NO. S1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,*
R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT,*
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT
OF NEW WALTER ENERGY CANADA HOLDINGS, INC.,
NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP.,
NEW WILLOW CREEK COAL CORP., NEW WOLVERINE COAL CORP.
AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS

BOOK OF AUTHORITIES OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

Reply Submissions

CRAIG P. DENNIS, Q.C.,
JOHN SANDRELLI &
OWEN JAMES
DENTONS CANADA LLP
Barristers and Solicitors
20th Floor, 250 Howe Street
Vancouver, BC V6C 3R8
Tel: 604-687-4460
Fax: 604-683-5214

COUNSEL FOR THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

MARY I.A. BUTTERY &
H. LANCE WILLIAMS
DLA PIPER (CANADA) LLP
Suite 2800, Park Place
666 Burrard St
Vancouver, BC V6C 2Z7
Tel: 604-687-9444
Fax: 604-687-1612

COUNSEL FOR WALTER CANADA GROUP

MARC WASSERMAN, MARY PATERSON &
PATRICK RIESTERER
OSLER, HOSKIN & HARCOURT LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, ON M5X 1B8
Tel: 416-362-2111
Fax: 416-862-6666

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TAB 1

Court of Queen's Bench of Alberta

Citation: Attila Dogan Construction v AMEC Americas Limited, 2015 ABQB 120

Date: 20150218
Docket: 0701 09436
Registry: Calgary

Between:

Attila Dogan Construction and Installation Co. Inc.

Applicant

- and -

AMEC Americas Limited, formerly AMEC E&C Services Limited and AGRA Monenco Inc.

Respondent

Reasons for Judgment of the Honourable Chief Justice Neil Wittmann

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Introduction

[1] These Reasons for Judgment address three applications:

(a) AMEC Americas Limited ("AMEC") seeks summary dismissal of the claims of Plaintiff Attila Dogan Construction and Installation Co. Inc. ("AD") against AMEC for alleged delays in AMEC's performance in a joint venture for the design and construction of a magnesium oxide plant (the "Summary Dismissal Application").

(b) AMEC seeks Summary Judgment on its counterclaim against AD for expenses to pursue and defend claims against a third party on behalf of both AMEC and AD (the "Summary Judgment Application"; together with the Summary Dismissal Application, the "Summary Applications").

(c) AD sought adjournment of the hearings of the above-noted Summary Applications (the "Adjournment Application").

Background

[2] In October 1998, AD and AMEC entered into a Joint Venture Agreement ("the Joint Venture Agreement"). The Joint Venture was to bid on a contract to design and build a magnesium oxide plant in Jordan ("the Project") for the Jordan Magnesia Company Limited ("JorMag" or "JD"). AMEC was to do the engineering work for the Project, and AD was to complete the construction work. The Joint Venture's bid was accepted and in March, 1999 the Joint Venture entered into an agreement "the Design-Build Contract") with JorMag. On April 26, 2000, AMEC and AD entered into a Joint Venture Amending Agreement ("the Amending Agreement") whereby the parties agreed, *inter alia*, to obtain external financing from Export Development Canada to resolve cash flow problems encountered by the Joint Venture.

[3] The Project was plagued by delays and was ultimately terminated by JorMag on July 7, 2002. On November 17, 2003, AMEC and AD entered into an Agreement on Procedures Concerning Claims ("the Claims Agreement"), which provided for a suspension of claims between AMEC and AD until the dispute between the Joint Venture and JorMag was resolved. It further provided that, with regard to the dispute with JorMag, AMEC would be responsible for retaining and instructing outside legal counsel and any experts for and on behalf of the Joint Venture and that AMEC would, in the first instance, pay AD's share of all third party expenses required to prosecute or defend the claim which was to be arbitrated. Pursuant to the Claims Agreement, AMEC would not be responsible for AD's share of any judgment, award or cost award against the Joint Venture, the responsibility for which would be determined in accordance with the terms of the Joint Venture Agreement.

[4] The Joint Venture initiated arbitration proceedings with JorMag in February, 2004 ("the JorMag Arbitration"). The JorMag Arbitration did not go well, and the Joint Venture resolved the dispute with JorMag pursuant to a settlement agreement dated April 24, 2007, under which the Joint Venture agreed to pay $41 million to JorMag and to release it from all claims. On July 30, 2007, AD brought this action against AMEC, claiming damages from AMEC for negligence and a variety of alleged breaches of the Joint Venture Agreement. AMEC counterclaimed, alleging that AD failed to pay its proper share of expenses associated with the JorMag Arbitration. I have been the Case Management judge of this action since 2010.

The Adjournment Application

[5] AD filed the Adjournment Application on September 4, 2014, arguing that newly retained counsel Gilbert's LLP ("Gilbert's) lacked access to the necessary materials and sufficient time to prepare adequate responses to the Summary Applications scheduled to be heard September 10th and 11th, 2014. AMEC protested that any further adjournment would unfairly draw out the already lengthy proceedings. I refused to adjourn the Summary Applications on September 10, 2014, with reasons to follow.

Background to Adjournment Application

[6] When AD filed its Statement of Claim on September 18, 2007 it was represented by Faber Bickman. AMEC, through Bryan & Company, its counsel at the time, filed a Statement of Defence and Counterclaim on February 27, 2009. On June 10, 2009 Bennett Jones took over conduct of the action for AD, and on May 4, 2010, Blake Cassels & Graydon took over as counsel for AMEC.

[7] The action proceeded in an orderly, if not particularly timely, way for nearly three years. Approximately 500,000 documents were produced, and 85 days of questioning occurred. A number of applications were heard, some of which resulted in reported decisions. On February 6, 2013, in the course of a case management hearing, I was advised by AMEC that it would be bringing the Summary Applications in respect of AD's claim and AMEC's counterclaim. A schedule was set by order dated February 6, 2013. The Summary Judgment Application in respect of the counterclaim was scheduled to be heard on May 15, 2013 and the Summary Dismissal Application in respect of AMEC's claim was set to be heard June 24, 2013.

[8] On March 25, 2013, AMEC filed the Summary Judgment Application and provided Bennett Jones with the supporting Affidavit of David Leonard ("the Leonard Affidavit"), which was filed on April 11, 2013.

[9] On April 22, 2013, after being advised that AD would be bringing an application to amend its Statement of Claim, I adjusted the dates of the Summary Judgment and Summary Dismissal Applications to June 24, 2013 and September 27, 2013, respectively. Argument in respect of the Amendment Application took place on May 15, 2013 instead of argument on the Summary Judgment Application, which had been scheduled for June 24, 2013. Reasons for judgment on the Amendment Application were issued on September 13, 2013: 2013 ABQB 525. The contested amendments proposed by AD were not allowed. On September 26, 2013, I vacated the April 22, 2013 Order concerning timing of the Summary Applications, in light of the timing of the Amendment Application decision and the likelihood that the decision would be appealed. AD filed its Notice of Appeal on October 2, 2013. On October 3, 2013, I directed that the Summary Judgment Application would be heard on May 14, 2014 and the Summary Dismissal Application on June 11, 2014, subject to change, if necessary, in light of the proceedings before the Court of Appeal. On November 29, 2013, I amended the schedule slightly so that the Summary Judgment Application would be heard on May 23, 2014.

[10] On February 21, 2014, the Court of Appeal rendered its decision in the Amendment Application, dismissing AD's appeal: 2014 ABCA 74. The same day, Bennett Jones withdrew as counsel for AD. On March 19, 2014 Fasken Martineau Dumoulin LLP ("Fasken") filed a Notice of Change of Representation, assuming conduct of the matter for AD.

[11] As a result of a fee dispute, Bennett Jones maintained a solicitor's lien over the materials relating to the proceedings, including documentary evidence, discovery transcripts and legal research (the "Bennett Jones File"). The fee dispute was the subject of related proceedings, as was AD's effort to compel delivery by Bennett Jones of the AD File. At the time of this hearing, AD had not received access to the Bennett Jones File.

[12] AD sought another adjournment of the Summary Applications on April 7, 2014. By Case Management Order of that date, the tentative date of June 11, 2014 was set for the Summary Judgment Application. AMEC was also ordered to file its Summary Dismissal Application and supporting affidavit by May 6, 2014. In accordance with this schedule, on May 6, 2014, AMEC filed its Summary Dismissal Application, and on May 8, 2014, filed Michael Ingram's supporting Affidavit ("the Ingram Affidavit"). At a Case Management hearing on May 13, 2014, AD asked again to adjourn the dates of the Summary Applications. The Summary Judgment Application was adjourned to September 10, 2014 and the Summary Dismissal Application to September 11, 2014.

[13] On May 23rd, 2014, Fasken filed an Originating Application asking the Court to compel Bennett Jones to transfer the file to AD pursuant to the *Alberta Rules of Court* ("*ARC*") 10.25. Over the course of the following months, the parties sought to resolve issues arising out of the changes in AD's counsel. On June 6, 2014, Fasken withdrew as counsel of record for AD, though Fasken continued to act for AD through June. On June 17, 2014, the parties came before me again to address the outstanding issue of the solicitor's lien on the Bennett Jones File, which AD sought to adjourn to July 23, 2014. I granted the adjournment, but also ordered that the Summary Applications would proceed on September 10 and 11, 2014, as scheduled, "subject only to an ability of new counsel, if there is one, to ask or to apply to the Court to move the dates."

[14] On July 23rd, 2014, Bennett Jones was again represented by counsel and prepared to proceed with the hearing on the outstanding issue of the solicitor's lien on the Bennett Jones file. AD was represented by Macleod LLP at that hearing, apparently on three days' notice and requested an adjournment of it, which was denied. AMEC's counsel withdrew before the hearing on the merits and was not privy to any of the affidavits received by the Court, nor the submissions made by MacLeod Law LLP or counsel for Bennett Jones. Everything in support of or against AD's application the hearing including the transcript of it and my reasons for denying AD access to the Bennett Jones file and allowing Bennett Jones to maintain its solicitor's lien over it, were ordered sealed by me, except the Originating Application itself.

[15] Also, on the transcripts of the record before the Court, Counsel for AMEC offered Fasken and any counsel thereafter, to make available their database of documents and all transcripts and

pleadings. Counsel for AMEC affirmed that offer on July 23rd, 2014 to any new counsel that may be retained by AD.

[16] On July 23rd, 2014 I gave an Order setting out further dates in relation to the Summary Applications as follows:

(a) Questioning on the Affidavit of Michael Ingram, if any, was to be completed by August 14, 2014;

(b) The Affidavit of Kaan Dogan in relation to the Summary Judgement Application was to be filed by August 22, 2014;

(c) Questioning on Kaan Dogan's Affidavits was to be completed by August 27, 2014;

(d) AMEC's briefs were be filed by August 29, 2014; and

(e) AD's briefs were be filed by September 5, 2014.

[17] In accordance with this Order, the parties filed their briefs on August 29, 2014 and September 5, 2014. AD did not question Mr. Ingram on his Affidavit in support of the Summary Dismissal Application nor file Kaan Dogan's Affidavit by August 22nd, 2014 concerning the Summary Judgment Application. Rather, Kaan Dogan's Affidavit was filed September 9, 2014, and as a consequence, AMEC was not able to cross-examine him.

[18] In the interim, AD sought to obtain new representation. In June, July and August 2014, Kaan Dogan participated in discussions with prospective counsel. Between July 29 and August 1, 2014, Kaan Dogan met with three law firms in Canada. He also met with Fasken to determine whether they would return as AD's counsel, but no agreement was reached.

[19] On August 4, 2014, AMEC provided pleadings and additional documents directly to AD at Kaan Dogan's request. According to the record before me, AMEC received no response to its requests to cross-examine Kaan Dogan and AD declined to file an affidavit in relation to the Summary Dismissal Application.

[20] On August 13, 2014, Kaan Dogan informed AMEC that he had interviewed four law firms but was waiting for proposals. He then requested AMEC's consent to delay the proceedings. AMEC responded August 14, 2014, refusing consent. In the same email, AMEC also requested to cross-examine Kaan Dogan by August 27, 2014, in accordance with the July 23, 2014 Case Management Order. There is no response from AD on the record.

[21] On August 31, 2014, AD reached tentative business terms with its present counsel, Gilbert's LLP ("Gilbert's"), and formally retained the firm on September 4, 2014.

[22] The same day, AD filed the Adjournment Application, seeking an order adjourning sine die both Summary Applications, or, in the alternative, adjourning the applications until March 2015, or at the Court's earliest convenience thereafter.

Arguments of the Parties - Adjournment

[23] AD argued that the factors set forth by this Court in ***Lameman v Alberta***, 2011 ABQB 40, warranted granting an adjournment. AD's principal argument was that the dispute could not be fairly decided on the merits where (a) its new counsel did not have sufficient time to familiarize itself adequately with the complex proceedings or prepare AD's defence, and (b) it did not have access to the Bennett Jones File. As a consequence, AD argued that it would suffer prejudice if this Court proceeded to rule on the multi-million dollar Summary Applications.

[24] AD further argued that a delay was warranted because with the conclusion of a review by the Assessment Officer of Bennett Jones' fees November 17-20, 2014, it could regain access to the Bennett Jones File, and that AMEC would suffer no prejudice that could not be addressed by an award on costs. During a Case Management hearing on June 17th, 2014 the Court indicated to counsel that the entire week of August 18th, 2014 could be made available for a review of Bennett Jones' fee by the Assessment Officer; that there was no need to wait until November 17th- 20th, 2014. AD was not amenable to accelerating the date. AD pointed to my order of June 17, 2014, which, it argues, contemplated that AD's new counsel would seek an adjournment.

[25] AMEC also relied on the factors set forth in ***Lameman***. AMEC pointed to the history of delay in these proceedings, noting that AD's requested adjournment to March 2015 would mean that the Summary Applications would be heard more than two years after this Court's first scheduling order. AMEC also argued that would be unjust to allow AD to benefit from failing to retain new counsel in a timely fashion, prejudicing AMEC with further costs and delay.

[26] AMEC further argued that there was no reason to believe the adjournment would accomplish its stated purpose. According to AMEC, AD is unlikely able to pay future counsel or address its alleged debt to Bennett Jones, and thus there was no assurance that existing counsel would still be acting for AD in March 2015, or that AD would regain access to the Bennett Jones File.

Analysis

[27] This Court has discretion to grant an adjournment. In ***Wenzel Downhole Tools Ltd v National Oilwell Varco Inc,*** 2010 ABCA 257 Bielby JA held, at para 14:

> [A] case management judge has a wide discretion to grant adjournments as he or she sees fit in those situations, to allow for the proper marshalling of evidence and prosecution of the litigation, particularly in such a complex and multi-faceted law suit as this. No doubt this Court would hesitate to make a decision which would tie the hands of a case management judge, familiar with and burdened with the on-going complexities of a large piece of litigation.

[28] Courts are, as always, called upon to exercise this discretion upon sound reasoning. As Pigeon J held in ***R v Barrette***, [1977] 2 SCR 121 at p.125:

> It is true that a decision on an application for adjournment is in the judge's discretion. It is, however, a judicial discretion so that his decision may be reviewed on appeal if it is based on reasons which are not well founded in law.

[29] Yamauchi J. helpfully canvassed these and other decisions in ***Lameman*** to identify a list of factors courts may look to in considering whether to exercise their discretion to grant an adjournment, as set out at para 33:

> 1. courts should make a just determination of the real matters in dispute and they should decide cases on their merits;
>
> 2. the prejudice caused by granting or denying the adjournment;
>
> 3. the applicant's explanation for not being ready to proceed;
>
> 4. the length of the adjournment the applicant is seeking and the consequent disruption of the court's schedule;
>
> 5. the importance of effectively enforcing previous court orders;
>
> 6. the proper marshalling of evidence and prosecution of complex and multi-faceted actions;
>
> 7. whether there is a realistic expectation that the adjournment will accomplish its stated purpose;
>
> 8. the history of the proceedings, including other adjournments and delays, and at whose instance those adjournments and delays occurred;
>
> 9. where a party is seeking the adjournment to amend pleadings, how long counsel has known of the issue to which the amendment is aimed and whether counsel has had previous opportunities to amend;
>
> 10. whether the application is merely an attempt to delay the proceedings; and
>
> 11. the party who seeks the adjournment should not bear the consequences of its counsel's failures.

[30] These factors are by no means exhaustive, nor must a court consider all eleven factors. Rather, they provide some reference from which a court may begin its analysis. In the case at bar, I considered most relevant the history of the proceedings, prejudice to the parties, the explanation provided by AD for the adjournment, the likelihood the adjournment would achieve its stated aims, and whether an adjournment was necessary to make a just determination on the merits of the Summary Applications.

History of the Proceedings

[31] The Summary Applications were first brought before me in February 2013. They have been pushed back at AD's instigation four times. On April 25, 2013, AD filed an application to amend its Statement of Claim, and as a result, on April 22, 2013, this Court adjusted the date of the Summary Judgment Application to June 24, 2013 and the Summary Dismissal Application to September 27, 2013. Then, following AD's appeal on the Amendment Application, on October 3, 2013 I directed that the Summary Applications be heard on May 14, 2014 and June 11, 2014. On May 13, 2014, AD again sought new dates and the applications were delayed to September 10 and 11, 2014.

[32] AD argued that a further adjournment was necessary as its new counsel lacks access to the Bennett Jones File. The File includes documentary evidence, discovery transcripts and legal research related to these proceedings. It is apparently voluminous, containing over 500,000 individual documents and 85 days of discovery transcripts. Bennett Jones had asserted a solicitor's lien over the File as security for outstanding fees after it withdrew as counsel in February 2014. AD sought to compel delivery of the file to Fasken, however the application was not granted. AD argued that the lien may be lifted after Bennett Jones' fees were reviewed.

[33] AD argued that without access, its counsel could not prepare a full defence. But AD, aware of the September dates set for the Summary Applications, has done little to resolve the fee dispute and gain access to the File. AD was given the option to meet with the Assessment Review Officer concerning the fee dispute in August 2014, but elected to proceed in November 2014 instead. In effect, AD has itself contributed to the delayed resolution of fee issue, and relies on that delay in support of the adjournment of the Summary Judgment Applications.

[34] Parties are fully entitled to amend claims, file appeals, and seek adjournments; however this Court cannot condone continual delay. Whether an intentional strategy or not, these delays frustrate the parties' and the Court's interest in a timely and cost-effective resolution of the dispute. The history of these proceedings is a factor that weighs heavily against the granting of an adjournment.

Explanation for the Delay

[35] AD justified the adjournment on the basis that Gilbert's did not have sufficient time nor access to the materials necessary to prepare for the Summary Applications.

[36] AD has had a lengthy and unstable history with counsel. Gilbert's is the fifth law firm to represent AD in these proceedings. AD was represented by Faber Bickman when its Statement of Claim was filed September 18, 2007. Bennett Jones took over on June 10, 2009, withdrawing in February 2014. Fasken was retained March 5, 2014 but withdrew on June 6, 2014. On July 23, 2014, McLeod made a brief appearance. Gilbert's was retained on September 4, 2014.

[37] When Fasken withdrew on June 6, 2014, AD was already on notice that the Summary Applications were scheduled for September 10 and 11, 2014. AD took three months to retain

Gilbert's. In the interim, Mr. Dogan attested that he actively sought new counsel, however his efforts were underwhelming. Mr. Dogan attested that in June, July and August, he had ongoing discussions with counsel in Toronto and Calgary; however Mr. Bickman noted that he appeared for AD on July 23, 2014 with only three days' notice by email. Mr. Dogan also attests that he traveled to Canada to meet with three law firms between July 29th and August 1st, 2014. AMEC rightly points out that meeting with only three firms is hardly compelling, given the urgency of the matter.

[38] Mr. Dogan's only explanation for AD's failure to retain counsel within a reasonable period of time was that AD had been unable to reach business terms with counsel. AD has provided no evidence of being impecunious; and says only that its finances were "significantly strained." This Court was of course, not privy to the terms that counsel or AD sought. However it is difficult to believe that AD was wholly unable to find counsel amenable to reasonable terms and with the capacity to assume conduct of these proceedings.

[39] AD also argued that its counsel lacked the necessary documents to prepare AD's defence. AD's chief concern was access to the Bennett Jones File. It is doubtful that AD is at a significant disadvantage without the Bennett Jones File. Counsel for AD advises that as of September 4, 2014, he had only received fifty documents from AD. Some of these appear to have been those provided by AMEC to AD by email in August. On September 5, 2014, AD's new counsel also received eight boxes of materials that had been provided to Gilbert's by Fasken. According to Carol Yau, a law clerk at Gilbert's, these materials did not include documentary production, discovery transcripts or complete answers to undertakings – amounting to over 500,000 documents. But access to these documents was offered to Fasken by AMEC in May or June 2014 through the provision of its database.

[40] AD's explanation for the delay sought is not satisfactory, and it has done little to mitigate the situation in which it finds itself. AD has delayed, rather than aggressively pursued resolution of the fee dispute. By failing to retain counsel prior to September 4, 2014, AD has itself ensured that counsel would have very little time to obtain documentation from other sources, e.g. the AMEC database. Beyond Kaan Dogan's request for pleadings in August, AD has not taken steps to obtain documents from AMEC, despite AMEC having already offered access to its database. The remainder of the court file, including all the transcripts of questioning on affidavits, was available as part of the Court's record.

Likelihood the Adjournment Will Achieve Its Stated Aims and Prejudice

[41] There is no realistic expectation that the adjournment would remedy the problem in the short term. When I issued my decision on September 10, 2014, there was no guarantee that the Bennett Jones documents would be released to AD. In fact, it seemed improbable that resolution of the fee issue would result in a complete removal of the lien given AD's attested financial constraints.

[42] AD did not provide any evidence in support of its argument that the Bennett Jones File would in fact be released to AD in November 2014 or at all. It seems in fact possible that AD may never regain access to the Bennett Jones File.

[43] Further, there was no guarantee that AD would not change counsel again, requiring a further adjournment. The history of AD's relationship with counsel is logically a predictor of the future endurance of the solicitor-client relationship.

[44] The prejudice caused by yet another delay is clear. AMEC was brought into this litigation seven years ago and still awaits final resolution. Its interest in a timely and cost-effective resolution of the dispute has been undermined with each delay. AD argued that any prejudice suffered by AMEC could be addressed by costs, but given the nature of AD's fee dispute with Bennett Jones, I am not entirely satisfied with AD's position in this regard. Moreover, as this litigation enters its seventh year, and after repeated delays, the ability of AD to compensate by way of costs is a factor that acquires increasingly less weight in the absence of AD providing increased security for costs, which is at present in excess of $2,000,000.00.

Resolving the Dispute upon Its Merits and Prejudice

[45] The Summary Applications raise complex issues. An adjournment would allow Gilbert's more time to access and review thoroughly the pertinent documents, familiarize itself with the issues and evidence in the proceedings and marshal AD's best defence to the two applications.

[46] This factor on its own does not justify an adjournment. I recognize that with more time, counsel for AD could have better familiarized himself with the record and better briefed the issues; however the short timeframe was a consequence of AD's actions. AD was advised of the Summary Judgment Applications in February 2013, nearly two years before they were finally heard. More importantly, Gilbert's admirably prepared extensive and thorough submissions on short notice, and those submissions addressed both the process and substance of the issues. Counsel may always benefit from more time, but after consideration of the questions at issue in the Summary Applications, it is my view that a proper resolution of the Summary Applications on the merits is possible and AD will not suffer prejudice. It is to be remembered that my refusal of the adjournment application was done not only after consideration of all of the above, but also after reviewing the comprehensive and thorough briefs Gilbert's submitted in response to the Summary Applications.

Decision: Adjournment

[47] In light of the foregoing, I rejected the Adjournment Application and proceeded to hear the Summary Applications.

Summary Judgment

[48] *ARC* 7.3 provides:

> 7.3 (1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.
>
> (2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.
>
> (3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:
>
> (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;
>
> (b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;
>
> (c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

[49] The appropriate approach to, and test for, summary judgment has recently been considered by both the Supreme Court of Canada and the Alberta Court of Appeal, respectively, in ***Hryniak v. Mauldin***, [2014] 1 SCR 87 and in ***Windsor v Canadian Pacific Railway Ltd***, 2014 ABCA 108. In ***Hryniak***, the Supreme Court called for a "culture shift" to broaden the application of summary proceedings, holding at para 2:

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pretrial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

And, at paras.31-33:

> Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes... an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and

> impact on the litigation, and its timeliness, given the nature and complexity of the litigation": ***Szeto v. Dwyer***, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53.
>
> This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.
>
> A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

[50] In ***Windsor***, the Alberta Court of Appeal held that the principles set out in ***Hryniak*** are consistent with Alberta summary judgment practice, and held at paras 13 - 15:

> The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record.
>
> ... Ontario R. 20 and Alberta R. 7.3 are both procedures for resolving disputes without a trial (as compared with Alberta's summary trial procedure which is a form of trial). As in Ontario, viva voce evidence may exceptionally be allowed in chambers applications: R. 6.11(1)(g). New R. 7.3 calls for a more holistic analysis of whether the claim has "merit", and is not confined to the test of "a genuine issue for trial" found in the previous rules...
>
> ... ***Hryniak v. Mauldin*** refers several times to the need for a change in culture. In other words, the myth of trial should no longer govern civil procedure. It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial". Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication...

[51] More recently, in ***Access Mortgage Corporation (2004) Limited v Arres Capital Inc.***, 2014 ABCA 280, the Alberta Court of Appeal summarized the principles governing summary judgment in Alberta, adopting the reasoning of Wakeling J. (as he then was) in ***Beier v Proper Cat Construction***, 2013 ABQB 351, at para 61:

Rule 7.3 of the new Alberta Rules of Court allows a court to grant summary judgment to a moving party if the nonmoving party's position is without merit. A party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high.

And, at paras 63 – 70:

First, the moving party is entitled to summary judgment if, as a plaintiff, it presents uncontroverted facts and law which entitle it to judgment against the nonmoving party. The court must be satisfied that the plaintiff has presented uncontested facts which establish all the essential elements of the action

Second, the moving party is entitled to summary judgment if, as a defendant, it presents uncontroverted facts and law, which makes it highly unlikely the plaintiff will succeed. Again, the court must conclude that the uncontested facts before it do not establish an essential element of the plaintiff's action or do establish all the essential elements of a defence.

There are a number of relevant principles which underly the fundamental norm that claims or defences that are so compelling the likelihood they will succeed is very high should be dealt with summarily.

First, the legal or persuasive burden rests on the moving party... The moving party must present the facts which, in combination with the applicable law, make its position unassailable if the nonmoving party does not contest the facts and the law...

Second, the nonmoving party has no legal or persuasive burden to discharge.... In some circumstances the nonmoving party may be at risk of losing the summary judgment application if it fails to present a version of the facts which is inconsistent with that relied on by the moving party...

Third, the motions court may not make findings of credibility and resolve contested fact issues... That a controversy over nonmaterial facts exists is irrelevant.

Fourth, if the law is unclear, either because the moving party is seeking to extend the scope of a well established proposition or to make new law, a chambers judge may decline to resolve the dispute. This is so even though the trial judge is, arguably, in no better position to decide this challenging legal issue than the chambers judge. The chambers judge may legitimately conclude that her proper role is to identify unassailable positions, which assumes the law on the issue is settled, not develop the law in the course of a summary judgment chambers application.

> Fifth, a nonmoving party's argument that questioning or trial may produce evidence which assists the nonmoving party is without merit.

[52] To this set of principles I would add some further points of direct application to the Summary Applications sought here. It is important to understand that the principle of proportionality and what has been described as the less stringent test for summary judgment in Alberta does not affect the evidentiary requirements for such applications. As discussed in further detail below, affidavit evidence sworn in support of summary judgment must comply with the provisions of the *ARC* and these are unaffected by ***Hryniak*** and ***Windsor***. Furthermore, a self-serving affidavit in and of itself is not sufficient to create a triable issue in the absence of detailed facts and supporting evidence: ***Guarantee Co. of North America v Gordon Capital Corp.***, [1999] 3 SCR 423, at para 31. Finally, the principle of proportionality will require that the procedure used to adjudicate the dispute should fit the nature of the claim, but proportionality has more than one aspect. The magnitude of the claim in terms of monetary value may have some place in this analysis, but the nature of the claim will as well. It has been recognized, for example, that disputes over the interpretation of an instrument, such as a contract, may lend themselves particularly well to summary judgment: ***Tottrup v Clearwater (Municipal District 99)***, 2006 ABCA 380.

Summary Judgment on the AMEC Counterclaim

The Leonard Affidavit

[53] In support of its application for Summary Judgment on the AMEC counterclaim, AMEC filed the Leonard Affidavit in April, 2013. AD contends the Leonard Affidavit attaches correspondence to which he was not party, and other documents of which he does not assert personal knowledge. Specifically, AD contends that the documents attached at Exhibits "E", "G", "I", "J", "K", "M", "N", "O", "R", "S", "T", "W", "X", "II" and "JJ" fall into these categories and are inadmissible on this application. AD further contends that paragraphs 14 through 17 of the Leonard Affidavit are inadmissible because they refer to meetings that Mr. Leonard himself does not mention having attended.

[54] *ARC* 6.11 provides:

> 6.11(1) When making a decision about an application the Court may consider only the following evidence:
>
> (a) affidavit evidence, including an affidavit by an expert;
>
> (b) a transcript of questioning under this Part;
>
> (c) the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31;

(d) an admissible record disclosed in an affidavit of records under rule 5.6;

(e) anything permitted by any other rule or by an enactment;

(f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;

(g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial.

[55] A summary judgment application is one that may dispose of all or part of a claim, such that *ARC* 13.18 applies:

13.18(1) An affidavit may be sworn

(a) on the basis of personal knowledge, or

(b) on the basis of information known to the person swearing the affidavit and that person's belief.

(2) If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.

(3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

[56] Every party to a proceeding must file and serve an affidavit of records on each of the other parties, disclosing and identifying all relevant and material records within that party's possession or power. *ARC* 5.15 provides:

5.15(1) In this rule, "authentic" includes the fact that

(a) a document that is said to be an original was printed, written, signed or executed as it purports to have been, and

(b) a document that is said to be a copy is a true copy of the original.

(2) Subject to subrules (3), (4), (5) and (6), a party who makes an affidavit of records or on whose behalf an affidavit of records is filed and a party on whom an affidavit of records is served are both presumed to admit that

(a) a record specified or referred to in the affidavit is authentic, and

> (b) if a record purports or appears to have been transmitted, the original was sent by the sender and was received by the addressee.
>
> (3) Subrule (2)
>
> (a) does not apply if the maker or the recipient of the affidavit objects in accordance with subrule (4),
>
> (b) does not prejudice the right of a party to object to the admission of a record in evidence, and
>
> (c) does not constitute an agreement or acknowledgment that the record is relevant and material.
>
> (4) The maker or recipient of an affidavit of records is not presumed to make the admission referred to in subrule (2) if, within 3 months after the date on which the records are produced, the maker or recipient serves notice on the other party that the authenticity or transmittal of a record, as the case may be, is disputed and that it must be proved at trial.
>
> (5) Notwithstanding that the maker or recipient of an affidavit of records does not serve a notice under subrule (4) within the time provided by that subrule, the Court may order that the maker or recipient is not presumed to make the admission referred to in subrule (2).
>
> (6) This rule does not apply to a record whose authenticity, receipt or transmission has been denied by a party in the party's pleadings.

[57] AD argues that under *ARC* 13.18, an affidavit must be sworn on the basis of personal knowledge, and that the Leonard Affidavit attaches documents, the truth of the contents for which he asserts no personal knowledge. AD refers in particular to correspondence that Mr. Leonard was not party to, and a portion of the affidavit summarizing certain strategy meetings which Mr. Leonard did not attend. AD argues that the Leonard Affidavit constitutes the bulk of AMEC's evidence required to overcome AD's defenses to the Summary Judgment Application.

[58] AMEC responds in its oral submissions that *ARC* 6.11 permits broader inclusion of affidavit evidence, a transcript of evidence at questioning on an affidavit and written or oral answers that may be used in the read-in process under *ARC* 5.31. AMEC further points out that a number of the documents that Mr. Leonard attests to in his Affidavit are introduced not for the truth of their contents, but as evidence in support of the proposition that the documents are authentic and were sent and received. AMEC points to Sopinka, Lederman & Bryant, ***The Law of Evidence***, 4th Edition at 6.27:

> The hearsay rule is invoked only where an out-of court statement or conduct is tendered as evidence of proof of the facts asserted therein because it is only in that circumstance that there is a need to test the reliability of what is being stated. If

> such evidence is presented, not for this purpose, but for some other relevant purpose – for example, if it is tendered to show that a person received notice by the fact that a statement was made to her or him – then the statement is admissible as proof, not of its truth, but that the statement was made.

[59] *ARC* 13.18 recognizes that where an application concerns disposition of some or all claims in a case, as here, the Court requires evidence to meet the standards required at trial. As Veit J. states in ***Murphy v Cahill***, 2012 ABQB 793 at para 25:

> It's a sensible rule because litigants shouldn't be vulnerable to having their rights finally determined by evidence that would not be admissible at trial, and relying on inadmissible evidence is like having no evidence at all.

[60] *ARC* 13.18(3) clearly provides that an affiant must support his or her sworn statements in a final application with "personal knowledge." This requirement embodies the common law rule against hearsay – an affiant must be capable of being tested by cross-examination on his or her own knowledge.

[61] The "personal knowledge" requirement in *ARC* 13.18 heightens the former "knowledge" standard under old Rule 305(1). As Graesser J. points out, in ***ATA v Alberta (Information & Privacy Commissioner)***, 2011 ABQB 19 at para 45:

> Rule 13.18(3) is similar to old Rule 305, although it appears that the requirement of personal knowledge under the new rules may be more stringent than before, as 13.18(3) refers to affidavits used in support of applications which may 'dispose of all or part of a claim.'

[62] The personal knowledge requirement ensures that the opposing party may cross-examine the affiant on his or her knowledge, testing the soundness of the evidentiary foundation for the application. Older cases considering Rule 305(1) are instructive so long as they are viewed in light of this higher threshold. See, e.g., ***Renfrew Insurance Ltd v Donald***, 2012 ABQB 228 at para 19. But see ***Murphy v Cahill***, 2012 ABQB 793 at para 28.

[63] Thus, *ARC* 13.18 requires that the affiant know of a circumstance or fact through firsthand observation or experience, rather than learning of such circumstance or fact from some other person or source. In effect, the affiant may not rely on hearsay.

Personal Knowledge and the Corporate Representative

[64] This requirement presents specific issues in the context of a corporation, where a corporate representative speaks on behalf of the legal entity. In many cases, it would be enormously costly, if not impossible, and of limited use, to require each employee involved in a corporate matter to provide testimony on the corporation's behalf. AMEC relies on a line of Alberta authorities that thus hold that a corporate representative may establish personal knowledge by familiarizing his or herself with reliable corporate records.

[65] In ***Alberta (Treasury Branches) v Leahy***, 1999 ABQB 185, Alberta Treasury Branches (ATB) brought suit against the defendants, alleging that Mr. Leahy, a senior manager within ATB, accepted bribes from the other defendants in exchange for having certain loans made. In support, ATB relied on an affidavit of a senior credit manager, Ms. Heibert, responsible for the management of the loans. The defendants submitted that the affidavit was not based on personal knowledge. Ms. Heibert only joined ATB and became responsible for the loans to the defendants in April 1997, three years after the loans were concluded. The defendants asserted that she was not at all personally involved in the transactions in dispute. Mason J. nonetheless found that she had "personal knowledge" within the meaning of old Rule 305(1).

[66] In assessing the affiant's knowledge of the matters deposed, Mason J. relied on paragraphs from her affidavit. Notably, he stated that her knowledge of the facts came in part by (at para 48(d)):

> ... reviewing the files and documents provided by ATB's solicitors who acted on the October 1994 refinancing, from the files maintained by or on behalf of ATB, from discussions with employees and former employees of ATB and from information obtained as a result of an investigation conducted by Bryan McBean of ATB's security department.

[67] Mason J. relied on a line of Alberta authorities in support, including ***Advance Rumely Thresher Co v LaClair***, [1917] 1 WWR 875 (ABCA); ***Alberta (Treasury Branches) v Wenley Enterprises & Sales Ltd*** (1985), 66 AR 232 (MC); and ***Principal Savings & Trust (Liquidator of) v Bowlen*** (1991) 1 CPC (3d) 206 (ABQB).

[68] In ***Advance Rumely Thresher Co. v Laclair*** [1917], 1 WWR 87 (Alta CA), the Court of Appeal found that as manager of the company, the deponent had access to all the relevant business records and it was not necessary that the manager be personally involved in all transactions in order to give evidence of them.

[69] In ***Bowlen***, the plaintiff applied for summary judgment against the maker and guarantors of a promissory note. In support of the application, the plaintiff submitted an affidavit of the general manager of the plaintiff's liquidator. In his affidavit, he asserts that his knowledge was obtained from "books and records of [the plaintiff] kept in the ordinary course of its business..." Master Quinn stated at para 13:

> Counsel for the defendants does not take the position that anything said in these affidavits is not true. His objection is that the affidavits are not admissible in evidence because the deponent cannot really swear that he has personal knowledge... In my opinion, his affidavits should be accepted as valid evidence in support of the plaintiff's application. Although he does not purport to have direct first-hand knowledge of the matters he deposes to, he had personal knowledge in the qualified sense that he obtained that knowledge from obtaining and perusing the records of the company in liquidation...

[70] As the Court of Appeal stated in ***R v Monkhouse***, 1987 ABCA 227, in preparing a summary or extract of original records or documents, that summary or extract is not hearsay, at para 12:

> He is not saying that the original time records prepared by the appellant are true nor is he saying that the transcription of those records by some unknown person is correct. What he says to the Court is: "I read this document and my extract correctly summarizes it." He is able to say that because he personally read the document which he summarized, and he can be cross-examined about that.

[71] In ***Leahy***, Mason J. concluded at para 56:

> To the extent that activities of a corporation are recorded in reliable documents, an authorized person may obtain the requisite personal knowledge by reviewing these and then speak to those activities, subject to compliance with other rules of evidence.

[72] Thus, by having a corporate representative review its business records, a corporation can satisfy the "personal knowledge" requirement of *ARC* 13.18. The corporate representative is in a suitable position to put the corporate records before the court. Mason J. added at para 58:

> I question how else a corporation can give evidence under these circumstances, other than through a representative such as Hiebert who has the requisite position and authority and who has reviewed the records of the corporation; a corporation is incapable of personally comprehending facts.

[73] Allowing a corporate representative to establish personal knowledge by relying on hearsay in the form of corporate records parallels the business records exception to the hearsay rule. What is not entirely clear is whether an affiant can establish personal knowledge based on corporate records that are not admissible hearsay, or more broadly, whether the affiant can establish personal knowledge on the basis of any admissible hearsay, not just business records.

[74] In **Leahy**, Mason J. suggested that Ms. Hiebert established personal knowledge through both review of the company's records and discussions with its employees, which would almost certainly be inadmissible hearsay. He later noted, however, that the affiant was "not purporting to speak to matters that are not based on business records.": **Leahy** at para 59. This is consistent with other decisions wherein deponents not involved in bank transactions routinely swear on the basis of their review of the business records: see ***Scotia Mortgage Corp v Aab***, 2012 ABQB 464 at para 15 and cases cited therein.

[75] The intent of *ARC* 13.18 is not served where a corporate representative may rely on any hearsay in support of his or her affidavit. The accommodation to allow a corporate representative to familiarize themselves with business records to establish personal knowledge goes too far if that representative must also rely on conversations with other employees, emails, correspondence and other third-hand information.

Where the Affiant Lacks Personal Knowledge

[76] In ***Murphy***, Veit J. held, at para 29:

> Where a litigant is applying for relief that may dispose of all or part of a claim, that litigant can only use in support affidavits containing either statements of fact within the knowledge of the deponent or statements containing hearsay evidence that would be admissible at trial for the truth of the content.

[77] Veit J.'s approach is consistent with ***Leahy***, which acknowledges an alternative route for the admission of documents under the old Rule 305 where the affiant lacks knowledge of the facts: rely on admissible material exhibited to the affidavit as direct evidence, thereby "curing" the hearsay. This less restrictive reading of the old rule permitted affidavits that attached relevant admissible documents of which the deponent had no personal knowledge. This reading furthered the view that documents, if admissible at trial, were admissible in chambers applications: see ***Leahy*** at para 73.

[78] Under this approach, even if the affiant knows little about the document other than where it was found, the document is introduced and the court can determine the reliability of the document. See, e.g., ***Kin Franchising Ltd v Donco Ltd*** (1993), 7 Alta LR (3d) 313 (ABCA) at para 6; ***Leahy*** at paras 55-66; ***Indian Residential Schools, Re*** (2002), 9 Alta LR (4th) 84 (ABCA) at para 36.

[79] The text of *ARC* 13.18(3) would seem to constrain this practice, however, requiring of the affiant some personal knowledge of the events or circumstances described in such admissible hearsay. Otherwise, the Rule would be meaningless, just allowing the admission of all admissible hearsay. The consequence is to limit the admission of evidence. Note, however, that cases decided under the old rule seemed totally satisfied that even if the affiant could only say where the document came from, it was enough of a personal connection. The judge would then keep that in mind for weight.

***ARC* 13.18 and Hearsay**

[80] Any admitted document containing hearsay must (1) be authenticated, and (2) fall under a common law or the principled exception to the hearsay rule. Per Dickson C.J. in ***R v Schwartz***, [1988] 2 SCR 443 at 476, dissenting.

> Before any document can be admitted into evidence there are two obstacles it must pass. First, it must be authenticated in some way by the party who wishes to rely on it. This authentication requires testimony by some witness; a document cannot simply be placed on the bench in front of the judge. Second, if the document is to be admitted as evidence of the truth of the statements it contains, it must be shown to fall within one of the exceptions to the hearsay rule . . . .

Hearsay Exceptions

[81] Evidence admissible under common law and principled exceptions to the hearsay rule is not barred by the application of *ARC* 13.18 or its predecessor Rule 305: ***Murphy v Cahill***, 2012 ABQB 793 at para 29; ***Harco Holdings 2000 Inc. v. B. (M.)***, 2010 ABQB 442 at para 29; ***Horrey v Litterst*** (1995), 37 Alta LR (3d) 74.

[82] In ***Horrey***, the Alberta Court of Appeal suggested that Rule 305 may incorporate the common law exceptions to the hearsay rule so as to allow the admission of documents and reliance on them by a party who was not their author. See also ***Leahy***, at para 71. The principled exception to the hearsay rule was set out by the Supreme Court in ***R v Khan***, [1990] 2 SCR 532 and ***R v Smith (AL)***, [1992] 2 SCR 915. In ***Smith***, the Court held at p 933: "[h]earsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity."

[83] A key exception to the hearsay rule is in regard to business records. In ***Ares v Venner***, [1970] SCR 608 , the Supreme Court held at para 26:

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record, should be received in evidence as prima facie proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so.

[84] Business records may be admitted "if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records.": ***R v Monkhouse***, 1987 ABCA 227 at para 24. Thus, (at para 25): "[w]here an established system in a business or other organization produces records which are regarded as reliable and customarily accepted by those affected by them, they should be admitted as prima facie evidence."

[85] In ***Monkhouse***, at para 104, Laycraft CJA noted several cases "where the witness gave testimony supporting a document about which he had no personal knowledge though the original documents containing the information recorded in the ledgers were undoubtedly prepared by persons with personal knowledge." Thus (at para 106), "records reliably kept in the ordinary way of business . . . should be admitted as prima facie evidence."

[86] Correspondence is generally not admissible where not "made or kept in the ordinary course of business" by a person under an obligation to accurately record the facts and thus such documents are unreliable third party hearsay evidence.

Summary

[87] An affiant must have "personal knowledge" as the basis of a sworn statement submitted in support of a final application.

[88] A corporate representative may, in familiarizing his or herself with corporate records, establish "personal knowledge" within the meaning of *ARC* 13.18(3). The representative may not, however, rely on otherwise inadmissible hearsay. Where the corporate representative lacks personal knowledge, he or she may rely on direct evidence exhibited to the affidavit or otherwise before the Court. Such direct evidence must be admissible in accordance with the common law rules of evidence, and thus hearsay must either fall under a common law or principled exception, or must be relied on for non-hearsay purposes.

Admissibility of Exhibits and Sections of the Leonard Affidavit

[89] AD asserts that the Leonard Affidavit attaches correspondence and other documents of which he does not have personal knowledge. Mr. Leonard was the Commercial Director for AMEC's UK engineering business as of September 15, 1998. Given his position within the company, and personal involvement in the Jormag dispute, I am satisfied that Mr. Leonard has personal knowledge of the general course of the JorMag Arbitration. The Leonard Affidavit, however, attaches a number of documents to which Mr. Leonard was not a party and the contents of which does not assert personal knowledge. It is necessary to determine whether these documents may be admitted for the truth of their contents.

[90] The email documents at Exhibit "E" and "G", which contain correspondence between AMEC and the Nabulsi & Associates and Hammonds law firms do not fall within any exception to the hearsay rule, nor has AMEC established that Mr. Leonard has personal knowledge of the contents therein. They are inadmissible for the truth of their contents.

[91] In cross-examination on the Affidavit, Mr. Leonard confirmed that he was not the author of the meeting notes at Exhibit "I". There is no indication of authorship in the notes. Mr. Leonard did not attend the meeting and confirmed that he does not have personal knowledge of meeting described in the notes. In ***Setak Computer Services Corp v Burroughs Business Machines Ltd***, 15 O.R. (2d) 750 (Ont Sup Ct), the Court found that meeting minutes are admissible both as proof of the events that occurred at the meeting, and as proof of the events described. Here, however, there is no evidence as to who recorded the notes, whether the notes were intended as minutes to capture the meeting, their intended purpose, and whether they were made contemporaneously. They are therefore inadmissible.

[92] The summaries of legal advice at Exhibits "J", "K", "M" and "N" do not fall within an exception to the hearsay rule, nor has AMEC established that Mr. Leonard has personal knowledge of the advice. These are inadmissible for the truth of their contents.

[93] Exhibit "O" is a copy of a letter dated June 6, 2003 from Mr. Casselman of AMEC to JorMag, on behalf of the Joint Venture, enclosing a summary of the Joint Venture's position and its claim in the format of and ICC Request for Arbitration. Mr. Leonard has personal knowledge of the letter as a recipient, and in his capacity as AMEC's corporate officer responsible for the JorMag dispute. I am satisfied that Mr. Leonard's knowledge would extend to the contents of this correspondence. The letter is therefore admissible for the truth of its contents.

[94] Exhibit "R" is a copy of an email dated October 3, 2003 from Mr. Palmer to Kaan Dogan and Mr. Casselman, providing an estimated cost for a 13 month arbitration, warning that some funding for the arbitration may not be provided by AIG [American International Group], the Joint Venture's insurer, and proposing a meeting to discuss how the resources of the Joint Venture would be deployed going forward. The email does not fall within an exception to the hearsay rule, nor has the defendant established that Mr. Leonard has personal knowledge of the information contained in the email. It is therefore inadmissible for the truth of its contents.

[95] Exhibit "S" is a copy of an email chain dated October 8, 2003. It contains the October 3, 2003 email from Mr. Palmer describing preparations for the JorMag arbitration at Exhibit "R", an inquiry from Kaan Dogan to Mr. Casselman of AMEC about the stance of AIG with respect to costs of the arbitration and the Joint Venture's financial position, and a response from Mr. Casselman indicating that the requested information would be provided that day. The email does not fall within an exception to the hearsay rule, nor has the defendant established that Mr. Leonard has personal knowledge of the email.

[96] Exhibit "T" is a copy of a chart of Joint Venture Claim costs up to September 28, 2003. Mr. Leonard is advised by Joe Browne, an employee of AMEC, that he recognizes it as a chart he would have prepared, though he could not remember preparing it, and that it was his practice to provide information to AD when he was directed by Mr. Casselman, but that he could not remember providing this particular chart to AD. The chart does not fall within an exception to the hearsay rule nor has the defendant established that Mr. Leonard has personal knowledge of the chart.

[97] Exhibits "W" and "X" are copies of email chains, in addition to a memo from Mr. Casselman to Kaan Dogan dated April 7, 2003, copied to Mr. Leonard and others. The letter and email chains do not fall within an exception to the hearsay rule and are not admissible for the truth of their contents.

[98] Exhibit "II" is a copy of an email dated September 8, 2005 in which Alex Chatham of AMEC provides AD with a chart containing a breakdown of all costs associated with the JV Claim up to that point, and Exhibit "JJ" is an email from Gokhan Dogan of AD to Mr. Chatham of AMEC requesting the number of the courier package containing the back up for the charts contained at Exhibit "II". These emails do not fall within an exception to the hearsay rule and are not admissible for the truth of its contents.

[99] Paragraph 14 of the Leonard Affidavit refers to strategy meetings in Jordan among Nabulsi, Hammonds, AD and AMEC in July 2002 to discuss Jordanian law and the strategy surrounding the JorMag claim. I am satisfied on the basis of his position and knowledge of the proceedings that Mr. Leonard can give evidence to the effect that such meetings took place. However, the summary of the meetings contained at Exhibit "J" and "K" was prepared by Simon Palmer and Mr. Leonard has no personal knowledge of the contents therein and they are therefore inadmissible for the truth of their contents.

Analysis: Summary Judgment on the AMEC Counterclaim

[100] In its Counterclaim, AMEC contends that, pursuant to the Claims Agreement, AMEC and AD agreed that litigation costs incurred in pursuing the JorMag litigation were to be divided equally between AMEC and AD. The litigation costs totalled $31,150,233.38, comprised of $22,458,591.62 paid to legal firms; $7,872,793.26 paid to experts and $818,848.50 paid to arbitrators: paras 49, 50 of the Leonard Affidavit. After accounting for the 25% of the litigation costs paid by AMEC's insurers, AMEC paid a total of $23,362,674: para 62 of the Leonard Affidavit. AMEC claims that $11,681,337 is owed to it by AD: para 63 of the Leonard Affidavit.

[101] In its Defence to the AMEC Counterclaim, AD denies the amount of the litigation costs claims, denies that 25% of those costs were paid by AMEC's insurers, and denies that AMEC paid the remaining costs. AD admits that AD and AMEC agreed to split the costs of the JorMag Arbitration pursuant to the Claims Agreement, but contends that the fees claimed by AMEC are not recoverable because they were covered by insurance carried by AMEC with respect to the Project and, to the extent the fees are being claimed pursuant to a right of subrogation, AD is an insured or is entitled to a waiver of subrogation. In the alternative, AD contends that it was a term of the Claims Agreement that AMEC was required to inform AD of all costs incurred in relation to the JorMag Arbitration as they were incurred, and that all costs so incurred were to be reasonably necessary, and that AMEC failed to comply with these provisions. AD argues that it was an express term of the Claims Agreement that AMEC was required to provide AD with copies of all correspondence sent to or received from the Joint Venture's legal team, arbitrators and third parties, and copies of all internal progress reports, in connection with the JorMag Arbitration, and that AMEC failed to provide AD with copies of all such correspondence.

[102] The Claims Agreement between AD and AMEC is dated November 17, 2003 and contains the following provisions:

> 4. Claims by and Against JMC [JorMag]
>
> 4.1 Attila Dogan and AMEC and each of them will fully support the Joint Venture and each other and engage in the orderly exchange of information between themselves necessary for:
>
> > (a) the prosecution of the Joint Venture's claims against JMC to seek additional payments which the Joint Venture believes are due to the Joint Venture from JMC under the Design and Build Agreement;
> >
> > (b) the prosecution of any and all claims against JMC and others for damages which the Joint Venture alleges it has suffered as a result of the actions of JMC and others relating to or in any way connected with the Design and Build Agreement, the performance of work thereunder and the termination thereof by JMC; and

(c) the defence of all claims which may be brought against the Joint Venture or either of its members by or on behalf of JMC relating to or in any way arising out of the Design and Build Agreement.

4.2 Notwithstanding the provisions of paragraph 4.1, but subject to the provisions of clause 5 hereof, in the first instance, AMEC shall be responsible for retaining outside legal counsel and any experts for and on behalf of the Joint Venture and AMEC agrees that in the first instance, it shall pay Attila Dogan's Joint Venture member's share of any and all such third party costs required to prosecute or defend those claims or actions set out in paragraph 4.1 hereof; Provided, however, nothing in this agreement shall obligate AMEC to make any payment for or on behalf of Attila Dogan of any judgment, award or cost award against the Joint Venture, the responsibility for which will be determined by and in accordance with the terms of the Joint Venture Agreement.

5.2 Any and all arbitration administrative expenses as well as arbitrators' fees or other third party costs incurred by mutual agreement and paid by AMEC, pursuant to paragraph 4.2 and subject to the limitations expressed in paragraph 5.1 hereof, to prosecute or defend any and all claims by or against the Joint Venture in connection with the Design and Build agreement shall be repaid from and form a first charge against the additional revenue or damage award actually paid to the Joint Venture in respect of such claims. If the Joint Venture becomes entitled to recover from insurers or from any other source (other than any arbitration award) any expenses incurred by the Joint Venture and paid in the first instance by AMEC with respect to the prosecution or defence of any claims prosecuted by or against the Joint Venture, AMEC shall be entitled to receive all such recoveries for its sole benefit. If no additional revenues or damage awards are actually paid to the Joint Venture from JMC then each of the JV partners are responsible to split the costs of pursuing a claim against JMC or defending a claim from JMC on a 50/50 basis and all such third party costs paid by AMEC, less any contribution to such third party costs AMEC might receive from insurers or from any other source, shall be charged to the Joint Venture and recovered by AMEC on a final Joint Venture accounting and distribution. The parties further agree that after payment of all costs as hereinbefore provided the parties shall divide equally between themselves the proceeds of any arbitration award actually received.

6.2 All correspondence or documents sent on behalf of the joint venture to [JorMag] in prosecution or defence of the claims made by or against [JorMag] shall be prepared by or on the instructions of AMEC. AMEC agrees to provide to Attila Dogan copies of all formal pleadings and submissions and all correspondence to or from [JorMag] in which the position of the joint venture with respect to the resolution of such claims is discussed. AMEC will also provide

> copies of any correspondence to the legal team, arbitrators, third parties and copies of internal progress reports.
>
> 7. All correspondence or documents sent on behalf of the Joint Venture to JMC in the prosecution or defense of the claims made by or against JMC shall be prepared by or on the instructions of AMEC. AMEC agrees to provide Attila Dogan copies of all formal pleadings and submissions and all correspondence to or from JMC in which the position of the Joint Venture with respect to the resolution of such claims is discussed. AMEC will also provide copies of any correspondence to the legal team, arbitrators, third parties and copies of internal progress reports.

[103] The JorMag Arbitration commenced in February, 2004. Mr. Leonard's responsibilities in connection with the arbitration were to assist with the preparation of the claim and to supervise AMEC's internal resources engaged in it. He had some involvement with the payment of legal and expert invoices on behalf of the Joint Venture. Mr. Leonard attended the Arbitration and provided evidence on behalf of the Joint Venture. It is Mr. Leonard's uncontested evidence that AD actively participated in the arbitration. He states that Kaan Dogan attended the arbitration most of the time. It is not disputed that Kaan Dogan and Marwan Safadi provided witness statements and testimony at the Arbitration.

[104] On July 31, 2006 the arbitration panel rendered an interim decision dismissing most of the Joint Venture's claim and allowing some of JorMag's counterclaims. Subsequently, the Joint Venture and JorMag participated in mediation and the dispute between JorMag the Joint Venture was ultimately settled. Pursuant to a settlement agreement dated April 24, 2007, the sum of $41,000,000 US was paid by the Joint Venture to JorMag. The settlement agreement was signed by Mr. Leonard on behalf of AMEC and by Kaan Dogan on behalf of AD: para 42 of the Leonard Affidavit.

[105] On June 6, 2007, AMEC entered into a settlement agreement with its insurer (the "Insurance Settlement"), under two separate policies, one in favour of the Joint Venture and with a limit of liability in the amount of $15 million, the second AMEC's own umbrella policy, with a limit of liability in the amount of $50 million. Coverage under the latter policy had been diminished by unrelated claims to $27,793,114, and as the date of the Insurance Settlement, $2.5 million had already been paid under the Joint Venture's policy. Under the terms of the Insurance Settlement, $40,293,114.16 of the JorMag settlement was paid by the insurer. AMEC paid the balance, in the amount of $706,885.84: paras 47,48 of the Leonard Affidavit.

[106] According to Mr. Leonard, after the insurance contribution, a balance of $23,262,674 remained. This amount has already been paid by AMEC. To date, AD has not paid $11,681,337, representing a 50% share of this balance that AMEC claims to be entitled to recover under paragraph 5.2 of the Claims Agreement: paras 62, 63 of the Leonard Affidavit.

Equitable Set-Off

[107] AD contends that, while it denies AMEC's counterclaim, it also may prove that AMEC owes it an amount of money, that this amount should be counted against any amount AD is found to owe to AMEC, and equitable set-off in these circumstances operates as a defence to the AMEC counterclaim. AD points in this regard to ***Five Oaks Inc. v 784566 Alberta Ltd.***, 2000 ABQB 152. In that case, on appeal from a Master, Clackson J. upheld a decision to stay enforcement of summary judgment on a mortgage on the basis that the mortgage claim was clearly connected with a cross-claim under an architectural contract. There is nothing in ***Five Oaks Inc.*** to suggest that the potential for an equitable set-off is sufficient to operate as a defence such that summary judgment should be refused entirely, and counsel for AD did not direct me to any other authority that would support this proposition. The potential for set-off is no reason, in and of itself, to dismiss AMEC's application for summary judgment.

Proof of AMEC's Claim

[108] Having challenged, with some success, significant portions of the Leonard Affidavit, AD says that AMEC's record fails to meet the threshold required to grant summary judgment on the counterclaim.

[109] AD contends that AMEC has failed to prove mutual agreement under paragraph 5.2 of the Claims Agreement. There are two elements to AD's argument in this regard. AD contends that recovery for any costs predating November 17, 2003 is not contemplated under the Claims Agreement and that, on the record before me, it is impossible to separate those costs from costs incurred after that date. Moreover, AD argues that there is insufficient evidence on the whole to prove that any of the costs incurred by AMEC in the course of the JorMag arbitration were mutually agreed to.

[110] With respect to the first point, the Claims Agreement refers to "Any and all arbitration administrative expenses as well as arbitrators' fees or other third party costs incurred by mutual agreement and paid by AMEC", without reference to date (emphasis added). I agree with AMEC that the language of the Claims Agreement is unambiguous and does not contemplate a distinction between pre-Claims Agreement costs and post-Claims Agreement costs associated with the JorMag Arbitration. Any inability to distinguish between these costs is not a reason to deny summary judgment on the counterclaim.

[111] AD's argument that AMEC has failed to prove mutual agreement requires a careful consideration of the language in paragraph 5.2 of the Claims Agreement. Paragraph 5.2 provides:

> Any and all arbitration administrative expenses as well as arbitrators' fees or other third party costs incurred by mutual agreement and paid by AMEC pursuant to paragraph 4.2 to prosecute or defend any claims in connection with the Design and Build Agreement shall be repaid from and form a first charge against the additional revenue or damage award paid to the Joint Venture in respect of such

> claims. If the Joint Venture becomes entitled to recover from insurers or any other source other than an arbitration award any expenses incurred by the Joint Venture and paid in the first instance by AMEC, AMEC shall be entitled to all such recoveries for its sole benefit. If no additional damage awards are paid to the Joint Venture as a result of the arbitration, then each of AMEC and AD are responsible to split the costs of pursuing the claim against JorMag or defending JorMag's claim on a 50/50 basis and all such third party costs paid by AMEC, less any contribution to such third party costs AMEC might receive from insurer or from any other source, shall be charged to the Joint Venture and recovered by AMEC on a final Joint Venture accounting and distribution. The parties further agree that after payment of all costs as hereinbefore provided the parties shall divide equally between themselves the proceeds of any arbitration award actually received.

[112] It is not immediately apparent that the requirement for mutual agreement applies to anything more than those fees or third party costs that AMEC might be repaid from any additional revenue or damage award paid to the Joint Venture as a result of the JorMag Arbitration. Later in paragraph 5.2 there is reference to dividing costs on a 50/50 basis in the event that no additional damage awards are paid to the Joint Venture, which is what in fact occurred. Here, there is no reference to mutual agreement; instead, the parties have agreed simply to split the costs of pursuing or defending in the JorMag Arbitration. Ultimately, however, it is not necessary to determine whether the requirement for mutual agreement extends to all claim costs in the event that no damages are paid to the Joint Venture, because the evidence clearly indicates that neither AD nor AMEC interpreted paragraph 5.2 to mean that AMEC was obligated to obtain prior approval for third party costs from AD. The evidence in this regard is not limited to the Leonard Affidavit, but includes the cross-examination on Kaan Dogan's Affidavit of April 24, 2013 and read-ins from the questioning of Kaan Dogan in June and August, 2012.

[113] There is no dispute that the Claims Agreement was duly executed by both AD and AMEC, and that Kaan Dogan signed off on the settlement agreement with JorMag. There is no dispute that, as a result of the JorMag settlement, AMEC paid $42 million.

[114] In his read-ins from questioning, Kaan Dogan has acknowledged:

> (a) that he was involved in discussions and carriage of the arbitration between the Joint Venture and JorMag on behalf of AD;
>
> (b) he was involved in negotiations leading to the Claims Agreement;
>
> (c) Kaan Dogan and Marwan Safadi were the contact points for Mr. Palmer of Hammonds through the course of the arbitration for AD;
>
> (e) Mr. Safadi was involved with the Addleshaw firm and other experts with respect to the calculation of damages;

(f) AD acquiesced to the retention of the Hammonds firm for the conduct of the JorMag Arbitration on behalf of the Joint Venture.

[115] In a memorandum dated September 27, 2005 Kaan Dogan and Marwan Safadi provide a report of a claim review meeting attended by them, as well as Mr. Leonard of AMEC, Martin Bowdery, identified in the memorandum as the lawyer for the Joint Venture in the arbitration, and Simon Palmer and Jonathan Tattersall, now of the law firm Addleshaw Goddard. The memorandum demonstrates that AD had engaged, together with AMEC, the Joint Venture's counsel and experts in a thorough review of the Joint Venture's prospects and strategy in the dispute with JorMag. There is, therefore, considerable evidence to support AMEC's submission that AD clearly agreed to pursue the Joint Venture claim and to hire external legal and necessary experts to advance it.

[116] AD argues that this conduct does not amount of evidence of mutual agreement under paragraph 5.2 of the Claims Agreement. In his Affidavit of April 24, 2013, Kaan Dogan swears that AMEC retained Hammonds without informing AD or seeking its consent, that AMEC retained experts without informing or obtaining the consent of AD, and that AD did not know if a budget was set for any of the experts. The Claims Agreement is silent on the question of how mutual agreement was to be arrived at. It does not provide for a mechanism whereby AMEC would communicate cost estimates to AD for pre-approval. There is, however, some evidence before me with respect to the information that was provided to AD regarding preparation for the JorMag Arbitration. It is not necessary to rely on the truth of the contents of the exhibits to the Leonard Affidavit in order to find, in fact:

(a) Kaan Dogan advised Barry Casselman, on June 10, 2002, that the Joint Venture needed to take "remedial and severe actions" against JorMag (Exhibit "H");

(b) Simon Palmer provided an outline of the overall objective of the Joint Venture in the JorMag dispute; the work that Hammonds had undertaken to date; the major issues; the case plan and risk evaluation; and litigation and action strategy to both AMEC and AD on September 18, 2002 (Exhibit "L");

(c) Jonathan Tattersall of Hammonds provided an update on the status of the Joint Venture claim against JorMag, including a schedule outlining further documentation that he was seeking from AD to continue to build the claim against JorMag, on December 19, 2002 (Exhibit "M");

(d) By email dated February 26, 2003 and sent to both AD and AMEC, Mr. Palmer summarized JorMag's claim and the Joint Venture's defences and the Joint Venture's claim against JorMag, including the values ascribed to each head of claim by JorMag and the Joint Venture (Exhibit "N");

(e) By letter dated July 25, 2003, and copied to AD, Mr. Casselman advised JorMag that the Joint Venture was prepared to meet with JorMag to investigate

the possibility of settlement (Exhibit "P") and by email dated July 29, 2003, Kaan Dogan confirmed receipt of this letter (Exhibit "Q");

(f) By email to AD and to AMEC and dated October 3, 2003, Mr. Palmer indicated that preparations for the arbitration were proceeding and estimated "costs for the full legal and expert team for a 13 month arbitration process" at between 3.65 million and 4.9 million pounds; (Exhibit "R")

(g) By email dated October 6, 2003, Kaan Dogan requested clarification from Mr. Casselman of AMEC about the Joint Venture's insurer's position with respect to the costs of preparation and seeking financial statements for the Joint Venture; (Exhibit "S"); and

(h) AD entered into the Claims Agreement after having received the correspondence and made the requests for further information described above;

(i) On September 8, 2005 Gokhan Dogan forwarded to AD and Kaan Dogan an email from Alex Chatham of AMEC, entitled "Cost of Preparing the Jormag Claim" and containing what appears to be a spreadsheet attachment entitled "Claim Cost Details to 31 July 05" (Exhibit "II").

[117] Moreover, in his own Affidavit, Kaan Dogan acknowledges:

(a) Information on JorMag claim costs was provided to AD on an "irregular basis";

(b) AMEC provided an Excel spreadsheet of claim costs to July 31, 2005 which, printed and reproduced in AD's own production, exceeds 500 pages in length.

[118] The only evidence that AD ever sought information about the budget for or expenses incurred in preparation for the JorMag Arbitration is contained in paragraphs 53 to 59 of the Kaan Dogan Affidavit, April 24th, 2013. That evidence shows that AD made requests for a budget on June 8, 2005, July 28, 2005 and August 16, 2005, and finally received the Excel spreadsheet referred to above in September, 2005. Kaan Dogan says that supporting documentation was sought by AD shortly thereafter and refused by AMEC. Nevertheless, there is no evidence that AD objected to any of the costs disclosed in the spreadsheet it received in September, 2005.

[119] By far the largest part of the JorMag Claim Costs is the $22,458,591.62 paid to legal firms, of which $22,416,379.58 was paid to the Hammonds and Addleshaw Goddard: Exhibit EE to the Leonard Affidavit. AD agreed to allow AMEC to retain counsel for the Joint Venture in the JorMag arbitration. Representatives of AD met and consulted with those lawyers on numerous occasions. Representatives of AD attended at the JorMag arbitration where those lawyers represented AD's interests as a party in the Joint Venture, and AD later signed the settlement agreement that ultimately resulted. AD is a large and sophisticated construction company. Its representatives had to have known that a highly complex international arbitration is

a costly enterprise. Upon receipt of the detailed spreadsheet of costs in September, 2005, AD did not communicate disapproval of all or any of the expenses set out therein to AMEC.

[120] The proper approach to the interpretation of any written agreement is to read the words in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object and intention. Even in the event of ambiguity, it is not always necessary to have recourse to extrinsic evidence if the meaning of the provision in question can be determined from a review of the agreement as a whole: ***Alberta Medical Assn. v Alberta***, 2012 ABQB 113 (leave to appeal refused: 2012 ABCA 391); ***Calgary (City) v International Assn. of Fire Fighters (Local 255)***, 2006 ABQB 133 (aff'd: 2008 ABCA 77). The Supreme Court of Canada recently emphasized this practical, common-sense approach to contractual interpretation in ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53, at paras. 47- 48:

> ...the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (***Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada***, 2006 SCC 21 (CanLII), [2006] 1 S.C.R. 744, at para. 27 per LeBel J.; see also ***Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)***, 2010 SCC 4 (CanLII), [2010] 1 S.C.R. 69, at paras. 64-65 per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (Reardon Smith Line, at p. 574, per Lord Wilberforce)
>
> The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see ***Moore Realty Inc. v. Manitoba Motor League***, 2003 MBCA 71 (CanLII), 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in ***Investors Compensation Scheme Ltd. v. West Bromwich Building Society***, [1998] 1 All E.R. 98 (H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[121] In Waddams, ***The Law of Contracts***, 5th ed. at p.417, the performance of contractual terms is defined as follows:

> The meaning of performance in any case will depend on the agreement of the parties to be deduced from their words and conduct in all the surrounding circumstances.

[122] The evidence is clear that both AD and AMEC were eager to pursue action against JorMag and AD entered into an agreement with AMEC that gave AMEC control over the proceedings. AD received some information on the costs of the preparations for the JorMag Arbitration, and consulted and shared information with the lawyers and experts that were retained. AD participated in the JorMag Arbitration and signed the settlement agreement that ultimately resulted. Taking a view of the Claims Agreement as a whole, the broad powers conferred upon AMEC to direct the conduct of the JorMag Arbitration, the absence of any specific provision by which mutual agreement in respect of costs was to be achieved, and AD's conduct in participating fully in the JorMag Arbitration, it is impossible to conclude that AMEC and AD were not mutually agreed with respect to the costs of legal counsel and experts that both parties must have known would be essential to the conduct of complex international arbitration proceedings. In my view, the evidence is sufficient to establish mutual agreement in respect of Hammonds and Addleshaw legal fees and the experts retained for the JorMag arbitration.

AD'S Defences to the AMEC Counterclaim

[123] AD's bare denial that 25% of the claim costs were paid by AMEC's insurers and that AMEC has paid the remaining costs is not supported by evidence.

[124] AD has denied the amount of the litigation costs claims, but has not provided any evidence that would support a challenge to the costs claimed by AMEC for the Hammonds and Addleshaw legal fees and the costs of the experts in the JorMag Arbitration. The fact that Hammonds has denied that AD was its client is not evidence that the Hammonds' fees were not incurred at the instruction of AMEC and on behalf of the Joint Venture in the JorMag Arbitration. AMEC has acknowledged that one of the invoices it relies upon, from the law firm of McCarthy Tetrault in Exhibit FF to the Leonard Affidavit in the sum of $6,500.00, should not form part of its counterclaim. On questioning, Mr. Leonard confirmed that some of the advice and AMEC received from the law firm of Nabulsi & Associates was related to disputes between AMEC and AD. I am therefore of the view that a sufficient factual dispute exists with respect to

the services of the Nabulsi firm such that summary judgment in respect of those costs is not appropriate. According to Exhibit EE to the Leonard Affidavit, these amounts total $42,212.04.

[125] Finally, AD argues that it was an express term of the Claims Agreement that AMEC was required to provide AD with copies of all correspondence sent to or received from the Joint Venture's legal team, arbitrators and third parties, and copies of all internal progress reports, in connection with the JorMag Arbitration, and that AMEC failed to provide AD with copies of all such correspondence. In his Affidavit, Kaan Dogan provides one example: an Agreed-To Litigation Plan that was drafted to be provided to the insurer AIG on September 16, 2005.

[126] In ***Windsor***, the Court of Appeal held, at para 21:

> A party faced with an application for summary judgment must put its best foot forward, and present evidence to show sufficient "merit" to establish a genuine issue requiring a trial with respect to the outstanding issues... Speculating that evidence might be available at a trial is not sufficient to create a genuine issue requiring a trial.

[127] Evidence of one occasion on which one document generated in the course of the JorMag Arbitration was not shared with AD is not evidence of sufficient merit to establish a genuine issue requiring trial with respect to AD's obligation to share in the expenses associated with the arbitration. I agree with AMEC that it can hardly be said that the failure to provide this report, or some other documentation, pursuant to paragraph 7 of the Amending Agreement is a breach that goes to the very root of that agreement that would absolve AD of all liability under the Claims Agreement.

[128] This Court is also mindful of recent authority calling for systemic change of procedure in civil cases that respects and considers proportionality, discourages delay and encourages a fair resolution of dispute with these factors in mind: ***Hryniak***; ***Access Mortgage***; ***Canadian Natural Resources Ltd v Shaw Cor Ltd.*** 2014 ABCA 289. Enhancing a fair resolution of a dispute by viewing the process through the lens of proportionality, the avoidance of delay and cost, at the same time preserving fairness, is an embedded premise in the new *Alberta Rules of Court (ARC)* since November 1st, 2010.

Conclusion: Summary Judgment on the AMEC Counterclaim

[129] AMEC is entitled to summary judgment in respect of 50% costs incurred by the Hammonds and Addleshaw firms, and experts retained in the preparation and course of the JorMag Arbitration. Summary judgment is not possible with respect to the costs incurred by the Nabulsi & Associates firm. The resultant sum is $22,458,591.62 – 45,212.04 – 6,500.00 = $22,406,779.58 for legal fees plus experts and consultants in the sum of $818,848.50, totalling $23,225,628.08, divided by two: $11,612,814.04.

[130] No submission was made with respect to interest on the amount, but interest was claimed at the rates prescribed in the *Judgment Interest Act*, RSA 2000 c.J-1 and interest will be awarded,

according to the prescribed rates from February 27th, 2009, the date of the Counterclaim, or such other time as the parties may agree on, or the Court may order, in the event of a dispute.

Summary Dismissal of AD's Delay Claim

[131] AMEC seeks summary dismissal of AD's claims for alleged delays in AMEC's performance on the Project. AMEC relies upon paragraph 2 of the Amending Agreement, which provides:

> Notwithstanding the Agreement and subject to section 3 of this Amending Agreement, each Member ("the Indemnifying Member") shall be solely responsible for and shall defend, indemnify and hold harmless the other Member ("the Indemnified Member") against all losses, damages, costs and expenses (including but not limited to legal expenses) suffered by the Indemnifying Member and/or any member of the Indemnifying Member's Group to the extent arising from any delay in the performance of the Work, whether occurring in the past, the present or the future and howsoever caused; provided that this paragraph 2 shall not apply to delays suffered or caused by AD-Demirel Steel Construction and Machine Industry Co. Inc. after the date of the Amending Agreement.

[132] Hereafter I will refer to "all losses, damages, costs and expenses ... to the extent arising from any delay in the performance of the Work, whether occurring in the past, the present or the future and howsoever caused" as the delay claim.

[133] AD contends that AMEC has failed to meet the threshold required for summary dismissal because paragraph 2 of the Amending Agreement is not a mutual release as alleged by AMEC; because AMEC's record with respect to AD's misrepresentation claims is deficient; and because none of AD's claims for which AMEC seeks summary dismissal arise solely from AMEC's delay.

[134] At issue are a number of claims contained at paragraph 60 of the Amended Statement of Claim:

> 60. AMEC's Actions or Inactions had the following impacts, caused the following costs, expenses, losses and/or damages to AD and give rise to the following claims:
>
> > (b) variations and changes set out in FTRs that were required to be made by AD because of AMEC's failure to provide timely complete, accurate and sufficient design and engineering totaling $145,915;
> >
> > (c) claims that were not advanced to JorMag in a timely manner or at all, resulting in additional compensation that should have been

paid to AD in an amount to be proved at trial, after AD is given full access to all JV financial records, plus interest;

(d) reduced productivity of AD's personnel as a result of late incomplete, inaccurate and insufficient design and engineering. The cost impact on productivity is calculated to be $586,333;

(f) impacting AD in its bulk procurement and build work as a result of late, incomplete, inaccurate and insufficient design and engineering. The damages caused as a result of this delay and interest are in an amount to be proved at trial;

(g) additional costs, in an amount to be proved at trial, plus interest, resulting from the increased Scope of Work from that originally anticipated in an extended Time of Completion, caused by AMEC's Actions or Inactions;

(j) reduced joint venture profits to AD as a result of late, incomplete, inaccurate and insufficient design, engineering and quantity take-offs, in an amount to be proved at trial, plus interest, after AD has been given full access to all JV financial records;

(k) additional costs to extend bank security and insurance totaling $1,722,290.13;

(l) the termination of the Design-Build Agreement and resulting loss or diminution of value of AD's Equipment totaling $2,870,683.92

(m) the calling by JorMag of AD's portion of the JorMag Security in the amount of $7,650,390.35, as a result of AMEC's Actions or Inactions and the termination of the Design-Build Agreement caused by the AMEC Actions or Inactions, or further or in the alternative, the failure of AMEC to recover the same from its insurers;

(o) actual significant financing costs for forgoing claims and damages based on AD's actual cost of borrowing from the date such claims and damages accrued to present in an amount of $18,231,756.54.

Mutual Release

[135] AD argues that, contrary to AMEC's characterization, paragraph 2 of the Amending Agreement does not constitute a mutual release. It is worth noting that this is inconsistent with AD's own Amended Statement of Claim, where at paragraph 60(e) AD claims AMEC:

> Induc[ed] AD to enter into the Joint Venture Amending Agreement in April 2000, as a result of AMEC's gross negligence, bad faith and false representations, *resulting in AD mistakenly agreeing to release any delay claims* (emphasis added).

[136] Nevertheless, AD points to the use in paragraph 2 of the term "indemnify" and cites ***Black's Law Dictionary, 10th ed.*** as follows:

> "Indemnification
>
> 1. The action of compensating for loss or damage sustained.
>
> 2. The compensation so made.
>
> "Indemnify"
>
> 1. To reimburse (another) for a loss suffered because of a third party's or one's own act or default.
>
> 2. To promise to reimburse (another) for such a loss.
>
> 3. To give (another) security against such a loss.
>
> "Indemnity"
>
> 1. A duty to make good any loss, damage, or liability incurred by another.
>
> 2. The right of an injured party to claim reimbursement for its loss, damage or liability from a person who has such a duty.
>
> 3. Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common law duty.

[137] Counsel for AD points out that in all of the foregoing definitions, an indemnity involves one party that has a duty to compensate or reimburse a second party for that second party's loss, whereas in the case of paragraph 2 of the Amending Agreement, the indemnifying party is obliged to indemnify the second party for the indemnifying party's own loss. AD contends that paragraph 2 is therefore ambiguous and not susceptible to interpretation in a summary proceeding.

[138] In my view, while paragraph 2 could have been more clearly written, there is no doubt about its intention and effect, and no ambiguity arises. Under paragraph 2, AD has promised AMEC that AD will indemnify AMEC, ie. ensure AMEC does not pay for, losses, damages, costs or expenses suffered by AD arising from any delay in the performance of the work. It might have been preferable to use the term "release", but the effect is the same because AD is effectively promising AMEC that AMEC will not have to pay for AD's losses (and vice versa), arising from delay. I am supported in this conclusion by the use of the term "hold harmless". AD argues that "hold harmless" is no more than a synonym for "indemnify", pointing again to ***Black's Law Dictionary, 10th ed.*** But, notwithstanding the inclusion of "hold harmless" among the synonyms for indemnify, it is worth pointing out that "hold harmless" is itself separately defined:

> hold harmless, vb. (18c) To absolve (another party) from any responsibility for damage or other liability arising from the transaction; IMDENIFY – Also termed save harmless.

[139] In holding one another harmless for all losses, damages, costs or expenses to the extent arising from any delay in the performance of the Work, AD and AMEC effectively agreed to a absolve one another for all claims arising out of delay. This is, in effect, a mutual release.

Misrepresentation

[140] Having determined that paragraph 2 of the Amending Agreement bars claims by either party for losses arising out of delay, it is necessary to consider AD's argument that it relied upon misrepresentations made by AMEC when it entered into the Amending Agreement.

[141] The test for fraudulent representation requires proof of four elements:

> (a) the representations complained of were made by the wrongdoer to the victim;
>
> (b) the representations were false in fact;
>
> (c) the wrongdoer, when he made the representations, either knew that they were false or made them recklessly without knowing they were false or true; and
>
> (d) the victim was thereby induced to enter into the contract in question.

[142] In its Reply to the Demand for Particulars, AD points to three alleged misrepresentations with respect to engineering status of the Project that induced it into entering into the Amending Agreement. These are:

> (a) AMEC's representations at a project recovery plan meeting with JorMag on April 9, 2000, wherein AMEC stated that the percent completion of the overall engineering deliverables was 75% as of March 31, 2000, and further stated that the progress of drawings that had already been issued IFC was 37%;

> (b) the Monthly Progress Report for the period ending March 31, 2000 that submitted to JorMag that the overall engineering completion was 75.2%; and
>
> (c) the project recovery plan schedule JM15, dated April 30, 2000, which indicated that most of AMEC's engineering efforts were completed and that only a small portion remained.

[143] AMEC points out that AD did not receive the March 31, 2000 Monthly Progress Report until May 3, 2000, and that the April 30 project recovery plan was actually made and dated after AD entered into the Amending Agreement. I agree with AMEC, therefore, that AD cannot claim to have relied on the representations made therein when it entered into the Amending Agreement. What remains at issue is AMEC's representations at the project recovery plan meeting on April 9, 2000, with respect to the overall state of the engineering for the Project at that time. As AMEC points out, AD has not filed any evidence in opposition to the application for summary dismissal of the delay claims, nor has AD questioned Mr. Ingram on the Ingram Affidavit he has filed in support of the application. Instead, AD contends that AMEC has simply not put forth a record that would allow for the necessary findings of fact relating to AD's reliance upon misrepresentations made by AMEC.

[144] Leaving aside the Ingram Affidavit, it is clear that on November 5, 1999 AD retained the services of Martin Hacker of MH-Project Management Ltd. ("MH") and MH agreed to provide an independent review/audit and report on the current status of the Jormag project, including engineering. In questioning, Kaan Dogan confirmed his understanding that MH was retained in connection with AD's concerns about the state of the engineering on the Project. In questioning, Mr. Hacker has stated that he was paid by AD to conduct the audit. On March 6, 2000, Mr. Hacker sent his analysis of the status of AMEC's engineering to AD, under cover of an email wherein he wrote:

> Attached find my analysis of the status of issue of engineering deliverables from [AMEC]. This information was for the period ending 25th Feb. There has been updated this week so the latest data indicates approx. 39% of IFC drgs have been issued. The %ages used to calculate the overall amount of engineering completed is subjective. It is my opinion, however that the detailed engineering is now approximately 70% complete.

[145] AD was not satisfied with Mr. Hacker's assessment of the state of the engineering work. In questioning, Kaan Dogan acknowledged that he did not accept a chart prepared by Mr. Hacker describing the status of engineering deliverables as of the end of March 2000 as 75% completed. Kaan Dogan, in questioning, was referred to his own correspondence to AD employee Dale Richards, dated March 13, 2000, wherein he also questioned the engineering estimates provided by the Project Recovery Team. It is clear from that correspondence that AD had surveyed its own employees and come up with its own estimates for completion figures for various aspects of the engineering work. In short, it is clear from AD's own evidence that instead of relying upon AMEC's own estimates of the state of its engineering work, AD retained and relied upon a

consultant, whose conclusion was very similar to AMEC's own, and also relied upon its own review.

[146] I am satisfied, therefore, that AD did not rely upon representations made by AMEC to JorMag on April 9, 2000 in entering into the Amending Agreement. In any event, I am not satisfied that those representations were demonstrably false. Even if it could be established that AMEC's representations regarding the status of its engineering progress were overstated (and the assessment of the Mr. Hacker suggests that they were not), I agree with AMEC that the reasoning of the Alberta Court of Appeal in ***Radhakrishnan v University of Calgary Faculty Assn.***, 2002 ABCA 182, at para 71, is apt:

> Any suggestion that one party could upset a contract freely entered into, because of prior failure to disclose to him a fact which he suspected and believed before the contract, is startling. The whole idea of misrepresentation as a ground to upset a contract is that one entered into the contract under a false belief induced by the other party to the contract. Relief from a contract for breach of a duty to disclose proceeds on similar reasoning. We have already seen that one could not upset a contract for failure to disclose a fact which the other party already knew.

[147] AD's allegation that the AMEC misrepresented the status of the Joint Venture's financial position fails for the same reason. In paragraph 17 of the Reply to Demand for Particulars, AD pleads:

> Throughout the Project, there was inaccurate, late, or unavailable financial reporting by AMEC that gave AD an unclear picture of the JV's cash flow and financial status at or around the time of the Project Recovery Plan and the Joint Venture Amending Agreement. In certain cases, misrepresentations were not contained in specific documents as the misrepresentations came instead from AMEC's failure to provide financial documentation in a timely manner or at all. For example, there is no record of AMEC providing AD with financial information for March 2000, which was the period of time during which the Project Recovery plan and Joint Venture Agreement were being negotiated.

[148] In his Affidavit of April 25, 2013, Kaan Dogan states that he was advised by AMEC that the Joint Venture "had a serious cash flow situation resulting in about a negative $22 million" in December, 1999. He describes a course of dealings and negotiations thereafter wherein AMEC demanded a cash contribution from AD, withheld construction progress payments and proposed an alternative plan whereby AMEC would arrange for financing from Export Development Canada and AMEC and AD would waive their rights to pursue claims against each other in respect of delays on the Project. The fact that the Joint Venture was in dire financial straits was well known to AD at the time that it entered into the Amending Agreement. AD has led no evidence in support of the proposition that it relied upon any particular misrepresentation or failure to disclose any particular fact in respect of the Joint Venture's financial position. Instead,

the only evidence from AD on the point indicates quite clearly that it was well aware, at least in a general sense, that the Joint Venture was in financial trouble.

Delay and the Claims at Issue

[149] AD contends that AMEC's attempt to summarily dismiss the claims at paragraphs 60(b), (c), (d), (f), (g), (j), (k),(l), (m) and (o) is vastly overreaching because AMEC has not brought any evidence that the claims set out in those paragraphs arise solely out of delay. AD points out that in addition to delay, those paragraphs describe allegations, *inter alia*, of inaccurate and insufficient design, the failure to advance claims, and increased scope of work because of AMEC's actions or inactions.

[150] Perhaps AD's allegations extend beyond delay. In argument, AMEC conceded that it was not seeking to strike those paragraphs from the Amended Statement of Claim in their entirety. AMEC seeks dismissal in respect of the issue of claims arising out of delay itself. AD responded that summary judgment with respect to delay alone may not result in any savings because there would be a need to desegregate the non-delay and delay aspects of the claims. I am somewhat sympathetic to AD's position in this regard, but nevertheless I am of the view that it would be appropriate to grant summary judgment on the terms proposed by AMEC. Separating delay from non-delay claims may be difficult and might require the assistance of experts. In other instances, the question may be straightforward and summary judgment in respect of the issue now may significantly reduce the complexity and the number of issues at trial. Where a summary judgment in respect of an issue is possible on the merits, and has a significant potential to shorten the proceedings, it should be granted.

Summary: Delay Claim

[151] The claims of AD "arising from any delay in the performance of the Work, whether occurring in the past, the present or the future and howsoever caused" are dismissed.

Costs

[152] AMEC has been significantly and largely successful on the two Summary Applications it has brought. It has asked for solicitor-client costs or enhanced costs. I decline to give solicitor-client or enhanced costs. There will however, be costs for each Summary Application separately, including the hearing of each. The Court could have issued a separate judgment in respect of each application rather than one judgment dealing with the two applications. Accordingly, there will be two sets of costs to be assessed on double Column 5 of Schedule "C" of the *ARC* in favour of AMEC and two separate judgments prepared and entered. If there is any dispute as to quantum, the parties may return the matter to this Court.

Heard on the 10th and 11th days of September, 2014.
Dated at the City of Calgary, Alberta this 18th day of February, 2015.

Neil Wittmann
C.J.C.Q.B.A.

Appearances:

Matthew Diskin
Salim Dharssi
Zarya Cynader
for Attila Dogan Construction and Installation Co. Inc.

David Tupper
Chris Petrucci
for AMEC Americas Limited, Formerly AMEC E&C Services Limited and Agra Monenco Inc.

TAB 2

1994 CarswellBC 214
British Columbia Supreme Court

Calder v. King

1994 CarswellBC 214, [1994] B.C.W.L.D. 575,
45 A.C.W.S. (3d) 841, 91 B.C.L.R. (2d) 336

BRIAN GLENN CALDER v. LORI ISABEL KING and VALERIE MARY KING

Fraser J. [in Chambers]

Judgment: January 25, 1994
Docket: Doc. Vancouver B921401

Counsel: *J.S. Gossen*, for plaintiff.
J.A. Hemmerling, for defendants.

Subject: Civil Practice and Procedure

Application under R. 18A for order dismissing action.

***Fraser J.* (orally):**

1 The defendants in this action apply under R. 18A for an order that the plaintiff's claim be dismissed with costs.

2 The claim arises from a motor vehicle accident which happened on November 27, 1990 in Vancouver, at the intersection of 49th Avenue and Oak Street. A car driven by the defendant Lori King was travelling north in the centre lane on Oak Street, approaching the intersection of 49th Avenue. Lori King became aware of an ambulance approaching from her right, travelling west on 49th Avenue. She brought her automobile to a stop, in effect yielding the right-of-way to the ambulance. She did so while the light for northbound traffic on Oak Street was green. The plaintiff was driving an automobile to the rear of the defendant Lori King and he ran into her automobile from behind.

3 The defendants have filed affidavits of their own and have filed affidavits from a number of independent witnesses. I think I can characterize these affidavits as fixing the blame solely on the plaintiff for his failure to stop his vehicle, either because he was too close to the King vehicle or was inattentive. The opinion shared by these witnesses is that there was negligence

on the part of the plaintiff. They say nothing about the driving of Lori King, other than that she brought her automobile to a stop in order to yield to the ambulance.

4 The liability in cases of rear-end collisions normally fixes upon the vehicle which is in the rear. This is not an absolute rule, as the decision of the Court of Appeal in *MacDonald v. Hemminger*, No. CA001483, Vancouver Registry, a decision of May 10, 1985, demonstrates. In that case, the Court apportioned blame between two vehicles involved in a rear-end collision.

5 The plaintiff's affidavit is on file. Among other things, he asserts that he did not see or hear the ambulance. Some of the evidence offered by him in his affidavit is suggestive in various ways but, given my conclusion, I do not propose to comment on it other than that.

6 In the course of the application, an evidentiary point arose. The defendants tendered the affidavit of Kelly Fisher, a legal assistant employed by the solicitors for the defendants. Appended to that affidavit were documents such as ambulance reports, police accident reports, police diagrams and police-generated witness statements, to which Ms. Fisher ascribed her belief. There are a number of authorities which hold that hearsay evidence is not admissible in a R. 18A application, on the basis that judgment granted to a party on an 18A application is not an interlocutory order and, therefore, the exception to the hearsay rule provided by the *Rules of Court* does not come into play. I have examined the documents appended to the affidavit of Kelly Fisher in this application for a different purpose. Rule 18A(5)(*b*) gives the court the power to grant judgment on an application of that kind unless the court is of the opinion that it would be unjust to decide the issues on the application. Counsel for the plaintiff has used the material appended to the affidavit of Kelly Fisher to suggest various lines of cross-examination which counsel at trial might take when cross-examining the witnesses whose affidavits are before me, in support of the contention that it would be unjust to grant the application. This I see as a legitimate use of hearsay evidence on a R. 18A application and I find that the evidence is admissible for that limited purpose. What those documents show is that there is some room for cross-examination. I will say no more than that, as to the facts.

7 There are two reasons why I will be dismissing this application. The first is that, so far as anyone knows at this point, in a cross-action commenced by the defendant Lori King against the plaintiff, Brian Calder, there is to be a trial conducted in the ordinary way, that is, with witnesses testifying orally and in open court. If I were to grant judgment to the defendants today, that could potentially embarrass the trial judge on the trial of the cross-action, in the sense that there would be a determination of liability by me which the trial judge might not see as warranted, based on the oral testimony before him or her. Where there is to be a trial in any event involving the same parties and involving the same transaction, a court should be slow on an application based on affidavits to arrive at determinations of fact which fetter the

hands of the later trial judge. That, in my view, is sufficient reason on its own for dismissal of this application. I do not see it as appropriate for me to make any comment as to the possible outcome of the cross-action or of this action.

8 I do say that it is obvious that these matters should at least be heard together by the same judge. The precise mechanism need not be a consolidation and should be in the discretion of the trial judge but one way or another there should be an order that the matters be heard more or less at the same time and by the same judge. Whether that takes the form of a consolidation or some other form is not my concern at the present time.

9 There is a second reason why I feel disinclined to grant the application. In the cross-action, the Insurance Corporation of British Columbia is on some ground denying coverage and the provision of a defence to the plaintiff, Calder, who is the defendant in that action. It has taken a position in that action as a statutory third party under the provisions which allow it to do so. The Corporation has had counsel present today and I am informed that the Corporation was prepared to abide by any decision I might make today as to liability for the purposes of the cross-action. The plaintiff, Calder, is unrepresented in that action. It seems reasonably clear that there is not a conflict of interest per se but a potential dispute between the Corporation and Calder, depending on the outcome of the cross-action. The Corporation obviously by its steps in the cross-action is reserving its right to claim over against Calder for any monies it may be obliged to pay to Lori King as plaintiff. Calder continues to have the right, so far as I am aware, to deny his negligence in this accident. If I were to dismiss this action, that would imply that I found no negligence on the part of King. That there may be no negligence on the part of King, that is, that that may be a possible verdict in the cross-action or in this action, does not necessarily imply that there was negligence on the part of Calder. His potential negligence I see as a live issue and one in which the Corporation, if not in a literal position of conflict of interest, is in a delicate position vis-à-vis the concession that it was prepared to make today.

10 I dismiss this application.

11 It may prove in the fullness of time that the Corporation's position on liability (more accurately, that the defendants' position) will turn out to be justified. We do not know that for sure. For that reason, the costs of this application will be costs in the cause.

Application dismissed.

TAB 3

1990 CarswellBC 216
Supreme Court of Canada

Hunt v. T & N plc

1990 CarswellBC 216, 1990 CarswellBC 759, [1990] 1 W.D.C.P. (2d) 523, [1990] 2 S.C.R. 959, [1990] 6 W.W.R. 385, [1990] B.C.W.L.D. 2347, [1990] S.C.J. No. 93, 117 N.R. 321, 23 A.C.W.S. (3d) 101, 43 C.P.C. (2d) 105, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 4 C.O.H.S.C. 173 (headnote only), 74 D.L.R. (4th) 321, J.E. 90-1436, EYB 1990-67014

CAREY CANADA INC. (CAREY-CANADIAN MINES LTD.) et al. v. HUNT, T & N plc and FLINTKOTE MINES LIMITED; FLINTKOTE MINES LIMITED et al. v. HUNT, T & N plc and CAREY CANADA INC.

Lamer C.J.C. [*], Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

Heard: February 22, 1990
Judgment: October 4, 1990
Docket: Nos. 21508, 21536

Counsel: *J. Giles, Q.C.*, and *R. McDonell*, for Carey Canada Inc.
D.M.M. Goldie, Q.C., for Lac d'Amiante du Québec Ltée.
M. Koenigsberg, for National Gypsum Co.
D. Martin and *M.P. Maryn*, for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited.
J.A. Macaulay and *K.N. Affleck*, for T & N plc.
R. Ward and *S.E. Fraser*, for Flintkote Mines Limited.
J.J. Camp, Q.C., and *P.G. Foy*, for Hunt.

Subject: Torts; Civil Practice and Procedure; Employment

Appeal from judgment of British Columbia Court of Appeal, [1989] B.C.W.L.D. 1516 (sub nom. *Hunt v. T & N plc*), setting aside judgment of Hollinrake J. dismissing action against one defendant for failing to disclose reasonable claim.

The judgment of the court was delivered by *Wilson J.*:

1 The issue raised in these appeals is whether it is open to the respondent to proceed with an action against the appellants for the tort of conspiracy. In particular, the appeals raise the question whether those portions of the respondent's statement of claim in which

he alleges that the appellants conspired to withhold information concerning the effects of asbestos fibres disclose a reasonable claim within the meaning of R. 19(24)(*a*) of the British Columbia Rules of Court.

1. The Facts

2 The respondent, George Hunt, is a retired electrician who alleges that he was exposed to asbestos fibres over the course of his employment. Mr. Hunt has brought an action against Atlas Turner Inc., Asbestos Corporation Limited, The Asbestos Institute, Babcox & Wilcox Industries Ltd., Bell Asbestos Mines Limited, Caposite Insulations Ltd., Carey Canada Inc., Flintkote Mines Limited, Holmes Insulation Ltd., Johns-Manville Amiante Canada Inc., Lac D'Amiante du Québec Ltée., National Asbestos Mines Limited, The Quebec Asbestos Mining Association and T & N plc ("the defendants").

3 Mr. Hunt alleges that the defendants were involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. He alleges that after 1934 the defendants knew that asbestos fibres could cause disease in those exposed to the fibres. In addition to suing Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N in negligence, Mr. Hunt alleges that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of that conspiracy he contracted mesothelioma.

4 The relevant portions of Mr. Hunt's statement of claim read as follows:

> 16. At various times, the particulars of which are well known to the defendants, including the period between 1940 and 1967, the defendants mined and processed asbestos and designed, manufactured, packaged, advertised, promoted, distributed and sold a variety of products containing asbestos fibres (the "Products"), the particulars of which are also well known to the defendants.
>
> 17. After about 1934 the defendants knew or ought to have known that the asbestos fibres contained in the Products could cause diseases, including cancer and asbestosis, in those who worked with or were otherwise exposed to those fibres.
>
> 18. After about 1934, some or all of the defendants conspired with each other with the predominant purpose of injuring the plantiff [sic] and others who would be exposed to the asbestos fibres in the Products, by preventing this knowledge becoming public knowledge and, in particular, by preventing it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products.
>
> 19. Alternatively, after about 1934, some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in

particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff and others who would be exposed to the asbestos fibres in the Products would result from the defendants' acts.

20. The defendants' acts in furtherance of the conspiracy referred to in paragraphs 18 and 19 include:

(a) fraudulently, deceitfully or negligently suppressing, distorting and misrepresenting the results of medical and scientific research on the disease-causing effects of asbestos;

(b) fraudulently, deceitfully or negligently misrepresenting the disease-causing effects of asbestos by disseminating incorrect, incomplete, outdated, misleading and distorted information about those effects;

(c) fraudulently, deceitfully or negligently attempting to discredit doctors and scientists who claimed that asbestos caused disease;

(d) fraudulently, deceitfully or negligently marketing and promoting the Products without any or adequate warning of the dangers they posed to those exposed to them; and

(e) fraudulently, deceitfully or negligently attempting to influence to their benefit government regulation of the use of asbestos and the Products.

5 Carey Canada Inc. brought an application before the Supreme Court of British Columbia under R. 19(24)(*a*) of the British Columbia Rules of Court seeking to have the action against it, which was based solely on the allegations of conspiracy, dismissed on the basis that it disclosed no reasonable claim. Rule 19(24) provides:

(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

(*a*) it discloses no reasonable claim or defence as the case may be, or

(*b*) it is unnecessary, scandalous, frivolous or vexatious, or

(*c*) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(*d*) it is otherwise an abuse of the process of the court,

and may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as between solicitor and client.

2. The Courts Below

(a) Supreme Court of British Columbia

6 Hollinrake J. accepted Carey Canada's submission that the only damage that could be the subject of a conspiracy action was "direct damage". Although counsel's memorandum summarizing Hollinrake J.'s oral reasons for judgment does not explain precisely what he understood the term "direct damage" to mean, it would appear that he meant damage suffered by a plaintiff that flows directly from acts aimed specifically at that plaintiff. Hollinrake J. stated:

> Dealing with the issue of direct or indirect damage, in the first kind of conspiracy Estey J. refers to the "predominant purpose" of the defendants' conduct [see *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 145 D.L.R. (3d) 385, 72 C.P.R. (2d) 1, 47 N.R. 191 [B.C.]]. I think this does import direct damage. The second type of conspiracy refers to conduct "directed towards the plaintiff". I think this imports direct damage. I think these conclusions are justified by what happened in *Can. Cement LaFarge Ltd.*

Hollinrake J. therefore allowed the motion and dismissed the action against Carey Canada as disclosing no reasonable claim.

(b) British Columbia Court of Appeal

7 By order of the British Columbia Court of Appeal (dated 30th March 1989), Flintkote Mines Limited and T & N plc were named as respondents to the appeal in the Court of Appeal.

8 Anderson J.A. (Macfarlane and Esson JJ.A. concurring) allowed the appeal [[1989] B.C.W.L.D. 1516 (sub nom. *Hunt v. T & N plc*)] and set aside Hollinrake J.'s order. Anderson J.A. explained his reasons:

> (1) The cases relied upon by counsel for the respondent Carey Canada Inc. and the learned trial judge to the effect that there is no such tort as a conspiracy to injure by unlawful means where the damage is indirect, all relate to the area of competition in the marketplace and to labour-management disputes. They may not be applicable to the very different circumstances alleged in this case and to the very different social considerations.

> (2) The arguments as to law and fact are intricate and complex and should be dealt with at trial after all the evidence is adduced. At this stage of the proceedings it is impossible to reach the conclusion that there is no cause of action in fact or law: see *Minnes v. Minnes* (1962), 39 W.W.R. 112 at 122, 34 D.L.R. (2d) 497 (B.C.C.A.).

9 Esson J.A. (Anderson and Macfarlane JJ.A. agreeing) gave additional reasons stressing that the "language of predominant purpose and direct damage" in *Can. Cement LaFarge Ltd.* had arisen in cases that involved competition and pure economic loss. In Mr. Hunt's case, however, the context was very different. Mr. Hunt had suffered personal injury and claimed that by conspiring to suppress information the defendants had created a foreseeable risk of causing him the harm which he in fact suffered. It was not possible at this stage in the proceedings to determine that the damage was not sufficiently direct to be able to support an action rooted in the tort of conspiracy. Esson J.A. specifically declined to embark upon a detailed consideration of the law of conspiracy, noting:

> It has not generally been part of our tradition and, given the complexity and novelty of some of the issues raised in this case, it would I think be particularly undesirable to render such decisions, as it were, in a vacuum. For those reasons, as well as the reasons given by Mr. Justice Anderson, I agree in allowing the appeal.

3. The Issues

10 The issues that arise in this appeal are:

11 1. *In what circumstances may a statement of claim (or portions of it) be struck out?*

12 2. Should Mr. Hunt's allegations based on the tort of conspiracy be struck out?

4. Analysis

13

(1) In What Circumstances May a Statement of Claim be Struck Out?

14 Carey Canada's motion to have the action dismissed was made pursuant to R. 19(24)(*a*) of the British Columbia Rules of Court. This rule stipulates that a court may strike out any part of a statement of claim that "discloses no reasonable claim". The rules of practice with respect to striking out a statement of claim are similar in other provinces. In Ontario, for example, R. 21.01 of the Rules of Civil Procedure states:

> 21.01 (1) A party may move before a judge,

(*a*) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial savings of costs; or

(*b*) *to strike out a pleading on the ground that it discloses no reasonable cause of action* or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(*a*) under clause (1)(*a*), except with leave of a judge or on consent of the parties;

(*b*) under clause (1)(*b*). [emphasis added]

15 Rule 19(24) of the British Columbia Rules of Court and analogous provisions in other provinces are the result of a "codification" of the court's power under its inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action: see McLachlin and Taylor, British Columbia Practice, 2nd ed. (1979), vol. 1, p. 19-71. This process of codification first took place in England shortly after the Supreme Court of Judicature Act, 1873 [36 & 37 Vict, c. 66], was enacted. It is therefore of some interest to review the interpretation the courts in England have given to their rules relating to the striking out of a statement of claim.

(a) England

16 In *Metro. Bank, Ltd. v. Pooley*, 10 App. Cas. 210, [1881-85] All E.R. Rep. 949 (H.L.), the Lord Chancellor explained at p. 951 that before the Supreme Court of Judicature Act, 1873, courts were prepared to stay a "manifestly vexatious suit which was plainly an abuse of the authority of the court" even though there was no written rule stating that courts could do so. The Lord Chancellor noted that "[t]he power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its procedure." That is, it was open to courts to ensure that their process was not used simply to harass parties through the initiation of actions that were obviously without merit.

17 Before the advent of the Supreme Court of Judicature Act, 1873, and the new Rules of the Supreme Court (enacted in 1883) it had been open to parties to use a "demurrer" to challenge a statement of claim. That is, it had been open to a defendant to admit all the facts that the plaintiff's pleadings alleged and to assert that these facts were not sufficient in law to sustain the plaintiff's case. When a demurrer was pleaded the question of law that was thereby raised was immediately set down for argument and decision: see 36 Hals. (4th) 4, para. 2, n. 7, and 26, para. 35, n. 5; Milsom, Historical Foundations of the Common Law, 2nd ed.

(1981), at p. 72; and Baker, An Introduction to English Legal History, 2nd ed. (1979), at p. 69. But a formal and technical practice eventually grew up around demurrer and judges were notoriously reluctant to provide definitive answers to the points of law that were thereby raised. As the Lord Chancellor explained in *Pooley*, it was eventually thought best to replace demurrers with an easier summary process for getting rid of an action that was on its face manifestly groundless. It was with this objective in mind that O. 25, r. 4, of the 1883 Rules of the Supreme Court came into force:

> 4. The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleading to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment entered accordingly, as may be just.

Commenting on the relative merits of demurrers and the new rule, Chitty J. observed in *Peru Republic v. Peruvian Guano Co.* (1887), 36 Ch. D. 489 at 496:

> Having regard to the terms of rule 4, and to the decisions on it, I think that this rule is more favourable to the pleading objected to than the old procedure by demurrer. Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the Court sees that a substantial case is presented the Court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.

18 One of the most important points advanced in the early decisions dealing with O. 25, r. 4, was the proposition that the rule was derived from the courts' power to ensure both that they remained a forum in which genuine legal issues were addressed and that they did not become a vehicle for "vexatious" actions without legal merit designed solely to harass another party. In *Pooley*, supra, at p. 954, Lord Blackburn asserted that the new rule "considerably extends the power of the court to act in such a manner as I have stated, and enables it to stay an action on further grounds than those on which it could have been stayed at common law." Nonetheless, as Chitty J. subsequently observed in *Peruvian Guano Co.*, the rule was not intended to prevent a "substantial case" from coming forward. Its summary procedures were only to be used where it was apparent that allowing the case to go forward would amount to an abuse of the court's process.

19 In one of the better known decisions concerning the circumstances in which resort should be had to the rule Lindley M.R. stated (*Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark*, [1899] 1 Q.B. 86 at 91 (C.A.)):

> The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. *The use of the expression "reasonable cause of action" in rule 4 shews that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases*. [emphasis added]

Lindley M.R.'s observations made clear that even if the rule expanded the court's power to stay actions, courts were to use the rule only in those exceptional instances where it was "plain and obvious" that, even if one accepted the version of the facts put forward in the statement of claim, the plaintiff's case did not disclose a reasonable cause of action. The question was not whether the plaintiff could succeed since this was a matter properly left for determination at trial. The question was simply whether the plaintiff was advancing a "reasonable" argument that could properly form the subject matter of a trial.

20 The Master of the Rolls had made this very point some six years earlier (*A.G. of Duchy of Lancaster v. London & North Western Ry. Co.*, [1892] 3 Ch. 274 at 276-77 (C.A.)):

> Then the Vice-Chancellor says: "*The questions raised upon this application are of such importance and such difficulty that I cannot say that this pleading discloses no reasonable cause of action, or that there is anything frivolous or vexatious*; therefore, I shall let the parties plead in the usual way." It appears to me that this is perfectly right. To what extent is the Court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given under Order xxv., rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched — cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take a long time, as is suggested, to satisfy the Court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether. [emphasis added]

Thus, the fact that the plaintiff's case was a complicated one could not justify striking out the statement of claim. Complex matters that disclosed substantive questions of law were most appropriately addressed at trial where evidence concerning the facts could be led and where arguments about the merits of a plaintiff's case could be made.

21 The requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been

affirmed repeatedly in the last century: see *Dyson v. A.G.*, [1911] 1 K.B. 410 (C.A.); *Evans v. Barclays Bank & Galloway*, [1924] W.N. 97 (C.A.); *Kemsley v. Foot*, [1951] 2 K.B. 34, [1951] 1 T.L.R. 197, [1951] 1 All E.R. 331 (C.A.); and *Nagle v. Feilden*, [1966] 2 Q.B. 633, [1966] 2 W.L.R. 1027, [1966] 1 All E.R. 689 (C.A.). Lord Justice Fletcher Moulton's observations in *Dyson*, at pp. 418-19, are particularly instructive:

> Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. *But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure*. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. *To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad*. [emphasis added]

22 A more recent and no less instructive discussion of these principles may be found in Lord Pearson's reasons in *Drummond-Jackson v. Br. Medical Assn.*, [1970] 1 W.L.R. 688, [1970] 1 All E.R. 1094 (C.A.). I note that in *Drummond-Jackson* the Court of Appeal dealt with Rules of the Supreme Court, O. 18, r. 19 (the provision that replaced R.S.C., O. 25, r. 4, in 1962), a provision very similar to the rules that now govern the striking out of pleadings in Canada:

> 19. — (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
>
> (*a*) it discloses no reasonable cause of action or defence, as the case may be; or

(*b*) it is scandalous, frivolous or vexatious; or

(*c*) it may prejudice, embarrass or delay the fair trial of the action; or

(*d*) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(*a*).

23 Responding to Lord Denning's suggestion that the potential length and complexity of a trial should be taken into account when considering whether to strike out a statement of claim, Lord Pearson (with whom Sir Gordon Willmer concurred in separate reasons) reaffirmed the proposition that Lord Justice Lindley had advanced some 80 years earlier in *A.G. of Duchy of Lancaster*: length and complexity were *not* appropriate factors to consider when deciding whether a statement of claim should be struck out. Lord Pearson said at pp. 1101-1102:

Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases ...

In my opinion the traditional and hitherto accepted view — that the power should only be used in plain and obvious cases — is correct according to the evident intention of the rule for several reasons. First, there is in r 19 (1) (*a*) the expression "reasonable cause of action", to which Sir Nathaniel Lindley MR called attention in *Hubbuck & Sons Ltd v. Wilkinson, Heywood and Clark Ltd.* No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some chance of success, when (as required by r 19 (2)) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagle v. Feilden* Danckwerts LJ said:

The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court.

Salmon LJ said:

It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.

> Secondly, r 19(1)(*a*) takes some colour from its context in r 19(1) (*b*) — "scandalous, frivolous and vexatious" — r 19 (1) (*c*) — "prejudice, embarrass or delay the fair trial of the action" — and r 19 (1) (*d*) — "otherwise an abuse of the process of the court". *The defect referred to in r 19 (1) (a) is a radical defect ranking with those referred to in the other paragraphs*. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. *The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success*. [emphasis added]

Lord Pearson concluded at p. 1102:

> That is the basis of the rule and practice on which one has to approach the question whether the plaintiff's statement of claim in the present case discloses any reasonable cause of action. *It is not permissible to anticipate the defence or defences — possibly some very strong ones — which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to rely on at the trial*. [emphasis added]

24 In England, then, the test that governs an application under R.S.C., O. 18, r. 19, has always been and remains a simple one: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? Is there a defect in the statement of claim that can properly be characterized as a "radical defect" ranking with the others listed in O. 18, r. 19? If it is plain and obvious that the action is certain to fail because it contains some such radical defect, then the relevant portions of the statement of claim may properly be struck out. To allow such an action to proceed, even although it was certain to fail, would be to permit the defendant to be "vexed" and would therefore amount to the very kind of abuse of the court's process that the rule was meant to prevent. But if there is a chance that the plaintiff might succeed, then that plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues of law and fact that might have to be addressed nor the potential for the defendant to present a strong defence should prevent a plaintiff from proceeding with his or her case. Provided that the plaintiff can present a "substantive" case, that case should be heard.

(b) Canada

(i) Ontario and British Columbia Courts of Appeal

25 In Canada, provincial courts of appeal have long had to grapple with the very same issues concerning the rules with respect to statements of claim that courts in England have dealt with for over a century. As noted earlier, the rules of practice in this country are to a

large extent modelled on England's rules of practice. It comes as no surprise, therefore, that the test Canadian courts of appeal have adopted is in essence the same one that the courts in England favour.

Ontario

26 In Ontario, for example, the Court of Appeal dealt with R. 124 (the predecessor to R. 21.01) in *Ross v. Scottish Union and National Ins. Co.* (1920), 47 O.L.R. 308, 53 D.L.R. 415 (C.A.). The rule followed closely the wording of England's R.S.C. 1883, O. 25, r. 4, and read as follows:

> 124. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

27 In *Ross*, Magee J.A. embraced the "plain and obvious" test developed in England, stating at p. 316:

> That inherent jurisdiction is partly embodied in our Rule 124, which allows pleadings to be struck out as disclosing no reasonable cause of action or defence, and thereby, in such case, or if the action or defence is shewn to be vexatious or frivolous, the action may be stayed or dismissed or judgment be entered accordingly. *The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence*. [emphasis added]

Magee J.A. went on to note at p. 317:

> To justify the use of Rule 124, a statement of claim should not be merely demurrable, but it should be manifest that it is something worse, so that it will not be curable by amendment: *Dadswell v. Jacobs* (1887), 34 Ch. D. 278, 281; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; and it is not sufficient that the plaintiff is not likely to succeed at the trial: *Boaler v. Holder* (1886), 54 T.L.R. 298.

28 At an early date, then, the Ontario Court of Appeal had modelled its approach to R. 124 on the approach that had been consistently favoured in England. And over time the Ontario Court of Appeal has gone on to show the same concern that statements of claim not be struck out in anything other than the clearest of cases. As Laidlaw J.A. put it in *R. v. Clark*, [1943] O.R. 501 at 515, [1943] 3 D.L.R. 684 (C.A.):

> The power to strike out proceedings should be exercised with great care and reluctance. Proceedings should not be arrested and a claim for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: *Evans v. Barclay's Bank et al.*, [1924] W.N. 97. But if it be made clear to the Court that an action is frivolous or vexatious, or that no reasonable cause of action is disclosed, it would be improper to permit the proceedings to be maintained.

29 More recently, in *Gilbert Surgical Supply Co. v. F.W. Horner Ltd.*, [1960] O.W.N. 289 at 289-90, 34 C.P.R. 17 (C.A.), Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".

30 Thus, the Ontario Court of Appeal has firmly embraced the "plain and obvious" test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that their process is not abused. The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

British Columbia

31 In British Columbia the Court of Appeal has approached the matter in a similar way. The predecessor to the rule that Carey Canada invokes in this appeal was worded in exactly the same way as England's R.S.C. 1883, O. 25, r. 4. Not surprisingly the British Columbia Court of Appeal's treatment of that rule has been similar to that taken in England and Ontario. For example, in *Minnes v. Minnes* (1962), 39 W.W.R. 112 at 122-23, 34 D.L.R. (2d) 497 (B.C.C.A.), Tysoe J.A. observed:

> In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under O. 25, R. 4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. *So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out*. If the action involves investigation of serious questions of law or questions of general importance, or if the facts are to be known before rights are definitely decided, the Rule ought not to be applied. [emphasis added]

For his part Norris J.A. noted at p. 116 (agreeing with Tysoe J.A.):

> I might add that upon the motion, with respect, *it was not for the learned trial judge as it is not for this court to consider the issues between the parties as they would be considered*

> *on trial*. All that was required of the plaintiff on the motion was that she should show that on the statement of claim, accepting the allegations therein made as true, there was disclosed from that pleading with such amendments as might reasonably be made, a proper case to be tried. [emphasis added]

The law as stated in *Minnes v. Minnes* was recently reaffirmed in *McNaughton v. Baker*, [1988] 4 W.W.R. 742, 25 B.C.L.R. (2d) 17 at 23, 28 C.P.C. (2d) 49 (C.A.), per McLachlin J.A. Similarly, Anderson and Esson JJ.A. relied on *Minnes v. Minnes* in this appeal.

32 Once again then the "plain and obvious" test has been firmly embraced. The British Columbia Court of Appeal has confirmed that the summary proceedings available under the rule in question do not afford an appropriate forum in which to engage in a detailed examination of the strengths and weaknesses of the plaintiff's case. The sole question is whether, assuming that all the facts the plaintiff alleges are true, the plaintiff can present a question "fit to be tried". The complexity or novelty of the question that the plaintiff wishes to bring to trial should not act as a bar to that trial taking place.

(ii) Supreme Court of Canada

33 While this court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the "plain and obvious" test. Justice Estey, speaking for the court in *A.G. Can. v. Inuit Tapirisat of Can.*, [1980] 2 S.C.R. 735 at 740, 115 D.L.R. (3d) 1, 33 N.R. 304 [Fed.], stated:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co*.

34 I had occasion to affirm this proposition in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1 [Fed.]. At pp. 486-87 I provided the following summary of the law in this area (with which the rest of the court concurred):

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?"

And at p. 477 I observed:

> It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. *The fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs*. [emphasis added]

35 Most recently, in *Dumont v. Can. (A.G.)*, [1990] 1 S.C.R. 279, [1990] 4 W.W.R. 127, 67 D.L.R. (4th) 159, I made clear at p. 280 that it was my view that the test set out in *Inuit Tapirisat* was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

36 Thus, the test in Canada governing the application of provisions like R. 19(24)(*a*) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in R. 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under R. 19(24)(*a*).

37 The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even though it may call for a complex or novel application of the tort of conspiracy.

(2) Should Mr. Hunt's Allegations Based on the Tort of Conspiracy Be Struck from his Statement of Claim?

38 In the last decade the tort of conspiracy has received a considerable amount of attention. In England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the defendants agree to use lawful means to harm the plaintiff and (ii) where the defendants use unlawful means to harm the plaintiff. The law with respect to the first situation is not in doubt (*Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, [1989] 3 W.L.R. 563 at 593, per Slade L.J.):

> If A and B agree to commit acts which would be lawful if done by either of them alone but which are done in combination and cause damage to C, no tortious conspiracy actionable at the suit of C exists *unless the predominant purpose of A and B in making the agreement and carrying out the acts which cause the damage is to injure C and not to protect the lawful commercial interests of A and B*. This proposition is established by five decisions at the highest level: *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.*, [1892] A.C. 25; *Quinn v. Leathem*, [1901] A.C. 495; *Sorrell v. Smith*, [1925] A.C. 700; *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 and *Lonrho Ltd. v Shell Petroleum Co. Ltd. (No. 2)*, [1982] A.C. 173. [emphasis added]

Courts in England have, however, encountered greater difficulty in stating with precision the applicable principles governing situations in which unlawful means are employed. In particular, they have struggled to decide whether the plaintiff must establish, not just that the defendants used means that were unlawful and resulted in harm to the plaintiff, but also that the defendants actually intended to harm the plaintiff.

39 In *Lonrho v. Shell Petroleum Co.*, [1982] A.C. 173, [1980] 1 W.L.R. 627, the House of Lords dealt with a consultative case stated by arbitrators in which it was asked to consider whether the tort of conspiracy could be extended to embrace a situation where the agreement in question resulted in a contravention of penal law (unlawful means) but did not include an intention to injure the plaintiff. In the process of deciding whether the tort should be so extended Lord Diplock noted at pp. 188-89:

> My Lords, conspiracy as a criminal offence has a long history. It consists of "the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it." I cite from Viscount Simon L.C.'s now classic speech in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435, 439. Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted the agreement which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement.

40 Lord Diplock went on to observe that he was of the view that the rationale that had apparently fueled the development of the tort in the late 19th and early 20th centuries, namely, that "a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise" (see *Mogul S.S. Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 at 616, per Bowen L.J.) was somewhat anachronistic in light of modern

commercial developments. Nevertheless he did not feel that this meant that the tort could now be dispensed with. He said at p. 189:

> But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II. The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. It was applied by this House 80 years ago in *Quinn v. Leathem*, [1901] A.C. 495, and accepted as good law in the *Crofter* case [1924] A.C. 435, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done.

41 Having set out this groundwork and having thereby confirmed that the tort of conspiracy was applicable in circumstances where the defendants entered into an agreement the predominant purpose of which was to injure the plaintiff, Lord Diplock turned to the question whether the tort should be extended beyond these confines. He concluded at p. 189:

> This House, in my view, has an unfettered choice whether to confine the civil action of conspiracy to the narrow field to which alone it has an established claim or whether to extend this already anomalous tort beyond those narrow limits that are all that common sense and the application of the legal logic of the decided cases require.
>
> My Lords, my choice is unhesitatingly the same as that of Parker J. and all three members of the Court of Appeal. I am against extending the scope of the civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff.

42 Lord Diplock's observations made clear that in order to succeed with the tort of conspiracy in England a plaintiff would have to demonstrate that the purpose for which parties acted in accordance with their agreement was to harm the plaintiff. The English Court of Appeal has recently had an opportunity to consider Lord Diplock's judgment in *Lonrho* (see *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, supra) and has confirmed

at p. 604 that "the House plainly intended the presence of a predominant intention to injure to be the touchstone of an actionable conspiracy." The Court of Appeal continued:

> Where the predominant intention to injure is absent but the defendants pursuant to agreement commit torts against the plaintiff, the House held, we conclude, that common sense and the legal logic of the decided cases are satisfied if the plaintiff is denied a remedy in conspiracy and left to sue on the substantive torts.

Thus, regardless of whether the alleged conspirators used lawful or unlawful means, the law in England required the plaintiff to establish that the defendants entered into the agreement with the predominant purpose of injuring the plaintiff.

43 Although Canadian jurisprudence has taken note of the developments in England, the law governing the tort of conspiracy in Canada is not in all respects the same as the law set out in *Lonrho*. Indeed, this court had occasion to consider both the tort of conspiracy and Lord Diplock's observations in *Lonrho* in *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, supra. Justice Estey stated at p. 468:

> The question which must now be considered is whether the scope of the tort of conspiracy in this country extends beyond situations in which the defendants' predominant purpose is to cause injury to the plaintiff, and includes cases in which this intention to injure is absent but the conduct of the defendants is by itself unlawful, and in fact causes damage to the plaintiff.

44 This passage made clear that this court agreed with the House of Lords that where a plaintiff alleges that the defendants entered into an agreement whose predominant purpose was to injure the plaintiff and where the plaintiff alleges that he or she has in fact suffered damage as a result of the agreement, then regardless of the lawfulness of the means that the defendants are alleged to have used to implement the agreement the plaintiff will have made out a cognizable claim in the tort of conspiracy.

45 But what of situations in which the plaintiff alleges that there was an agreement that involved the use of unlawful means and that resulted in the plaintiff's suffering damage? Must the plaintiff also establish that the predominant purpose of the agreement was to injure him or her? It is in answering this question that Estey J. chose to follow a somewhat different path from Lord Diplock. Estey J. was of the view that it was not appropriate to go as far as the House of Lords had gone in precluding the action. He said at pp. 471-72:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) *where the conduct of the defendants is unlawful*, the conduct is directed towards the plaintiff (alone or together with others), and *the defendants should know in the circumstances that injury to the plaintiff is likely to and does result*. In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. [emphasis added]

46 Estey J.'s summary of the law in Canada suggests that in cases falling into the second category it may not be necessary to prove actual intent. As G.H.L. Fridman has noted in The Law of Torts in Canada (1990), vol. 2, at p. 265:

> The difference between the English and Canadian formulations of the tort of conspiracy lies in the way the intent of the defendants is expressed. The language of Lord Diplock seems to indicate that the necessary intent should be actual. That of Estey J. suggests that it may be possible for a court to infer an intent to injure from the circumstances even if the defendants deny they acted with any such intent.

Fridman goes on to observe at pp. 265-66:

> In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the pre- dominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances.

In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is "good law", it seems to me, it is not for the court to consider in this proceeding where the issue is simply whether the plaintiff's pleadings disclose a reasonable cause of action. I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

47 I note that in this appeal Mr. Hunt was clearly fully aware of Estey J.'s observation in *Can. Cement LaFarge Ltd.*, when he prepared paras. 18 and 19 of his statement of claim. Paragraph 18 of his statement of claim follows faithfully the first proposition that Estey J. put forward at p. 471, alleging that some or all of the defendants "conspired with each other with the predominant purpose of injuring" Mr. Hunt. Paragraph 19 of the statement of claim presents an alternative argument that is faithful to the wording of Estey J.'s second proposition, alleging that "some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff" would result. If there is a defect in Mr.Hunt's statement of claim, it is certainly *not* that paras. 18 or 19 fail to follow the language of this court's most recent pronouncement on the conditions that must be met in order to ground a claim in the tort of conspiracy. In other words, given this court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim, it is not "plain and obvious" that the plaintiff's statement of claim fails to disclose a reasonable claim.

48 The defendants contend, however, that this court's recent pronouncements, as well as those of courts in England, make clear that the tort of conspiracy cannot be invoked outside a commercial law context and that it certainly cannot be invoked in personal injury litigation. They point out that in *Lonrho*, supra, at p. 189, Lord Diplock was not prepared to extend the tort to cover the facts of the case before him. They em phasize that Estey J. displayed a measure of sympathy for Lord Diplock's reluctance to extend the scope of the tort when he stated at p. 473 of *Can. Cement LaFarge Ltd.*:

> The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho, supra*, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

49 Finally, the defendants point to my observations in *Frame v. Smith*, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 42 C.C.L.T. 1, 23 O.A.C. 84, 78 N.R. 40, where I had occasion to consider whether the tort of conspiracy might be extended to cover a case in which a father was suing his former wife for denying him access to his children. Although I was in dissent in the final result, the court agreed with my observations about the

tort of conspiracy (see La Forest J. at p. 109). The defendants place a good deal of weight on my suggestion that "the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context" (at p. 124). I concluded that even though the tort could in theory be extended to the facts of *Frame*, it was not desirable to extend the tort to the custody and access context.

50 Not surprisingly, the defendants contend that it would be equally inappropriate to extend the tort of conspiracy to cover the facts of this case. The difficulty I have, however, is that in this appeal we are asked to consider whether the allegations of conspiracy should be struck from the plaintiff's statement of claim, not whether the plaintiff will be successful in convincing a court that the tort of conspiracy should extend to cover the facts of this case. In other words, the question before us is simply whether it is "plain and obvious" that the statement of claim contains a radical defect.

51 Is it plain and obvious that allowing this action to proceed amounts to an abuse of process? I do not think so. While there has clearly been judicial reluctance to extend the scope of the tort beyond the commercial context, I do not think this court has ever suggested that the tort could not have application in other contexts. While Estey J. expressed the view in *Can. Cement LaFarge Ltd.*, supra, at p. 473, that the action had lost much of its usefulness, and while I noted in *Frame v. Smith*, at pp. 124-25, that some have even suggested that consideration should be given to abolishing the tort entirely (see Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C. L. Rev. 229, at p. 254), we both affirmed the ongoing existence of the tort at the date of these judgments. In my view, it would be highly inappropriate for this court to deny a litigant who is capable of fitting his allegations into Estey J.'s two-pronged summary of the law on civil conspiracy the opportunity to persuade a court that the facts are as alleged and that the tort of conspiracy should be held to apply on these facts. While courts should pause before extending the tort beyond its existing confines, careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts.

52 I note that in *Frame v. Smith*, at p. 126, I was not prepared to extend the tort of conspiracy to the custody and access context both because such an extension was not in the best interests of children and because such an extension would not have been consistent with the rationale that underlies the tort of conspiracy: "namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination" [p. 125]. But in the appeal now before us it seems to me much less obvious that a similar conclusion would necessarily be reached. If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to

this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success.

53 The issues that will arise at the trial of the plaintiff's action in conspiracy will unquestionably be difficult. The plaintiff may have to make complex submissions about whether the evidence establishes that the defendants conspired either with a view to causing him harm or in circumstances where they should have known that their actions would cause him harm. He may well have to make novel arguments concerning whether it is enough that the defendants knew or ought to have known that a class of which the plaintiff was a member would suffer harm. The trial judge might conclude, as some of the defendants have submitted, that the plaintiff should have sued the defendants as joint tortfeasors rather than alleging the tort of conspiracy. But this court's statements in *Inuit Tapirisat* and *Operation Dismantle Inc.*, as well as decisions such as *Dyson* and *Drummond-Jackson*, make clear that none of these considerations may be taken into account on an application brought under R. 19(24) of the British Columbia Supreme Court Rules.

54 In my view, Anderson and Esson JJ.A. were entirely correct in suggesting that it should be left to the trial judge to ascertain whether the plaintiff can establish that the predominant purpose of the alleged conspiracy was to injure the plaintiff. It seems to me that they were also correct in suggesting that it should be left to the trial judge to consider the merits of any arguments that may be advanced to the effect that the "predominant purpose" test should be modified in the context of this case. Similarly, it seems to me that the argument that some of the defendants advanced, to the effect that Quebec's Business Concerns Records Act, R.S.Q. 1977, c. D-12, might limit the range of information that the defendants could produce at trial, is a matter that is not relevant to the question whether the plaintiff's statement of claim discloses a reasonable claim.

55 The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

56 Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in para. 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.

57 In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff *alleges* that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the *facts* as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants') submission that "[u]pon proof of the commission of the tortious acts alleged" in para. 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.

58 This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This is a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

59 In the result the appellants have not demonstrated that those portions of the respondent's statement of claim which allege the tort of conspiracy fail to disclose a reasonable claim. They should not therefore be struck out under R. 19(24)(*a*) of the British Columbia Rules of Court.

5. Disposition

60 The appeal should be dismissed with costs.

Appeal dismissed.

Footnotes

* Chief Justice at the time of judgment.