In the Court of Appeal of Alberta

Citation: Tempo Alberta Electrical Contractors Co Ltd v Man-Shield (Alta) Construction Inc, 2025 ABCA 310

Date: 20250919
Docket: 2303-0172AC
Registry: Edmonton

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Between:

Tempo Alberta Electrical Contractors Co. Ltd. and Tempo Alberta Contractors Co. Ltd. carrying on business as Tempo Electrical Contractors Co. Ltd.

Respondents

- and -

Man-Shield (Alta) Construction Inc. and Man-Shield (Alta) Construction Inc. carrying on business as Man-Shield (Alta) Construction

Appellants

The Court:

The Honourable Justice Dawn Pentelechuk
The Honourable Justice April Grosse
The Honourable Justice Kevin Feth

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice S.L. Bercov
Dated the 26th day of July, 2023
Filed the 11th day of September, 2023
(2023 ABKB 444, Docket: 1703 19697)

Memorandum of Judgment

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The Court:

Overview

[1] This appeal concerns the impact of an equitable set-off on a summary judgment application and the availability of the "clean hands" principle to bar an equitable set-off defence.

[2] The chambers judge granted partial summary judgment to the plaintiff/respondent for charges payable under a subcontract for electrical work performed on a construction project: ***Tempo Alberta Electrical Contractors Co Ltd v Man-Shield Construction Inc***, 2023 ABKB 444 (*Decision*). The defendant/appellant, as the general contractor, had counterclaimed for damages allegedly caused by the delayed performance of the electrical subcontract and had asserted an equitable set-off as a defence. While the chambers judge found that the counterclaim allegations raised a genuine issue for trial, she concluded that the defendant had no "true defence" to the summary judgment application and exercised what she characterized as the "just result principle" to grant partial summary judgment.

[3] As this Court confirmed in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 32 [***Weir-Jones***], the party moving for summary judgment must not only prove the factual elements of its case, but also the absence of a genuine issue requiring a trial. More specifically, "[i]f the plaintiff is the moving party, it must prove 'no defence'".

[4] On the record before us, the plaintiff was unable to meet this burden because it failed to demonstrate that no genuine issue arose about equitable set-off as a defence to the claim. The chambers judge therefore erred in granting partial summary judgment. Further, the plaintiff's contention on appeal that the defendant's litigation conduct and refusal to pay for completed work constitutes "unclean hands", disentitling it from relying on equitable set-off, is not established on this record. The appeal must be allowed and the matter returned to the Court of King's Bench for trial.

Background

[5] The parties have been involved in complex litigation since 2017 about building delays and unpaid claims arising from the construction of a seniors' care facility called the Shepherd's Garden Heritage condominium (the "Heritage Condominium").

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[6] In May 2014, the defendant, carrying on business as Man-Shield (Alta) Construction ("Man-Shield"), was hired by Shepherd's Care Foundation ("Shepherd's Care") to be the general contractor for the build. The plaintiff, carrying on business as Tempo Electrical Contractors Co Ltd ("Tempo"), provided Man-Shield with a quotation of $3,028,560.00 to perform most of the electrical work for the project. In July 2014, Man-Shield and Tempo entered into a subcontract for the electrical work ("Subcontract").

[7] The Heritage Condominium was completed in 2017 after a delay of 45 weeks. Responsibility for the delay and the resulting damages owing between the parties are contested. Both parties agree however that a trial is necessary to resolve these issues: *Decision* at para 4.

[8] Tempo maintains that Man-Shield owes $678,261 for outstanding payments under the Subcontract as follows:

a. $188,733.15 in progress invoices;
b. $366,845.13 representing a 10% holdback; and
c. $122,682.12 in change orders.

[9] Tempo registered a builders' lien on the Heritage Condominium lands in February 2017 (for the holdback amount of $366,846) and subsequently filed a Statement of Claim against Man-Shield and Shepherd's Care. Tempo originally claimed $678,261.00 in damages against Man-Shield for breach of contract.

[10] Man-Shield filed a Statement of Defence and a Counterclaim against Tempo in the amount of $2,675,000 for the consequences of the delay, expenses flowing from allegedly negligent work, and damages caused by registering a purportedly invalid lien. Man-Shield pleaded an equitable set-off as a defence to the claim.

[11] Tempo subsequently initiated another action against Man-Shield (later consolidated with the first action) and claimed a total of $2,788,056.46 for amounts owing under the Subcontract and damages caused by the 45-week delay.

[12] Tempo also registered a second builders' lien in June 2017, claiming $1,142,323. Man-Shield contested the validity of the lien. Shepherd's Care settled Tempo's second lien claim by paying $1,199,439.15 into court as security for the second lien, which was then discharged. As part of the settlement, Shepherd's Care assigned its rights to the lien funds to Man-Shield.

[13] In May 2020, Man-Shield was granted permission by an applications judge to replace the lien funds with an equivalent lien bond. Tempo appealed. The decision was upheld by a chambers judge: ***Tempo Alberta Electrical Contractors Co Ltd v Man-Shield (Alta) Construction Inc***, 2021 ABQB 627.

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[14] Tempo then appealed the substitution of the lien bond to this Court. The appeal was allowed in part, after this Court determined that s 22 of the *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4, formerly the *Builders' Lien Act*, imposed a statutory trust on the lien funds, and the trust was breached when Man-Shield took the funds to satisfy other obligations: ***Tempo Alberta Electrical Contractors Co Ltd v Man-Shield (Alta) Construction Inc***, 2022 ABCA 409 at paras 17, 19, 22-24 [*Lien Decision*]. In particular, this Court found:

> The key point. . . is that at the time of Man-Shield's application, the project was completed and Tempo had issued a certificate of substantial performance... the applications judge and the chambers judge erred by failing to determine that a s 22 trust was imposed and, . . . to consider whether, or to what extent, Man-Shield should be permitted to utilize the money outside the contractual chain in light of that existing trust.

This Court concluded that the statutory trust was for Tempo's benefit and ordered Man-Shield to pay $678,407.88 into court within 90 days as security for Tempo's claim for the outstanding payments.

[15] Man-Shield never complied with this Court's Order to pay the funds into court. Tempo applied in the Court of King's Bench to have Man-Shield held in contempt for failing to comply with the Order. That application was dismissed on June 14, 2024, because Man-Shield was found to be in a negative financial and cash flow position that created a reasonable excuse for not paying the money into court. This Court recently upheld the dismissal of the contempt application but varied the decision on other grounds: ***Tempo Alberta Electrical Contractors Co Ltd v Man-Shield (Alta) Construction Inc***, 2025 ABCA 282 [*Contempt Decision*].

Decision Below

[16] Tempo applied for summary judgment and other relief against Man-Shield. An applications judge granted partial summary judgment to Tempo of $678,261 for the outstanding payments under the Subcontract. Man-Shield appealed to the chambers judge, who considered the matter *de novo*.

[17] Man-Shield argued that summary judgment was not available to Tempo because: a) Tempo charged for work performed under change orders that were not approved by Man-Shield; b) Man-Shield was entitled to off-setting payments for "chargebacks" for work Man-Shield performed to complete or remediate Tempo's delayed and deficient work; and c) Man-Shield had a cross-claim for other damages caused by Tempo's delayed and deficient work: *Decision* at para 6. Man-Shield characterized its cross-claim as an equitable set-off.

[18] The chambers judge cited ***Weir-Jones*** for the "guiding principles" in determining whether summary judgment was appropriate. She concluded that the evidence was "sufficient to meet

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Tempo's burden and standard of proof" in establishing that Tempo's "claims are owing" for work performed under change orders: *Decision* at paras 20 and 22. Next, she found the evidence did not raise a genuine issue for trial that Man-Shield was entitled to any "chargebacks"; Man-Shield failed to provide Tempo with notice of any alleged deficiencies and an opportunity to remediate as required by the Subcontract: *Decision* at paras 34, 36, 38, 40, 42 and 45.

[19] The chambers judge then considered whether "summary judgment is not appropriate because Man-Shield advances a significant claim for set off." She found some merit to Man-Sheild's claim for damages, noting that the record did not give her "sufficient confidence" to find "no genuine issue that Tempo may be responsible for some delay in breach of the Subcontract and that there are no damages arising from this breach". She declined "to summarily resolve the issue of whether Man-Shield is entitled to a set off for its alleged damages": *Decision* at paras 51, 55 and 56.

[20] The chambers judge nevertheless concluded that the set-off claim did not prevent partial summary judgment in favour of Tempo. At paragraph 50, she wrote:

> . . . There is a difference between a true defence and a set off. Awarding summary judgment where there is a genuine defence, may result in the moving party receiving a judgment it is not entitled to and depriving the responding party from litigating a potential meritorious defence. Where there is an alleged set off, granting summary judgment to the moving party does not grant a judgment that the moving party is not entitled to and does not deprive the responding party with the opportunity to prove the set off at trial. The responding party will still receive a judgment at trial for the amounts it proves by way of the counterclaim, albeit later than the judgment awarded to the moving party.

[21] Having decided that a set-off claim is not a "true defence", the chambers judge found that Man-Shield's set-off was not instrumental to determining whether summary judgment was available. Instead, the chambers judge held that the "culture shift" endorsed in ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87 [***Hryniak***] towards "proportionate, timely and affordable procedures" over "conventional trial[s]" drove the determination: *Decision* at paras 50, 60-61.

[22] The chambers judge did not fully address Tempo's argument that even if Man-Shield's set-off claim had arguable merit, it was a procedural rather than an equitable set-off and did not bar summary judgment. Instead, she concluded that "whether Man-Shield's claims are equitable, or procedural does not bring final resolution to the issue of whether it is appropriate to grant summary judgment": *Decision* at para 60.

[23] Ultimately, the chambers judge acknowledged the possibility that Man-Shield might recover a judgment against Tempo after a trial for more than the outstanding payments of $678,261, but reasoned that because six years had passed since Tempo issued its Statement of

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Claim and the evidence of Man-Shield's claims appeared to be "questionable", summary judgment must be decided by "application of the just result principle". She concluded: "To require Tempo to wait another several years based on Man-Shield's questionable claims does not achieve a just result". The chambers judge held that Man-Shield's claims for delay damages raised a genuine issue for trial, but the record supported Tempo's entitlement to the outstanding payments because "there is no genuine defence to Tempo's claims": *Decision* at paras 62-66. Accordingly, summary judgment was awarded to Tempo for the outstanding charges while the parties' claims for delay damages were left for trial.

[24] In a subsequent decision, the chambers judge declined Tempo's claim for solicitor-client costs of the summary judgment application. She did not accept Tempo's argument that Man-Shield's substitution of the lien bond and use of the lien funds justified a substantially enhanced costs order based on alleged litigation misconduct. Instead, she found that Man-Shield had not complied with the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*] in presenting its evidence by way of a disorganized 500 page "document dump", which was inferred to have been "done to obfuscate, rather than clarify the issues": ***Tempo Alberta Electrical Contractors Co Ltd v Man-Shield Construction Inc***, 2023 ABKB 575 [*Costs Decision*]. The chambers judge did not refer to the *Lien Decision* or this Court's finding that the evidence "strongly" pointed to Man-Shield requesting and using the lien funds for its own liquidity: *Lien Decision* at para 27.

Issues on appeal

[25] This appeal raises three issues:

1. Did the chambers judge err in law by holding that equitable set-off was not a genuine defence to summary judgment?
2. If equitable set-off is a genuine defence at law, did Man-Shield's claim for equitable set-off raise a genuine issue for trial?
3. If a genuine issue for trial was raised, should Man-Shield's appeal be denied based on the clean hands principle?

Standard of Review

[26] The test for summary judgment, and the interpretation of relevant statutes and the *Rules*, are questions of law reviewed for correctness. Deference is otherwise owed to a chambers judge's findings of fact underlying a decision to grant summary judgment. "The chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination on whether summary resolution is appropriate are all entitled to deference": ***Weir-Jones*** at para 10, citing ***Hryniak*** at paras 81-84; ***Amack v Wishewan***, 2015 ABCA 147 at para 27, 602 AR 62.

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Analysis

1. Equitable set-off is a genuine defence to summary judgment

[27] The chambers judge erred in law by finding that Man-Shield's claim to an equitable set-off was not a "true defence". Equitable set-off is a defence and may raise a genuine issue for trial that prevents summary judgment: ***Scott v Golden Oaks Enterprises Inc***, 2024 SCC 32 [***Scott***]; ***Holt v Telford***, [1987] 2 SCR 193 at 204, 41 DLR (4th) 385 [***Holt***].

[28] The principles governing the defence of equitable set-off were described in ***Holt*** at 204:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands . . .
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed . . .
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim . . .
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract . . .
>
> 5. Unliquidated claims are on the same footing as liquidated claims . . . . [Citations omitted]

[29] Before the chambers judge, Man-Shield relied on ***Holt*** to argue that its claim of equitable set-off was a defence barring summary judgment. During oral argument, the chambers judge countered that she did "not read the [***Holt***] case that way" but recognized that it "distinguishes equitable set-off from a procedural set-off." She suggested that a set-off might be a factor in declining to grant summary judgment but was not a defence or determinative: Transcript at 12-14. Man-Shield acknowledged that procedural set-off (where two *unrelated* claims are balanced in a net judgment) is not a defence to summary judgment but maintained that equitable set-off is a defence, so granting summary judgment without considering its cross-claim for damages would be inequitable and an error.

[30] The *Decision* did not reference or grapple with ***Holt***. The chambers judge further declined to determine the nature of the set-off. She reasoned that "[r]egardless of whether the set off is properly characterized as procedural or equitable, the principles of summary judgment espoused in ***Hryniak*** and ***Weir-Jones*** should be considered in determining whether it is appropriate to grant summary judgment": *Decision* at para 60.

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[31] The chambers judge did not have the benefit of the Supreme Court of Canada's subsequent decision in ***Scott***, which affirmed the ***Holt*** principles and confirmed that equitable set-off applies to liquidated and unliquidated claims. As explained in ***Scott*** at paragraphs 91-93, equitable set-off is available if the transactions or dealings between the parties "are so inseparably connected that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim", quoting from RJ Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015), at 102.

[32] ***Scott*** affirms a long line of appellate authority, including from this Court, recognizing equitable set-off as a defence. Examples include:

- ***Aboussafy v Abacus Cities Ltd***, 1981 ABCA 136 at paras 35-36 – "By set-off is meant something in the way of a defence: where claim and cross-claim are merged and the lesser is thereby extinguished";

- ***Saskatchewan Wheat Pool v Feduk***, 2003 SKCA 46 at para 54 [***Feduk***] - "We note that equitable set-off as a defence has been recognized in England and there is both academic and jurisprudential authority for it in Canada. Neither [party] took issue with the conclusion that the law of equity permits set-off to operate as a defence";

- ***Tahvili v HSBC Bank Canada***, 2004 BCCA 22 at para 17 – "The question for the chambers judge [on an application for summary judgment] was therefore whether the defence of equitable set-off was a *bona fide* triable issue in this proceeding";

- ***Grand Financial Management Inc v Solemio Transportation Inc***, 2016 ONCA 175 at para 97 [***Grand Financial***] - "Equitable set-off is a defence that is particularly rooted in the circumstances of the individual case. It requires, amongst other things, that the set-off claim go directly to impeach the plaintiff's demands … the defence requires that the set-off claim be so closely connected to the plaintiff's demands that it would be 'manifestly unjust' to allow the plaintiff. . . to enforce payment without taking into account the set-off claim: see *Holt v Telford*".

[33] In Alberta, equitable set-off has been used to successfully resist summary judgment where a statement of defence or a counterclaim raised a genuine issue for trial. See as examples:

- ***JBuck and Sons Inc v Resource Land Fund V, LP,*** 2023 ABKB 308 at para 34 - "Equitable set-off is a substantive defence", citing ***Grand Financial***;

- ***1297835 Alberta Ltd v Xtreme Coil Drilling Corp***, 2010 ABQB 539 at paras 24-29 [***Xtreme***] – "I disagree with [the applicant plaintiff] that the onus is on [the defendant], at this time, to. . . establish its entitlement to equitable set-off. The question of clean hands and [the defendant]'s ultimate entitlement to the remedy

remain issues for trial. In this application, it is [the applicant plaintiff] that seeks to sever the counterclaim and obtain summary judgment on the main claim. It is [the applicant plaintiff], therefore, that has the onus of establishing that the defence of equitable set-off plainly cannot succeed"; and,

- ***Point on the Bow Development Ltd v William Kelly & Sons Plumbing Contractors Ltd***, 2007 ABQB 530 at paras 26-30 [***Point on the Bow***] - It is "common practice for parties to a construction project to defend by way of set-off against the claims of another, which claims are typically for money owed under the building contract and damages for breach of that Contract or delay: [***Swagger v UBC et al***, 2000 BCSC 1839], at para. 9."

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[34] Equitable set-off is like other defences in precluding summary judgment where a genuine issue for trial is established. The culture change advanced by ***Hryniak***, including the emphasis on litigation efficiency and proportionality, did not alter equitable set-off principles.

[35] Moreover, we reject the reasoning in the court below that equitable set-off need not prevent summary judgment because the responding party may still proceed to trial, "prove the set-off" and receive a judgment. The risk of unfairness caused by piecemeal litigation and interim transfers of funds has repeatedly been accepted as a reason for rejecting summary judgment in the face of an interrelated counterclaim. The "law is clear that summary judgment cannot be granted in the face of a valid defence, counterclaim or claim for set-off": ***Point on the Bow*** at para 29.

2. Man-Shield's claim for equitable set-off raised a genuine issue for trial

[36] Tempo's "ultimate burden" as the moving party was to prove the factual elements of its claim and to show that no genuine triable issue remained about a defence. Man-Shield was not required to prove its defence. "The party resisting summary judgment need only demonstrate that the record, the facts, or the law preclude a fair disposition, or, in other words, that the moving party has failed to establish there is no genuine issue requiring a trial": ***Weir-Jones*** at paras 32, 35.

[37] Contrary to the finding of the chambers judge, Man-Shield was not required to demonstrate "that there is a *high probability* that after trial [it] will recover a judgment against Tempo in excess of Tempo's summary judgment claim" (emphasis added): *Decision* at para 64.

[38] The relevant question was whether Man-Shield's equitable set-off defence raised a genuine issue requiring a trial. That inquiry did not engage a vague assessment of "what is just in this situation" or what is a "just result". Further, the passage of six years in litigation was not relevant to the assessment.

[39] The chambers judge's own findings confirm the presence of a triable issue. The chambers judge properly considered the evidence in support of the equitable set-off, the strength of which

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she characterized as "questionable" and determined that an adjudication of the merits was necessary. The parties submitted and the chambers judge agreed that the issue of delay and the resulting damages must proceed to trial. The chambers judge further found that she did "not have sufficient confidence in the state of the record to exercise my discretion to summarily resolve the issue of whether Man-Shield is entitled to a set off for its alleged damages", and otherwise accepted that a genuine issue was raised that "Man-Shield may be entitled to a judgment for damages it sustained because of Tempo's breaches of contract": *Decision* at paras 56, 66.

[40] Tempo's claim for the payment of outstanding charges and Man-Shield's cross-claim for damages allegedly caused by Tempo's project delays all related to the Subcontract. Triable issues remained about the extent of the delays, the party responsible, and the consequential losses. Demonstrating a clear connection between a plaintiff's demand and a cross-claim is a *prima facie* indicator that allowing summary judgment would be unjust, although it is not invariably determinative. In the circumstances here, and considering the evidentiary record before the chambers judge, Tempo's claim and Man-Shield's counterclaim were so "inseparably connected" that it would be unjust to allow Tempo to realize on the outstanding payments under the Subcontract while Man-Shield would be limited to a damages claim against Tempo to be determined at a future date: ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187 at para 54 [***Stankovic***].

[41] In summary, a genuine issue for trial was established about a set-off defence (subject to the clean hands discussion below). Given this conclusion, we need not comment further on whether the chambers judge's finding that Man-Shield had no right to the "chargebacks", regardless of their characterization, "could have *res judicata* implications on the issues to be determined on the counterclaim": ***Stankovic*** at para 54. Similarly, we need not comment on whether having found that partial summary judgment was warranted, a stay of that judgment should have been considered pending a trial on the delay issue: see for example, ***Hinke v Thermal Energy International Inc***, 2012 ONCA 635 at paras 29-30.

3. No reason to deny the appeal based on the clean hands principle

[42] On appeal, Tempo argues that Man-Shield did not have clean hands or engaged in some other form of inequity disqualifying it from relying on equitable set-off as a defence to summary judgment. While clean hands was raised briefly in oral argument before the chambers judge, the *Decision* did not comment on this issue. Tempo did not initially raise clean hands in responding to Man-Shield's grounds of appeal but returned to this argument as part of its additional written submissions following the release of ***Scott***.

[43] As explained in ***Scott***, a party claiming equitable set-off may be denied such relief, as an exercise of judicial discretion, where it comes before the court with unclean hands or where its actions are "tainted by some other form of inequity". Relief may be refused because "Courts of Equity do not permit parties to gain advantages that accrue to them solely through their own

default": at para 93, citing KR Palmer, *The Law of Set-Off in Canada* (Aurora: Canada Law Book, 1993) at 66-67 [Palmer]. In short, a party seeking equity cannot profit from its own wrong.

[44] Conduct that constitutes unclean hands or another form of inequity can bar equitable set-off where it has "an 'immediate and necessary relation' to the particular *transaction* at issue, such that it would be 'unjust' to grant relief in light of the conduct" (emphasis added). The claimant's general depravity is otherwise irrelevant: ***Scott*** at para 93, citing Palmer at 66-67; ***Grand Financial*** at para 98, ***Bardsley v Stewart***, 2014 NSCA 106 at paras 58-61, and ***DeJesus v Sharif***, 2010 BCCA 121 at paras 85-86 [***DeJesus***]. Circumstances that may constitute unclean hands are not closed nor fully defined, but examples include abusing a position of trust or corporate malfeasance, wrongfully retaining funds, or failing to disburse them in accordance with an agreement, or waiving payment of a claim: ***Scott*** at para 94.

[45] The application of the clean hands principle to deny equitable set-off generally requires a "relation" or connection between the alleged misconduct and either the transaction or the equitable relief sought: ***DeJesus*** at paras 83-87; ***Wang v Wang***, 2020 BCCA 15 at paras 46-47. As stated in ***Wang*** at paragraph 46, use of the clean hands doctrine "must be kept to the circle of behaviour related to the [equitable] relief sought"; see also ***Vestby v Galloway***, 2020 ABQB 361 at para 112 [***Vestby***]. The kind of conduct that invites a finding of unclean hands often gravitates toward dishonesty, fraud, deceit, unconscionability, and bad faith: ***Vestby*** at para 110.

[46] For example, in ***Scott*** at paragraph 97, the Supreme Court disqualified the appellants from equitable set-off because "their wrongful conduct [involvement in a fraudulent Ponzi scheme] was at the heart of their claim for set-off, thus disentitling them from the benefit of the defence of equitable set-off." However, the opposite result was reached in ***DeJesus***, where the conduct did not meet the relation or connection test because the party's equitable claim could be established without reliance on her misconduct: see paras 79, 87. Similarly, conduct that follows the transaction and arises after the loss crystallized has a "substantive and temporal gap" that generally cannot ground a finding of unclean hands: ***Bang v Kim***, 2022 BCSC 1893 at paras 63-68, appeal allowed in part on other grounds, 2024 BCCA 88. This can exclude litigation misconduct, even where alleged to be fraudulent or perjurious: ***DeJesus*** at paras 79, 87.

[47] ***DeJesus*** concluded that the misconduct must not only be connected to the particular transaction at issue, "but must be made to be the very ground upon which the transaction took place, and must have given rise to this contract"; there must be "an immediate and necessary relation to the equity sued for": at paras 84-86, citing Ellis' *Fiduciary Duties in Canada,* looseleaf (Toronto: Carswell, 2009), at 20-38; ICF Spry, *The Principles of Equitable Remedies,* 6th ed (UK: Sweet & Maxwell, 2001) at 169-170 [*Spry*]; *Snell's Equity,* 30th ed. (London: Sweet & Maxwell, 2000) at 32; see also ***Mayer v Mayer***, 2012 BCCA 77 at paras 85-86. ***Scott*** at paragraph 93 relied on these same academic authorities to clarify the test for unclean hands in the context of an equitable set-off defence: "the iniquitous conduct must have an 'immediate and necessary relation'

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to the particular transaction at issue, that it would be 'unjust' to grant relief in light of the conduct; the claimant's general depravity. . . is irrelevant".

[48] Tempo, citing ***Xtreme*** and ***Feduk***, argues that Canadian courts have recognized two relevant categories of conduct that result in "unclean hands": (a) where a party misleads the court or abuses its process, and (b) where the court is being asked to assist in unconscionable conduct (e.g. by enforcing a right improperly obtained). Both ***Xtreme*** and ***Feduk*** rely on commentary from Spry at 245-246, which refers to those categories as general expressions of circumstances in which specific performance may be refused (without referring to equitable set-off). However, even if those categories apply to equitable set-off in general, neither category automatically disentitles a party to relief. Spry at 246 clarifies in relation to the first category: "Whether on any particular occasion the behaviour of the plaintiff has been sufficiently improper to lead to a refusal of relief is within the discretion of the court." The exercise of discretion is influenced by "the gravity and nature of the impropriety ... together with such other matters as hardship to the parties". For the second category, "the undesirable behaviour in question must involve more than merely a 'general depravity'; it must have 'an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense'".

[49] ***Scott*** did not specifically reference these categories when addressing conduct that would disentitle a party from advancing an equitable set-off defence. The operation of the clean hands principle is not a categorization exercise. Instead, as explained at paragraph 93 of ***Scott***, the question is whether an equitable set-off defence may be denied where the resisting party's "iniquitous conduct [had] an 'immediate and necessary relation' to the particular transaction at issue, such that it would be 'unjust' to grant [equitable] relief".

[50] In our view, Tempo has failed to demonstrate wrongful conduct by Man-Shield that would disentitle it from the benefit of the defence of equitable set-off by leaving no genuine issue for trial. Tempo's main arguments related to unclean hands are Man-Shield's "document dump" during the summary judgment proceedings before the chambers judge and an allegation of "breach of trust" in replacing the lien funds paid into court with a bond. Both events arose after the transaction and commercial dealings between the parties under the Subcontract. Man-Shield does not rely on Tempo's liens, nor what happened with the lien funds paid into court to argue its claim for set-off. Similarly, any "document dump" does not appear to be at the "heart of [Man-Shield's] claim for set-off".

[51] The alleged misconduct also does not seem akin to that typically present in cases of unclean hands – no dishonesty, fraud, deceit, unconscionability, or bad faith is being alleged in the original transaction leading to the Subcontract or the parties' construction dealings: ***Vestby*** at para 110. While the chambers judge did not expressly address clean hands, we note that in the *Costs Decision* she declined to make a finding that Man-Shield had intended to delay Tempo's recovery of the outstanding charges through its litigation conduct.

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[52] In the *Lien Decision*, this Court similarly made no findings that Man-Shield replaced the money with a lien bond knowing it was impressed by a statutory trust or with the intent to commit fraud. Rather, Man-Shield had proceeded after obtaining two court orders that allowed the lien bond substitution. While Tempo relies on ***Ekum-Sekum Incorporated (Brantco Construction) v Lanca Contracting Limited***, 2024 ONCA 189, for the proposition that a breach of trust can bar equitable set-off, the breach of trust in that case occurred in the context of the parties' transactions. The funds received for completed work were improperly deposited into a general account: ***Ekum-Sekum Incorporated cob as Brantco Construction v Lanca Contracting Limited***, 2023 ONSC 7535 at paras 60-62. This factual matrix does not align with Tempo's argument that an alleged breach of trust occurring after the commercial dealings under the Subcontract should disentitle Man-Shield from equitable relief.

[53] Tempo also asserts that Man-Shield's conduct was contemptuous of this Court's order directing that the lien funds be repaid into court as security. However, no finding of contempt was before the chambers judge. The subsequent application for a finding of contempt was dismissed and the dismissal was not disturbed on appeal: *Contempt Decision*. In any event, we are satisfied that a genuine issue remains about the availability of equitable set-off. The "immediate and necessary relation" to the transaction underlying the equitable set-off would need to be considered at trial, including any substantive and temporal gap between the transaction and any alleged iniquitous conduct. Further, the inquiry might also consider other factors, such as the nature and gravity of any misconduct, and any hardship imposed on Man-Shield if disentitled to an equitable set-off defence.

[54] Finally, Tempo argues that equitable set-off should be unavailable because Man-Shield withheld payments under the Subcontract and therefore did not conduct itself with above-board commercial dealings. However, withholding payments, on its own, does not clearly establish iniquitous conduct by Man-Shield because the payments were arguably withheld as an exercise of Man-Shield's entitlement to set-off its damages claim against the payments owed to Tempo. Generally, a party is not disqualified from pursuing an equitable set-off by exercising its entitlement to that set-off: ***Feduk*** at para 62. Even if the withholding of payments occurred during the transaction, there are no findings by the chambers judge of fraud, misrepresentation, deceit, or otherwise iniquitous conduct that would support disqualification. This situation is distinguishable from the facts in ***Scott*** where the appellants were involved in a fraudulent scheme and the trial judge made findings about failures to perform basic due diligence.

[55] While the Supreme Court in ***Scott*** at paragraph 94 left the door open for new circumstances of iniquitous conduct that might disqualify a defendant from advancing an equitable set-off defence, we are not persuaded that the unclean conduct alleged by Tempo is sufficient to summarily disqualify Man-Shield from relying on that defence.

Disposition

[56] We conclude the chambers judge erred in finding that Man-Shield's defence of equitable set-off did not raise a genuine issue for trial.

[57] The appeal is allowed, partial summary judgment is set aside, and the claim and counterclaim are returned to the Court of King's Bench for trial.

Appeal heard on October 1, 2024

Memorandum filed at Edmonton, Alberta
this 19th day of September, 2025

Pentelechuk J.A.

Grosse J.A.

Feth J.A.

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Appearances:

J. Delgado
M. Harris
for the Respondents

K.S. Burron
for the Appellants

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