Court of King's Bench of Alberta

Citation: Davlyn Corporation Ltd v Latium Fleet Management Inc, 2026 ABKB 322

Date: 20260428
Docket: 2203 16352
Registry: Edmonton

Between:

Davlyn Corporation Ltd. Operating Under the Registered Trade Name Airways Truck Rentals, Leasing, Sales

Plaintiff/
Defendant by Counterclaim

- and -

Latium Fleet Management Inc.

Defendant/
Plaintiff by Counterclaim

Memorandum of Decision
of the
Honourable Justice E.C. Lew

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[1] The Defendant and Plaintiff by Counterclaim, Latium Fleet Management Inc., (**Latium**) appeals from a decision of the Applications Judge dated March 14, 2024 (**Summary Judgment Decision**) granting the Plaintiff, Davlyn Corporation Ltd., operating under the registered trade name Airways Truck Rentals, Leasing, Sales (**Airways**) summary judgment on its claim in debt for unpaid invoices in the total amount of $248,191.42.

[2] Airways also applied to dismiss Latium's counterclaim. The Applications Judge did not dismiss Latium's counterclaim.

[3] Latium's grounds of appeal as stated in its brief are as follows:

1) Latium's counterclaim and defence of set-off are inextricably linked to Airways' purported debt claim, making piecemeal litigation inappropriate.
2) The Applications Judge relied on authority that has since been overturned in concluding that Latium's counterclaim and set-off defence could proceed independently of Airways' claim.
3) Multiple material facts remain in dispute, giving rise to genuine issues requiring a trial, including:
    a) Latium never executed the alleged lease contracts and was never provided with the 36 purported contracts for each vehicle.
    b) Latium maintains that different terms governed the parties' rental arrangements based on their long-standing course of dealings;
    c) Airways unilaterally increased rental rates mid-lease without providing consideration, thereby artificially inflating the alleged debt; and
    d) Latium disputes any indebtedness as of the date Airways purported to terminate the leases for alleged late payment.

[4] Airways' position on this appeal is that the Applications Judge was correct in granting Airways judgment but erred by failing to dismiss Latium's counterclaim. Airways did not appeal from the Application Judge's failure to dismiss the counterclaim, but, at the hearing of this appeal, sought leave to apply and have Latium's counterclaim dismissed.

I. Background Facts

[5] Latium was and is in the business of leasing vehicles primarily to commercial customers for use in their customers' business. Airways was and is in the business of leasing vehicles to its customers. The primary difference in the business models between the parties is that Latium does not own the vehicles it leases to customers but Airways does.

[6] Latium had been leasing vehicles from Airways from time to time for almost 30 years, since 1997. Latium rarely leased more than a few vehicles at a time. In 2021, this pattern changed. In December 2020, Latium entered into a two year contract with its customer, Pacific Atlantic Pipeline Construction (**Pacific**), to supply vehicles for a pipeline project. Latium arranged to lease 36 vehicles from Airways between May 11, 2021 and March 3, 2022.

[7] There was no written supply contract between Latium and Airways for the supply of multiple leased vehicles to Latium. The nature and terms of any contract between Latium and Airways is the primary issue in dispute between the parties.

[8] On April 6, 2022, Airways provided a revised rate sheet to Latium which increased rental rates. A prior rate sheet had governed the parties' rentals since May 12, 2021. The April 6, 2022 rate sheet stated that it applied to new rentals effective immediately and to existing rentals effective May 1, 2022.

[9] On April 22, 2022, Airways gave notice to and issued a demand for payment to Latium on the basis that Latium was in arrears of amounts owing for rentals in the total amount of $118,273.27. Airways also demanded return of all vehicles rented by Latium by April 25, 2022.

[10] Latium did not pay the arrears amount in accordance with that demand nor did it return the vehicles as demanded. Latium did make payments towards the amount claimed as arrears by Airways over the next few weeks.

[11] On April 27, 2022, Airways gave notice of termination of the rental contracts relating to the vehicles rented and demanded the immediate return of them.

[12] Latium ultimately returned the rented vehicles over a period of time from April 27 to June 9, 2022. Airways issued invoices relating to the rental of the vehicles returned by Latium for the periods of time Latium (or their customers) had possession of Airways' leased vehicles.

[13] Latium counterclaims for breaches of the rental contracts with Airways. The breaches are described in Latium's brief as the improper, unilateral increase in rental rates mid-rental, alteration of payment terms from 60 days to 30 days without adequate notice, and termination of the rental contracts. Latium also claims for breach of a contract by Airways to lease a picker truck to Latium, which, Latium alleges, was agreed to in March 2022.

[14] Latium claims damages for these breaches including the unauthorized increased rental rates charged, the cost of retrieving the rental vehicles from its customers, lost profits from the premature return of those vehicles, lost profits from Airways' refusal to supply a picker truck to Latium and administrative costs of repairing relationships with Latium's customers resulting from the improper termination of the leases.

II. Standard of Review

[15] The parties agree that the standard of review on appeal from a decision of an Applications Judge to a Justice is correctness, unless fresh evidence is adduced on the appeal: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166, at para 30, ***Rayner v Mizier***, 2026 ABKB 160, at para 6.

III. Fresh Evidence

[16] Latium argued that fresh evidence was adduced on this appeal and that the standard of review was not correctness but was a *de novo* appeal, effectively a re-hearing. Airways disputed the fact that any evidence was new or fresh on this appeal.

[17] Latium pointed to three items of evidence for the proposition that they were new or fresh and therefore not available to the Applications Judge, as follows:

a) Answers to Undertakings of Bart Dornan, filed.

b) Further Answers to Undertakings of Christopher Shaw, filed February 14, 2024.

c) The Transcript of Proceedings before the Applications Judge.

d) The March 14, 2024, Birkett Order.

[18] Airways argued that the Answers to Undertakings of Bart Dornan, though unfiled at the time of the hearing before the Applications Judge, pre-dated the Application Judge hearing and were available for reference at that hearing. Similarly, the Further Answers to Undertakings of Christopher Shaw were filed prior to the hearing and were similarly available for that hearing. The transcript of the hearing itself does not meet the test of new evidence, nor does the Order arising from the hearing appealed from.

[19] I agree with Airways' position. The answers to undertakings were available at the hearing before the Applications Judge and do not constituted new evidence. The transcript of that hearing and order arising are not evidence.

[20] The test for this appeal is therefore correctness.

IV. *Tempo KB* Overturned

[21] Latium took issue with the Application Judge's reliance on the case of ***Tempo Alberta Electrical Contractors Co Ltd v Man-Shield Construction Inc***, 2023 ABKB 444 [***Tempo KB***] a Court of King's Bench decision. In that decision, the Court granted summary judgment in the face of a counterclaim for set-off. Latium characterizes ***Tempo KB*** as standing for the proposition that the existence of a defence of set-off does not preclude judgment on a claim. ***Tempo KB*** was overturned on appeal, subsequent to the Application Judge's decision in this matter: ***Tempo Alberta Electrical Contractors Co Ltd. v Man-shield (Alta) Construction Inc***, 2025 ABCA 310 [***Tempo CA***]. As such, Latium argued, the Applications Judge erred in law by allowing judgment on the claim in the face of the counterclaim for set-off.

V. The Contract or Contracts between the Parties

[22] Latium's counterclaim is in the nature of breach.

[23] Latium's pleadings describe the contract or contracts between Latium and Airways as follows:

> 1) Since approximately 1997, Airways has been a vehicle rental supplier for Latium on an as needed basis. Airways and Latium did not sign rental contracts for each vehicle rented to Latium by Airways. (Latium Defence, par. 2)
>
> 2) Since approximately 2020, Airways and Latium agreed that Latium would pay invoices issued by Airways within 60 days of receipt of the invoice. (Latium Defence, par. 3)
>
> 3) On or about April 6, 2022, Airways advised Latium that it would be immediately increasing Latium's vehicle rental rates and amending its payment terms on all existing and future rentals, as follows:
>
> a) increasing monthly rental rates by over 25%;
>
> b) increasing excess kilometre rates by 35 to 50%;
>
> c) requiring Latium to pay Airways' invoices within 30 days of receipt of the invoice; and

d) such further and other amendments as may be proven at the trial of this action (Latium Defence, par. 7)

4) Airways further advised Latium that if it did not agree to Airways' revised terms, it would require the immediate return of all vehicles that it had rented to Latium. (Latium Defence, par. 8)

5) Latium refused to accept Airways' unilateral amendment to its vehicle rental rates and payment terms. (Latium Defence, par. 9)

[24] Latium's evidence echoes this description of the contract or contracts in its pleadings. Both Latium's pleadings and its evidence fail to provide particulars of the nature (ie. written vs verbal), terms and relevant details of the contract or contracts it alleges governed its rentals with Airways and that it alleges were breached.

[25] In contrast, Airways has provided those particulars and that evidence.

[26] Airways' evidence was that it provided its standard form of contract, which is a 2 page document, with each car rental. The contract was provided by leaving a copy in the glove box of the vehicle and was emailed to Latium.

[27] Latium contests receipt of emails of the standard form of contract prior to entering into a lease for each vehicle. Latium takes issue with Airways' evidence of acceptance of the standard form terms. Airways' evidence shows that emails were sent *after* Latium took possession of each vehicle, not *before* and that those emails only sent the first page of the standard form. Latium also contests receipt of each printed copy of the standard form lease contract in the glove box. Alternatively, even if received, the documents were received after possession of each vehicle, not before.

[28] Latium's position is that the terms of its contract or contracts with Airways is contested. There is conflicting evidence and positions as to what constitutes the contracts and therefore what the terms of any such contract are. As such, summary judgment is not appropriate. A trial is necessary to adjudicate the conflicting positions and evidence.

[29] Latium's brief summarizes the contested contract issue as follows:

> [75] The Applications Judge erred in granting summary judgment in the face of materially conflicting evidence that left the terms of the lease agreements unresolved.
>
> [76] Latium respectfully submits where the terms of a contract are in dispute, this resolution requires oral evidence and a trial to determine the true agreement between the parties after conducting a credibility assessment. The current record presents two conflicting positions, which cannot be resolved summarily.

[30] Airways' debt claim arises from unpaid invoices. The invoices relate to usage charges for the rental vehicles and for repairs to those vehicles for damage caused or incurred while rented by Latium. Latium does not dispute the repair charges. Latium accepts that it is a term of its contracts with Airways that it is responsible for damage to the vehicles. Neither does Latium dispute that it must pay for vehicle rental or usage for the time it (or its customers) had possession of the vehicles. The dispute relates only to the following issues:

1) The increase in rental rate charged. Latium disputes Airways entitlement to increase that rental rate "mid-rental".

2) Premature termination of the rental contract or contracts.

3) Altering the payment terms from 60 days to 30 days without notice or adequate notice.

[31] Latium claims damages for those breaches of the contract or contracts and seeks set-off for those damages against the debt claim.

[32] The problem with Latium's position is that both the defences to the debt claim, and the set-off for the counterclaim, arise from the very same breaches of the contracts between the parties.

[33] Latium, however, is unable to articulate the terms of that contract or those contracts. Latium's position is that these terms are contested and represent a triable issue, necessitating a trial. The difficulty with that position is that Latium is asking the Court to accept that it may have defences and a counterclaim for breaches of contracts which it cannot define. This is not a question of whether or not Latium can prove the contract or contracts, or a specific term or terms of that contract or contracts. Latium's position is essentially that it does not know what the terms of the contract or contracts are, and that a trial is required to make that determination.

[34] There is a difference between being unable to prove the terms of a contract at a chambers hearing as compared to being unable to describe and particularize what those terms or contracts are. The former may require a trial. The latter is a failure to convince this court that Latium's defence and counterclaim have merit.

VI. What Is the Dispute About the Contracts

[35] Airways has produced a form of contract which includes standard form terms. Airways' position is that this standard form of contract governed the parties' relationship and contract for each vehicle rental.

[36] The front page of the standard form is a pre-printed form with space to fill in the contract specifics. For example, it has a place to fill in the "Returned Due Date". The pre-printed form has large type in red font which states "VEHICLE PRESUMED STOLEN IF NOT RETURNED BY DUE DATE". It has space to fill in "KMS IN", "KMS OUT", "DATE AND TIME IN", DATE & TIME OUT" as well as rates per day, per week and per month. It has space to fill in mileage, charges and damage values.

[37] The second page is all standard form printed terms. Following are some of those printed terms:

> **1. Condition of Vehicle and Date of Return**
>
> The Renter acknowledges that the vehicle is the property of Airways and is received by the Renter in good condition, mechanical and otherwise. The Renter shall return the vehicle together with all tires, tools, accessories and equipment of the vehicle, to Airways on or before the Due Date at the place designated on the front of this rental agreement, in the same condition as when received, ordinary wear and tear excepted. The Due Date indicated on the front of this rental

> agreement shall be in no event more than 30 days from the date the vehicle was rented, and any provision written on this rental agreement indicating a longer duration of rental shall be void.
>
> **2. Early Termination and Repossession**
>
> Airways may terminate this rental agreement and demand the return of the vehicles at any time before the Due Date by giving notice in writing to the Renter at the Renter's address shown on the front of this rental agreement…If the Renter fails to deliver up the vehicle within 24 hours of Airways providing notice to do so, Airways may repossess the vehicle at any time or place.

[38] The standard form terms also include a clause defining circumstances representing breach of the contract, entitlement to terminate the contract for breach, and an entire contract clause.

[39] Latium disputes accepting these standard form terms. It disputes receipt of those terms. It alleges that, to the extent that these standard forms were provided, only the first page was provided, not the second page.

[40] Latium received a copy of both pages of the standard form by email on March 22, 2021. The standard form was sent in response to an email from Christopher Shaw, Latium's affiant and its operations manager, dated March 22, 2021 in which he stated the reasons for his request as follows:

> Hi Gary,
>
> Just putting this bid together for these 10 trucks.
>
> F550s and half tons.
>
> Can you send me a copy of your certificate of insurance as well as a blank sample copy of your rental contract with terms? [emphasis added]

[41] In response, Mr. Shaw received a blank standard form from Airways with both the front and back pages. This exchange occurred after Latium entered its contract with Pacific and a little less than 2 months prior to Latium beginning to rent the 36 vehicles.

[42] Christopher Shaw, Latium's affiant, swore an affidavit in response to the Summary Judgment application by Airways. His affidavit does not provide any more information or detail as to the nature or terms of its contracts with Airways than what is in Latium's Statement of Defence. He does not swear that the terms of the contract were different from the standard form and, if so, what those terms were. He did not describe verbal discussions in which contractual terms were discussed. The only exception was his evidence that payment terms was 60 days. His evidence on this point is as follows:

> Since approximately 2020, Airways and Latium agreed that Latium would pay invoices issued by Airways within 60 days of receipt of the invoice.

[43] As discussed further below, whether or not this was the agreement on payment terms does not materially impact the analysis. This evidence is highlighted to illustrate the lack of particulars or details of the contract Latium alleges governed.

VII. Summary Judgment Test

[44] Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims: ***Hryniak v Mauldin***, 2014 SCC 7, at para 5. In ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,*** 2019 ABCA 49 [***Weir-Jones***] the Alberta Court of Appeal summarized the key considerations on a summary judgment application as follows (par. 47):

a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

VIII. Summary Judgment Test: Analysis

[45] Airways asserts that the terms of the rental contracts are defined in the standard form. Those terms include the following relevant provisions:

1) Airways may terminate the rental contract at any time on 24 hours' notice;

2) Each rental contract had a rental due date which was no longer than 30 days from the rental start date.

[46] Latium denies that the standard form contract was accepted by it and disputes that these terms were agreed to. In response, Latium alleges that Airways breached the terms of its contract with Latium by:

a) Unilaterally increasing the rental rates without providing any consideration,

b) Unilaterally shortening the payment cycles for invoices without consideration,

c) Improperly terminating the lease contracts,

d) Requiring the immediate return of all vehicles,

e) Refusing to proceed with the agreed-upon Picker Truck rental as retaliation for Latium's refusal to accept the new terms; and

f) Acting in bad faith in relation to the performance of its contractual obligations.

[47] The step Latium is missing is particularizing and proving the terms of the contract which it alleges were breached. If Latium is unable to provide evidence of the terms of the contracts, then it ought to provide an explanation why it cannot provide that evidence or particulars.

[48] Latium cannot maintain that there is a contract different from that proposed by Airways without particularizing that contract. One cannot agree to a contract if one does not know the terms.

[49] Latium relies on the summary judgment principle that Airways bears the onus of proving that there is no defence to its claim. Latium argues that Airways has failed to prove that there is no merit to Latium's counterclaim and that, therefore, the counterclaim should be set off against Airways' claim.

[50] Airways has satisfied the burden to show there is no defence to its claim. It has asserted contractual terms which support its claim. As stated in ***Weir-Jones***, once Airways satisfies its burden, the burden shifts to Latium to show there is a triable issue. To do so, Latium must put its best foot forward. It cannot resist summary judgment on the basis that evidence may surface at trial which supports its defence: ***Honourable Patrick Burns Estate Memorial Trust v P Burns Resources Limited***, 2015 ABQB 378, par. 13, ***Weir-Jones***, par. 37. The party asserting a fact or proposition denied by the other bears the burden of proving that fact or proposition: ***Braile v Calgary (Police Service)***, 2018 ABCA 109 at par. 23.

[51] Latium has not explained why it cannot prove the terms of its contracts with Airways which, it alleges, were breached and on which its defence and counterclaim rests. Only one contract can govern any car rental between the parties.

[52] By contrast, Airways has proven the terms of its contract were accepted by Latium. The email from Latium's affiant, Mr. Shaw, to Airways requesting its standard form terms, and the response providing the form of contract on which Airways relies, compels the conclusion that Latium was aware of Airways standard terms. Latium's subsequent conduct in entering into rental arrangements for 36 vehicles within a short time evidences its acceptance of those terms.

[53] I accept Airways' argument that conduct can support acceptance of contractual terms: ***Beller Carreau Lucyshyn Inc. v. Cenalta Oilwell Servicing Ltd.***, 1999 ABCA 122 at paras. 27 – 30. Latium's conduct supports acceptance of Airways' standard form contractual terms. Latium has provided no evidence to contradict or undermine this conclusion.

[54] Airways' standard terms are a complete response to Latium's breach arguments. If Airways is in a position to terminate each rental contract on 24 hours' notice, then there is no contractual basis to oppose Airways' notice to Latium to increase rental pricing, termination of the rental contracts and the demand for return of the rental vehicles. None of those are breaches. Whether or not the payment terms were verbally agreed to be 60 days, 30 days or something in between does not alter Airways' entitlement to terminate. The termination clause is not conditional on payment breach or any breach by Latium.

[55] Regarding the picker truck, the evidence does not show that the parties entered into a binding contract for Airways to supply the picker truck. Airways sent a rental contract to Latium to sign. There was no evidence that contract was signed and returned.

[56] Even if the evidence did establish a binding contract to supply the picker truck, the termination clause could have been invoked and would have resulted in termination of the picker truck rental contract without any claim for damages arising. Latium has failed to prove that there were different terms that were to govern the picker truck rental.

[57] If this matter were to proceed to trial, Latium has failed to articulate how it intends to prove the terms of its contracts with Airways and what those terms will be. It has failed to put its best foot forward.

[58] Airways is entitled to summary judgment for its debt. The appeal of the Summary Judgment Decision is dismissed.

IX. Latium's Counterclaim

[59] Airways argued at the hearing of this appeal that the court has jurisdiction to dismiss Latium's counterclaim. Airways applied to dismiss Latium's counterclaim before the Applications Judge. The Applications Judge did not dismiss the counterclaim, finding that there was or were triable issues in relation to it.

[60] It is not necessary to consider whether or not the Applications Judge erred by reliance on the ***Tempo KB*** decision. I find that the Applications Judge did not err by granting summary judgment to Airways. I find, however, that the Applications Judge did err by failing to grant summary judgment dismissing the counterclaim and disposing of both the claim and counterclaim simultaneously. I find that her decision to allow the counterclaim to continue was not correct. I will address the procedural consequences of this finding below.

[61] Latium appealed from the Application Judge's Summary Judgment Decision but Airways did not appeal from the Application Judge's order not to dismiss the counterclaim.

[62] Airways relied on ***Pyrrha Design Inc v Plum and Posey Inc***, 2016 ABCA 12 [***Pyrrha Design***] in support of its argument that the Court has inherent jurisdiction to dismiss the counterclaim despite Airways having failed to file a formal application seeking that relief.

[63] In ***Pyrrha Design***, the Alberta Court of Appeal considered whether a Justice in chambers had the jurisdiction to dismiss an action summarily upon hearing an application by the plaintiff in the action seeking summary judgment of its claim. A majority of the Court of Appeal held that the chambers justice had such authority and discretion: paras. 8 – 12. The majority relied on the court's inherent jurisdiction to control its process, s 8 of the *Judicature Act*, RSA 2000, c J-2, and *Rule* 1.3 of the *Alberta Rules of Court*, Alta Reg 124/2010.

[64] The dissenting Justice in ***Pyrrha Design*** expressed concern that to grant relief without a formal request was a breach of procedural fairness to the plaintiff whose claim had been dismissed.

[65] The majority was alive to the procedural fairness issue which it addressed in its reasons: ***Pyrrha Design***, para. 12 – 14. The Alberta Court of Appeal cited ***Pyrrha Design*** with approval in its recent decision ***Debut Developments Incorporated v Redcliff (Town)***, 2025 ABCA 223 at par. 18.

[66] I agree with Airways' submissions that this Court has the jurisdiction to award dismissal of the counterclaim in this matter and I hereby dismiss Latium's counterclaim.

[67] The record in this matter shows that the claim and counterclaim are factually interconnected. Latium resists this appeal on the basis that the claim and counterclaim are sufficiently connected (Latium's words: intrinsically connected, Latium's brief, par. 53) such that the counterclaim raises the defence of set-off to the claim. Latium's counterclaim is founded on a claim for breach of the contracts by Airways. I have found that Latium has failed to particularize the terms of the contracts it alleges were breached and that it cannot prove those breaches. Those findings dispose of the counterclaim in its entirety.

[68] Latium's position at the hearing of this matter was that it was taken by surprise at Airways' request to dismiss its counterclaim. Procedurally that may be true, substantively it is not true.

[69] Airways applied for summary dismissal of Latium's counterclaim at the hearing before the Applications Judge. Latium was therefore put on notice prior to the hearing before the Applications Judge that Airways sought this remedy. Latium was obliged to put its best foot forward in support of its counterclaim before the Applications Judge.

[70] I am unable to see what step Latium could have taken, but did not take, on the basis that Airways failed to formalize an appeal from the Application Judge's failure to dismiss the counterclaim. Any evidence or legal argument that it ought to have put before the court to defend against an application for such dismissal ought to have been before the Applications Judge. Any evidence not already tendered before the Applications Judge in support of its appeal from the Applications Judge should have been tendered at the hearing of this application.

[71] The counterclaim is governed by all of the same facts, evidence and legal principles as Latium's defence to the claim.

[72] If I fail to dismiss the counterclaim, Airways will be obliged to issue an application to do so. The basis for such an application would be the factual findings in these reasons. Latium would have no substantive defence to such an application. It would be a formality. Proceeding in two steps instead of one step (i.e. dismissal now) would give Latium no additional procedural protection. It would just result in additional cost and delay.

Heard on the 9th day of April, 2026.
Dated at the City of Edmonton, Alberta this 28th day of April, 2026.

E.C. Lew
J.C.K.B.A.

Appearances:

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