para. 24.

[44] The scope of the fraud exception is central to this application. The plaintiff is express that it relies on the existing fraud exception and does not seek an expansion of it.

[45] In *Angelica-Whitewear Ltd.* the Supreme Court of Canada refused to confine the fraud exception to cases of fraud in the tendered documents. After discussing the policy considerations supporting the autonomy principle and reviewing the leading American, British and Canadian authorities, Le Dain J. wrote for a unanimous court at para. 17:

In my opinion the fraud exception to the autonomy of documentary letters of credit should not be confined to cases of fraud in the tendered documents but should include fraud in the underlying transaction of such a character as to make the demand for payment under the credit a fraudulent one. (Emphasis Added)

[46] In 430872 B.C. Ltd. v. KPMG Inc., 2004 BCCA 186 at paras. 23, 29-31, the BC Court of Appeal considered fraud in the underlying transaction and held that to seek to draw down a letter of credit notwithstanding that there had been no breach of the obligations that the letter of credit secured would be an abuse of the principle of autonomy within the concept of fraud.

[47] More recently, in *Eurobank Ergasias S.A. v. Bombardier inc.*, 2024 SCC 11, the Supreme Court of Canada again discussed the contours of the fraud exception and held:

[114] “Fraud” in this context does not refer to fraud in the criminal sense and carries with it a different connotation. Generally, civil or commercial fraud is broader than its criminal counterpart (McGuinness, at §17.342). A key feature of fraud in this context is its effect on the demand for payment by the beneficiary. As authors L’Heureux and Lacoursière observed, [TRANSLATION] “the subject matter of the fraud may be either the documents or the underlying transactions (that is, the commercial contract) of such a character as to make the demand for payment under the letter of credit a fraudulent one” (p. 410). If a beneficiary demands payment while knowing that they have no right to be paid under the underlying contract, that conduct may amount to fraud (McGuinness, at §17.338). Whether it does is an issue of mixed fact and law for which deference is owed on appeal. In this case, the essence of HMOD’s fraudulent conduct is that it demanded payment under the Letter of Guarantee when it knew it had no right to do so. (Emphasis Added)

[48] The Supreme Court of Canada went on to explain:

[25] ...I agree that a breach of contract, without more, is not fraud. However, a breach of contract, like any other behaviour in a transaction that “import[s] some aspect of impropriety, dishonesty or deceit” (*Cineplex*, at para. 31), can amount to fraud....

[49] The Supreme Court of Canada also emphasized that the fraud exception to the autonomy of letters of credit is identical in both the Canadian common and civil law systems: *Eurobank*, at para. 84. Counsel for both parties before me urged that caselaw from other provinces was equally helpful in identifying its contours.

[50] In *Cineplex Odeon Corp. v. 100 Bloor West General Partner Inc.*, [1993] O.J. No. 112, 37 A.C.W.S. (3d) 1132, cited with approval by the Supreme Court of

Canada in *Eurobank*, the Ontario Court of Justice explained in more detail how fraud may arise in an underlying transaction:

28 I pause at this point to note, in passing, a factor which occasionally seems to be lost amidst the melee in these sorts of disputes, disputes which more and more are finding their way to the courts in times of economic stress: the exception is "fraud", not something less than fraud.

29 In the eyes of the party seeking to prevent payment on the letter of credit, almost any conduct or position of the beneficiary which does not accord with the aggrieved party's view of the universe may appear to be fraud, and therefor justify non-payment. Such, of course, cannot be the case, given the recognized characteristics of a letter of credit. One may be sympathetic towards the plaintiff's position, and the operation of the principle of autonomy may even appear unfair at times. The question, however, is not whether the plaintiff has the better of the argument on the facts or at law. The question is whether there is a strong *prima facie* case of fraud in what the beneficiary of the letter of credit has done or is seeking to do.

30 Fraud is a straightforward five-letter word, meaning just what it says: "fraud". Fraud is not simply a legitimate dispute or disagreement over the interpretation of a contract, however onesided that dispute may appear. While the notion of fraud may elude precise definition, it is a concept well-known to the law, and it must, in my view, import some aspect of impropriety, dishonesty or deceit. In *Washburn v. Wright* (1913), 31 O.L.R. 138 (App. Div.), Mr. Justice Riddell said, at p. 147.

But, suppose the defendant was wrong in this or in any other respect, there is absolutely no evidence of fraud. Fraud is not mistake, error in interpreting a contract; fraud is "something dishonest and morally wrong, and much mischief is ... done, as well as much unnecessary pain inflicted, by its use where 'illegality' and 'illegal' are the really appropriate expressions:" Ex p. Watson (1888), 21 Q.B.D. 301, per Wills, J., at p. 309.

31 Cases where the demand on the letter of credit can be said to be "clearly untrue or false", or "utterly without justification", or where it is apparent there is "no right to payment", all fall within the foregoing principles and must be read in the context of those "fraud" principles: see *C.D.N. Research & Development Ltd. v. Bank of Nova Scotia* (1980), 18 C.P.C. 62 (Ont. H.C.), at p. 65; *Henderson v. Canadian Imperial Bank of Commerce et al.* (1982), 40 B.C.L.R. 318 (B.C.S.C.), at p. 320; *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.*, *supra*, at p. 169. (Emphasis Added)

Analysis**Has the plaintiff established a strong *prima facie* case of fraud?**

[51] The first question that arises is whether the plaintiff has established a *strong prima facie* case of fraud.

[52] The plaintiff argues that the fraud arose in this case because when the January 22 Demand was made:

- a) Mu3 knew it had no right to be paid under the Agreement because:
 - i. Notice of the invoices was not given in accordance with the terms of the Agreement and the invoices were therefore not owing. However, Mu3 dishonestly claimed that the invoices were owing.
 - ii. The underlying invoices claimed money owing because the LOC had not been renewed. However, Mu3 took the position that the LOC had been automatically extended. Its claim to money for non-renewal was therefore dishonest.
 - iii. The Agreement had been terminated and Mu3 did not intend to provide future services. Therefore, Mu3 was not entitled to money in respect of any non-renewal of the LOC. Mu3 was dishonest about this fact in its Demand.
- b) Mu3 engaged in impropriety, dishonesty or deceit in the January 22 Demand by omitting certain statements from the Demand. These omissions are said to be false representations.

[53] Mu3's position is that:

- a) The Court need not resolve whether it had a right to be paid under the Agreement. At a minimum the Demand was not fraudulent as there is a legitimate dispute or disagreement over the interpretation of the Agreement. In particular, its position is that:

- i. The notice provisions relied upon by the plaintiff did not apply in the circumstances in which the demand was made. It was therefore honest in its claim that the invoices were owing.
- ii. The plaintiff's obligation to provide a replacement letter of credit was triggered by the Bank issuing a notice of non-renewal even if that notice of non-renewal was invalid. Its request for payment was therefore honest.
- iii. The plaintiff's obligation to pay all amounts due to Mu3 over the term of the Agreement was not affected by the termination of the Agreement. Mu3 was not obliged to provide future services in order to draw on the LOC in those circumstances. Its omission of the fact that the Amendment referred to a requirement to provide future services was not dishonest, it was in compliance with Mu3's interpretation of the Agreement and the requirements of the International Chamber of Commerce's ("ICC"), Uniform Customs and Practice for Documentary Credits (the "ICC Rules").

- b) Any omissions from the Demand were not improper, dishonest, or deceitful. The content of the Demand is governed by the LOC and ICC Rules.

[54] The plaintiff argues that the Agreement and the Amendment provide that Mu3 was entitled to call on the LOC in the following situations.

- a) First, for unpaid invoices (an "Unpaid Invoice Demand") if:
 - i. an invoice was outstanding for more than 20 days of receipt by the plaintiff;
 - ii. Mu3 had issued the plaintiff with a Notice of Draw on the letter of credit and a request for payment of the Unpaid Invoice; and
 - iii. payment was not made within 10 business day of the delivery of the Notice to Draw.

Agreement, Article 4.1 and Schedule B, Articles 1-3

b) Second, in the event that the LOC was not renewed (or replaced) ("Non-Renewal Demand"):

- i. within 15 days prior to termination of the LOC [Mu3] shall furnish the [plaintiff] invoices in the value of the balance of billable amounts, including future CPI @3%, being for the balance of the term of the Agreement and proceed to draw on the Letter of Credit provided by [the Bank]. The [plaintiff] shall not contest such draw and shall not be entitled to any credit or offset for such early draw. [Mu3] shall continue to provide its Services till the end of the term of the Agreement without fixed monthly payment.

Amendment, Article 9

[55] The plaintiff's position is that the Demand is both an Unpaid Invoice Demand and a Renewal Demand and must therefore comply with the staged notice periods set out at Schedule B.

[56] Mu3's position is that the Demand is a Non-Renewal Demand only. It argues that in those circumstances the Agreement does not contemplate the staged notice period set out at Schedule B.

[57] I have concluded that I need not resolve this question of contractual interpretation. Fraud is not simply a legitimate dispute or disagreement over the interpretation of a contract, however one-sided that dispute may appear: *Cineplex*, at para. 29. This disagreement as to the proper interpretation of the Agreement and whether and when the notice periods apply is not strong *prima facie* proof of fraud: *Bombardier Inc. v. Hermes Aero*, [2004] QJ No 9810, 2004 CanLII 7014 (QC CS), at paras. 36, 40.

[58] The next question is whether a strong *prima facie* case of fraud is made out because the Demand was a Non-Renewal Demand which claimed money owing

because the LOC had not been renewed in circumstances where Mu3 took the position that the LOC had been automatically extended.

[59] Mu3's position is that its right to make a Non-Renewal Demand is triggered by the Bank "providing a notice of nonrenewal" of the LOC: Amendment, Article 9. Mu3 argues that it matters not whether the notice issued by the Bank is valid.

[60] The plaintiff suggests it is an implied term of the Amendment that any such notice must be valid in order to trigger the right to make a Non-Renewal Demand.

[61] Both parties agree that the Court cannot determine whether the notice of non-renewal issued by the Bank was valid although both agree it was issued within the 60-day notice period set out in the LOC. The validity of the Bank's conduct is the subject matter of a separate action initiated by Mu3 against the Bank.

[62] I do not find the arguments presented by either party to be abusive or tantamount to fraud. While one may question whether the parties truly intended to have two parallel overlapping securities in the event that the Bank purported to issue a notice of termination which the parties believed to be invalid, it is possible that the Amendment was drafted to give Mu3 peace of mind so that uncertainty introduced by the Bank would be resolved in its favour. It is unsurprising that this specific fact situation is not expressly contemplated in the Amendment.

[63] The issue is not clear-cut. Mu3 relies on the letter of Article 9 whereas the plaintiff relies on the commercial objective underlying it. This is a valid commercial disagreement about how to interpret the Agreement, it is not a strong *prima face* of fraud: *SNC-Lavalin Polska*, at paras. 41-44.

[64] The third issue is whether Mu3 was entitled to issue a Non-Renewal Demand in circumstances where the Agreement had been terminated and Mu3 did not intend to provide future services. Here, the plaintiff relies on the letter of the Amendment which provides: "The Consultant shall continue to provide its Services till the end of the term of the Agreement without fixed monthly payment." The plaintiff notes that this clause was omitted from the demand letter which cited the Amendment.

[65] Mu3 argues that the objective of the Amendment was to secure its financial interests for the term of the Agreement. While it acknowledges that the letter of the Amendment requires that Mu3 continue to provide its services, it argues that the term was intended to ensure that those services continued only so long as the Agreement had not been terminated. It argues that the clause simply does not apply to the facts of this case where the Agreement was terminated prior to the Bank issuing notice of the termination of the LOC. It notes it was entitled to continue to be paid if the Agreement was terminated for breach under s. 6.2(e). It urges that its interpretation of Article 9 is the only reasonable reading of the Agreement as a whole.

[66] Without resolving this question of contractual interpretation, it is worth noting that the Amendment provides that Mu3 was entitled to call on the LOC for unpaid invoices related to payment upon termination if:

- i. The Agreement was terminated for breach under s. 6.2(e);
- ii. The plaintiff failed to pay the Consultant fees at the agreed upon monthly fees including any increases entitled to that for the remainder of the contract on a monthly basis;
- iii. Mu3 provided a notice of draw on the LOC with a request for payment within 10 business days; and
- iv. payment was not made within 10 business days of the delivery of the Notice to Draw.

Agreement, Article 6.3 and Schedule B, Articles 3-4

[67] Thus, I do not find the question of whether or not Mu3 took the position that the Agreement had been terminated to be of particular force in establishing a strong prima face case of fraud in its decision to call on the LOC. As I have noted, there is a dispute between the parties as to whether the Agreement was terminated pursuant to s. 6.2(d) or 6.2(e). That dispute is not being adjudicated on this application.

[68] It is not fraudulent for Mu3 to rely on its view of the world and to seek to interpret the Agreement as a whole including Article 6.3 and Article 9. There exists between the parties a valid commercial disagreement about how to interpret the Agreement which the court should not resolve on this application. That such a question arises does not give rise to a strong *prima face* of fraud: *SNC-Lavalin Polska*, at paras. 41-44.

[69] With respect to whether there was an obligation on Mu3 to draw the clause in question to the attention of the Bank, Mu3 argues that the requirements for the contents of the Demand are governed by the LOC and the ICC Rules.

[70] The LOC provides:

Drawings under this Credit shall be made in the form of a written demand for payment by The Beneficiary delivered to the Bank at the above mentioned office of the Bank. Any demand for payment must bear on its face the date and number of this Credit and signed by the officer of The Beneficiary. Partial drawings are permitted. Any Demand must provide documentation as to the outstanding /unpaid invoice(s) to support the amount owing by 427703 BC Ltd to The Beneficiary. A copy of the demand for payment must be delivered to 427703 B.C Ltd address concurrently to the attention of Emmie Leung.

Demands for payment in proper form and presented to the Bank while this Credit continues in effect shall be honored on presentation without inquiry by the Bank as to The Beneficiary's rights to make such demand and without recognizing any claims of the Customer against The Beneficiary.

[71] Article 14 of the ICC Rules provides in relevant part:

g. A document presented by not required by the credit will be disregarded and may be returned to the presenter.

[72] It therefore says that anything additional that is contained (or omitted) in the Demand is irrelevant because it was bound to be disregarded by the Bank in any event.

[73] Without resolving whether Mu3's interpretation of its obligations under the LOC and the ICC Rules is correct, I conclude that especially in light of its view that

the clause is not applicable, it is an honest interpretation and not one giving rise to a strong prima facie case of fraud.

[74] Lastly, the plaintiff argues that Mu3 engaged in impropriety, dishonesty or deceit in the January 22 Demand by omitting certain statements which are said to be false representations, in particular, the plaintiff argues that Mu3 failed to advise the Bank:

- a) That the plaintiff had given notice to Mu3 on October 9, 2024 of the plaintiff's termination of the Agreement for breach of its terms;
- b) Of Mu3's allegation that the Agreement had been unilaterally and wrongfully terminated by the plaintiff in July 2024;
- c) That on December 10, 2024 it had advised the plaintiff that it had previously elected to terminate the Agreement and did not intend to provide future services.

[75] Again, Mu3 argues that the requirements for the contents of the Demand are governed by the LOC and the ICC Rules and that all of this information was bound to be disregarded by the Bank in any event.

[76] Without resolving whether Mu3's interpretation of its obligations under the LOC and the ICC Rules is correct, I conclude it is an honest interpretation and not one giving rise to a strong prima facie case of fraud.

Should the Court order that any payment on the LOC be paid into court pending determination of these proceedings?

[77] The plaintiff asks that the Court order that any payment on the LOC be paid into court pending determination of these proceedings.

[78] I have not been referred to any authority for making of such an order.

[79] In any event, I do not find that such an order would be in the interests of justice given that the main benefit of a letter of credit is essentially to reallocate

contractual risk so that there is a near absolute assurance for a person selling goods or services that the counterparty will pay promptly when payments are due. If there is any dispute that must be resolved with litigation, the dispute will be resolved after payment in most instances. The one exception, discussed at length above, is when the plaintiff can establish a strong prima facie case of fraud. Having failed to do so, it would be unprincipled to deprive Mu3 of the very benefit bargained for in obtaining the LOC being the assurance of prompt payment.

[80] As the Quebec Superior Court observed in *SNC-Lavalin Polska*, at para.24, if the strong prima case of fraud is not established, then the beneficiary will suffer irreparable harm if he cannot draw upon the credit that was precisely issued to offer him a guarantee in the context of the underlying transaction and the balance of convenience favours the beneficiary.

Conclusion

[81] The interlocutory injunction granted on February 21, 2025 is vacated.

[82] The application is dismissed with costs.

“Latimer J.”