IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rotor Maxx Support Limited v. Air Palace Co., Ltd.,*
2023 BCSC 170

Date: 20230206
Docket: S183230
Registry: Vancouver

Between:

Rotor Maxx Support Limited

Plaintiff

And

Air Palace Co., Ltd.

Defendant

Corrected Judgment: The text of the judgment was corrected on the front page and paragraphs 7, 11, 28, 45, 46, 91, 93 and 99 on March 10, 2023.

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:	W.S. Taylor D. Field
Counsel for Defendant:	S. J. Bae
Place and Date of Trial:	Vancouver, B.C. August 15-17, 2022
Place and Date of Judgment:	Vancouver, B.C. February 6, 2023

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I. INTRODUCTION

[1] The plaintiff Rotor Maxx Support Limited ("RMS") brings an application pursuant to R. 9-5 to have certain parts of the response to civil claim struck out on the basis that the offending parts are *res judicata*.

[2] The defendant Air Palace Co., Ltd. ("AP") seeks leave to amend its response to civil claim and to file a counterclaim.

II. BACKGROUND FACTS

[3] RMS is a company which disassembles, maintains, and repairs, parts for aircrafts, as well as aircraft overhaul maintenance. AP is a Korean company which operates a commercial aircraft business in South Korea.

[4] In March 2015, RMS removed an engine on a helicopter owned by AP and transferred it to B.C. to be overhauled. In October 2015, the engine was returned to AP in Korea. There was a fuel leak incident, which AP says happened because of failures in the fuel control unit, the fuel divider and the bleed valve.

[5] RMS repaired the bleed valve which was damaged in the fuel leak incident. The other two components were repaired by a third party.

[6] On September 23, 2016, employees of RMS installed the repaired fuel control unit, fuel divider and bleed valve into the engine in Korea. The engine was then installed in the helicopter by employees of AP. The helicopter was taken out for a test flight, and there was an over-temperature event (a "Hot Start Event") which damaged the engine.

[7] The damaged helicopter engine was shipped to B.C. for assessment. RMS alleges the parties agreed that RMS would perform the required repairs. However, AP denies such an agreement. RMS leased a rental helicopter engine to AP while the repairs were being made.

[8] In 2017, AP commenced an action in Korea alleging that RMS caused the Hot Start Event, alleging breach of contract and negligence in the supply, maintenance, and installation of various parts including the three fuel parts.

[9] RMS brought an application to have AP's claim heard in B.C., not Korea. AP defended and maintained it should be heard in Korea. AP was successful on the motion, and the claim was maintained in the Korean courts.

[10] AP lost its claim at trial. AP appealed the trial decision, and lost its appeal. AP has appealed to a further court in Korea.

[11] In 2018, RMS commenced this claim in B.C. for breach of the 2016 repair contract and breach of the 2016 rental contract. RMS alleges that AP has not paid for the engine repairs, and has not paid any rental fees for, or returned, the rental helicopter engine.

[12] In this B.C. action, AP has pleaded the negligence of RMS in the repair and installation of the fuel parts as a defence to the breach of contract claims.

[13] RMS applies to strike the negligence claims pleaded by AP, as being *res judicata*, or an abuse of process.

[14] AP applies to amend its response to plead, as a set off to RMS's claims, breach of contract, breach of fiduciary duty, conversion and detinue, and breach of implied duty of good faith in relation to matters arising in 2015 and earlier, going back as far back as 2010. In addition, AP seeks to file a counterclaim against RMS for breach of contract, conversion and detinue, unjust enrichment, breach of fiduciary duty, and punitive damages, which claims rely on the facts pleaded in the proposed response to civil claim and date back to 2010.

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III. ISSUES

[15] These applications raise a number of interlocking issues. The issues may be summarized as:

a) Is AP barred from raising as defences in the B.C. proceeding, claims which were tried and dismissed in the Korean proceeding?

b) Can AP raise issues with RMS's work in 2010 and 2011 as an equitable set off against the claims of RMS in this litigation?

c) Do the proposed amendments to the response to civil claim disclose a reasonable defence in relation to the claims of breach of fiduciary duty?

d) Do the proposed amendments to the response to civil claim disclose a reasonable defence in relation to any remaining issues?

e) Should AP be permitted to file the proposed counterclaim?

A. Is AP barred from raising as defences in the B.C. proceeding, claims which were tried and dismissed in the Korean proceeding?

[16] RMS applies pursuant to R. 9-5(1)(b) and (d) to strike aspects of the defence filed by AP. It is well established that an application to dismiss a claim as *res judicata* can be made under R. 9-5 and that affidavit evidence is admissible to establish an allegation that a matter is *res judicata*: *Boyd v. Cook,* 2016 BCCA 424 at para. 16. Rule 9-5(1)(b) addresses claims which are unnecessary, scandalous, frivolous or vexatious. Rule 9-5(1)(d) addresses claims which are an abuse of process. An attempt to relitigate issues which have already been decided is an abuse of process: *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 at para. 37.

[17] In response to the application by AP to amend its response to civil claim, and to file a counterclaim, RMS argues that the proposed amendments and counterclaim are also barred by virtue of the application of *res judicata*. The same principles which apply in the application to strike pursuant to R. 9-5(1)(b) and (d), apply in

considering whether the proposed amendments and counterclaim are scandalous, frivolous, vexatious or an abuse of process: *Navarro v. Doig River First Nation*, 2016 BSCS 2006 at para. 62.

[18] RMS advances the principles of *res judicata*, which includes both issue estoppel and cause of action estoppel, in seeking to strike the response of AP and to oppose the amendments sought be AP. These principles are available to the court in controlling its process, and preventing parties from re-litigating issues which have been previously decided: *Ellis v. Denman Island Local Trust Committee*, 2020 BCSC 935 at para. 10.

[19] In *Ellis*, the court summarized the principles of both issue estoppel and cause of action estoppel. I adopt this summary in its entirety:

> [12] Cause of action estoppel and issue estoppel are two distinct branches of the doctrine of *res judicata*. Both forms of estoppel are reflective of several important public interests, namely finality and protection of the interests of justice. The potential tension between these interests was discussed in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 [*Danyluk*], one of the leading cases on issue estoppel. With respect to finality, Binnie J. explained that "[a]n issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner". Thus finality is a "compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal". However, it is also necessary to consider whether a strict application of estoppel rules would "bar the courthouse door" in a manner that would be contrary to the interests of justice: *Danyluk* at para. 18-19.
>
> [13] What I take from these comments is that an unduly rigid application of estoppel rules in a particular case could cause the court to sacrifice the interests of justice on the altar of finality. For this reason, "[t]he rules governing estoppel should not be mechanically applied": *Danyluk* at para. 33. The necessary degree of flexibility is attained by a two-stage analysis. At the first stage, the court must determine whether the legal requirements of estoppel have been established. At the second stage, the court must consider whether to exercise its discretion to relieve against the effects of estoppel: *Danyluk* at para. 33.
>
> [14] The preconditions for a successful plea of cause of action estoppel are that: (i) there was a final decision of a court of competent jurisdiction in the prior proceeding, (ii) the parties to the prior proceeding were the same parties or in privity with the parties to the subsequent proceeding, (iii) the cause of action in the prior proceeding was not "separate and distinct" from the subsequent proceeding, and (iv) the basis for the cause of action in the subsequent proceeding was argued or could with reasonable diligence have been argued in the prior proceeding. In this analysis, the concept of a "cause

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> of action" connotes "a factual situation that entitles one person to obtain a remedy against another person": *Stoneman v. DILTC,* 2013 BCCA 517, at para. 69, 71. At the first stage of the analysis, the burden is on the party advancing the plea of cause of action estoppel to establish that these legal pre-conditions are met.
>
> [15] The preconditions for a successful plea of issue estoppel are that: (i) the prior proceeding decided the same issue that is raised in the subsequent proceeding, (ii) there was a final determination of the issue in the prior proceeding, and (iii) the prior proceeding involved the same parties or parties in privity with those involved in the subsequent proceeding: *Danyluk* at para. 25. Once again, at the first stage of the analysis the burden is on the party advancing the plea of issue estoppel to establish that these legal pre-conditions are met.

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[20] Both issue estoppel and cause of action estoppel have application on the issues before me, as will be discussed in more detail below.

[21] In addition to the factors relevant to the application of the principles of *res judicata* set out above, because the judgment in question was issued by a foreign court, for that judgment to be recognized and enforced, the following conditions must be met, "the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce": *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52 at para. 31.

[22] In the Korean proceeding, AP raised issues with respect to the helicopter engine, going back to the 2010 agreement by RMS to maintain and repair the helicopter, and continuing through the 2015 repairs and the 2016 Hot Start Event.

[23] The legal issues raised in the Korean proceeding are:

a) was RMS's negligence the cause of the Hot Start Event and damage to the engine;

b) did RMS breach the maintenance agreement entered into in 2010;

c) was RMS liable to pay damages suffered by AP as a result of RMS's negligence, including the cost of engine rental during the repair period following the Hot Start Event;

d) was AP obliged to pay for the repairs to the engine RMS undertook following the Hot Start Event.

[24] RMS defended against AP's action in Korean.

[25] On August 30, 2019, the Seoul Central District Court dismissed AP's action, and awarded costs to RMS.

[26] The District Court found that, while RMS employees installed the fuel components in the engine, it was AP's employees who installed the engine in the helicopter. The Court stated:

> … The plaintiff's engineers connected the helicopter airframe of this case and the emergency throttle support when reassembling the engine of this case back into the helicopter airframe of this case. During the connecting work, they did not perform any readjustment or fitting work. The emergency throttle rack takes the role of opening and closing the emergency fuel valve. Then the emergency fuel valve was left open because of the failure of performing the readjustment or the fitting work with the emergency throttle rack.

[27] The District Court determined that AP had not established that RMS's engineers "committed negligence or conducted poor performance such as failing to perform readjusting or fixing the emergency throttle rack while replacing the temporary fuel control unit of this case with the fuel control unit of this case". Further, the District Court found that it was AP's engineer who failed to secure the emergency throttle rack when installing the engine in the helicopter, and this failure was the cause of the Hot Start Event and loss to AP.

[28] The District Court finally concluded that the repair costs to the engine for work performed by RMS after the Hot Start Event and the rental fees for the helicopter engine AP leased from RMS were to be determined in the action commenced by RMS in B.C., i.e., the action before me.

[29] On September 10, 2019, AP filed a notice of appeal of the District Court's decision. That appeal was heard and dismissed. AP has since filed its final appeal to the Korean Supreme Court.

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[30] In September 2020, AP challenged this B.C. action on jurisdictional grounds. AP's jurisdictional challenge application was heard on September 8, 2020. The B.C. Supreme Court (indexed as *Rotor Maxx Support Limited v. Air Palace Co. Ltd.*, 2020 BCSC 1321) held:

> [57] AP also submits that both the Repair Agreement and the Rental Agreement are contingent upon the events giving rise to the negligence claim; that the negligence claim is the primary dispute and both the Repair Agreement and the Rental Agreement are ancillary. It notes the evidence from its deponents that the understanding of the parties was that whoever was found to be responsible for the damage, would pay for the repair and rental.
>
> [58] In my view, the fact that the incident that gave rise to the negligence action was the reason that the engine needed to be repaired, and a substitute engine rented during the interim, does not mean that the negligence action and the contracts claims are indivisible in a legal sense. I note that the Korean court did not believe that was the case as it found that the actions could proceed in parallel in different jurisdictions. I note further that in the present action, RMS is not attempting to retry the negligence claim.
>
> …
>
> [93] RMS submits that there are no parallel proceedings. The contract claims that are at issue in the present action are distinct legally and factually from the negligence action. At present the negligence action stands as dismissed. However, if AP does succeed on appeal, the judgment can be registered as a set off in the contract action. There is no need to retry the issues in the negligence action in British Columbia. There is therefore no potential for conflicting decisions.
>
> [94] RMS notes that the Korean court addressed the issue of forum in its decision in the negligence action. In that action, RMS sought to have the Korean court decline jurisdiction on the basis of, *inter alia*, the current litigation in British Columbia. The Korean court held that:
>
> > … the causes of action are different between the lawsuit of this case seeking a remedy of compensation and the Canadian lawsuit of this case seeking a remedy of the repair costs and the rental payment. Thus, suitability, promptness and effectiveness of the lawsuit won't be impeded even though the lawsuit of this case proceeds in the court of The Republic of Korea and the Canadian lawsuit of this case proceeds in the Canadian court respectively; …
>
> [95] RMS notes that, in the alternative, if the court concludes that there are parallel proceedings, this is but one factor to be considered with all of the others, citing *Teck Cominco* at para. 31; *Ruloff Capital* at paras. 56; *Breeden v. Black*, 2012 SCC 19 at paras. 26-27.
>
> [96] I agree with RMS that there are no parallel proceedings. The Korean court has not assumed jurisdiction with respect to the claims advanced in the present litigation. The negligence action involves distinct facts and causes of

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> action. There are no proceedings in another jurisdiction dealing with the matters raised in the present action. As noted above, I also agree that there will be no need to retry the issues in the negligence action in this court. If AP succeeds on appeal, it can deal with its judgment as a matter of set off.

[31] RMS submits that all issues relating to its work in 2015 and 2016 are *res judicata* and cannot be raised as defences to the contractual claims in the B.C. action.

[32] AP argues it is entitled to raise its proposed defences in B.C. for the following reasons:

a) not all of the issues it seeks to raise in defence were before the court in Korea;

b) the trial process in Korea is not as extensive as in B.C., and AP was not able to call expert evidence, have discoveries, or obtain document production; and

c) Article 498 of the [Korean process] applies such that the decisions of the Korean District courts are not final and can be varied or sent back by an appellate court.

1. Is the Korean court a court of competent jurisdiction?

[33] In the preliminary application in this matter, indexed as *Rotor Maxx Support Limited v. Air Palace Co. Ltd.*, 2020 BCSC 1321, this court has already recognized the Korean court as a court of competent jurisdiction to determine the issues of negligence and damages relating to the Hot Start Event. These issues are clearly of a nature which principles of comity require the B.C. courts to enforce. I am satisfied that the Korean judgment may be properly considered on the issue of *res judicata*.

2. Is the Korean trial process inadequate to the extent that it would be unfair to preclude AP from raising the issues decided by the Korean court in AP's defence in B.C.?

[34] On this issue, AP's arguments must fail. AP commenced the action in Korea and, in so doing, accepted that forum as adequate to dispose of the issues raised. If

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AP believed that the Korean process was inadequate or unfair, it could have brought its action in B.C. Instead, it chose the forum it did, and cannot now argue that the forum of its own choosing is inadequate. Further, AP brought an application in this proceeding arguing that liability with respect to the contract claims advanced was inextricably linked to liability in the negligence action commenced by AP in Korea, and asked this court to decline jurisdiction. While AP was unsuccessful in its jurisdictional challenge, nevertheless it cannot now argue the inconsistent position before me, namely that the Korean action was inadequate, and could not fairly dispose of the issues raised by AP.

3. Is the Korean judgment final?

[35] AP argues that the Korean decision is not final because it is still under appeal. AP relies on opinions of solicitors from Korea concerning the appeals process in Korea, and how it impacts the finality of the Korean judgment.

[36] For the purposes of the application of *res judicata* in the B.C. courts, the fundamental issue is whether the Korean court that granted judgment has jurisdiction or a residual power to vary or retry the issues that it has decided. In other words, is the Korean decision final as that term is defined in Canadian law? If the judgment cannot be revisited by the court that issued the judgment, it is final: *Cao v. Chen*, 2020 BCSC 735 at para. 144.

[37] Experts retained by AP provided evidence regarding the different levels of appeal in Korea, and what jurisdiction each level of appeal has vis-à-vis the lower court decision. However, I agree with RMS that this does not answer the fundamental question before me. Ms. Han, a solicitor retained by RMS to provide expert evidence, did address the fundamental question as to whether the court which issued the judgment in Korea could revisit its judgment. The answer to that question is “no”.

[38] Ms. Han stated:

> The six High Courts have appellate jurisdiction over cases decided by a trial panel of three judges in a District Court. If there is an appeal, the High Court

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> conducts the proceeding *de novo* and both parties may present new arguments and submit new evidence. At the High Court, a plaintiff may alter the causes of actions or counts of the claim set out in the initial complaint, but only within the extent that the basis of such claim (i.e., the factual ground) is not altered. In other words, the plaintiff appellant cannot add any new causes of action based on facts which have not already been pleaded in the initial complaint. Otherwise, on appeal, the proceeding is still bound by the initial complaint filed in the court below and the High Court considers the same claims and issues as the court below. All claims decided in the court of first instance that are no longer in issue in the modified complaint cannot be pursued by the plaintiff in another lawsuit, absent changed circumstances. The District Court would still have no ability to vary its own judgment with respect to these claims which are not being appealed.

[39] The Seoul Central District Court, which dismissed AP's action, has no power to review, recall or vary its judgment. Similarly, the Appellate Court (the High Court), which dismissed AP's appeal, has no power to review, recall or vary its decision.

[40] The Korean judgment of the Seoul Central District Court is a final decision. It has been appealed, and the appeal was dismissed. A trial decision is final, whether or not it can be appealed: *Litecubes v. Northern Lights Products*, 2007 BCSC 1545 at para. 12.

[41] The Korean court is a court of competent jurisdiction to determine the issues of negligence and breach of contract raised by AP in that litigation. Its jurisdiction to determine the issues has been decided by both the Korean court and the B.C. Supreme Court. As such, I find the principles of *res judicata* and issue estoppel may be applied in this application to bar AP from raising the issues determined by the Korean court: *Corlett v. Hoelker*, 2012 BCCA 355 at paras. 34-37.

4. Did the Korean court dispose of all the issues AP seeks to raise in its defence in the B.C. proceeding?

[42] The Korean claim sets out the following:

a) AP purchased the helicopter in 2010.

b) In 2015, AP retained RMS to perform regular checking and overhaul for the helicopter engine. This arrangement included travel to Korea by RMS technicians, and the transfer of the engine to Canada to be overhauled.

AP describes how the engine was mounted on the air frame on October 20, 2015.

c) AP alleged that because of the poor overhaul work of RMS, there was an "exceed fuel leak" accident after the helicopter had been in operation for 1.5 hours. AP alleges the failure of three components: the fuel control unit, the starting bleed valve, and the fuel divider.

d) AP alleged that RMS removed the engine components, and sent the components to Canada to be repaired. Once the repair was completed, two RMS mechanics came to Korea to remount the components in the engine.

e) AP alleged that two mechanics from RMS came to Korea and replaced and installed the repaired components to the engine between September 21, 2016 and September 23, 2016.

f) AP alleged that when the engine was started, after the work done by the RMS mechanics had been completed, the engine was damaged due to a "hot start" (or abnormal overheating) of the engine.

g) AP alleged that RMS was negligent in performing its maintenance, repair and installation work which caused the hot start and damage to the engine.

h) AP alleged the negligence of RMS occurred in March 2015, October 2015 and September 2016. AP further alleged that RMS was exclusively responsible for the helicopter's maintenance since June 2010, when the helicopter was purchased.

i) AP alleged breaches of the maintenance agreement which had been in effect since 2010.

j) AP claimed compensation for the costs of repairing the engine after the Hot Start Event, and for the costs of renting a replacement engine.

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k) In its claim for compensation, AP claimed the following in breach of contract:

> Namely, as this case is the matter that the immense damage was occurred from the incomplete performance (Positive receivables violation) due to violation of a series of obligations of the maintenance agreement, which the immense expensive damage occurred from (1) removal of this engine from the airframe of this helicopter, (2) checking/repair of this engine such as replacement of the components of this engine, (3) installation of this engine on the airframe of this helicopter and (4) overall direction/supervision and etc. related to repair of this engine and etc., the defendant shall bear the liability for compensation for damage occurred from the default (incomplete performance of obligations) against the plaintiff.

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[43] The Korean court considered all of the issues above and found that AP had not proven that RMS's engineers "committed negligence or conducted poor performance such as failing to perform readjusting or fixing the emergency throttle rack while replacing the temporary fuel control unit". The court determined that AP's allegation that RMS negligently replaced the fuel control unit was unfounded.

[44] The Korean court also concluded that, after the components had been repaired and installed in the engine, it was the responsibility of AP's engineers to reinstall the engine in the helicopter. When AP's own engineers reinstalled the engine in the helicopter, they failed to properly connect the emergency throttle support and emergency throttle rack, which was the ultimate cause of the Hot Start Event and subsequent damage to the helicopter. The court found that emergency throttle support and emergency throttle rack were part of the helicopter and not the engine. On this issue, the Korean court concluded that all responsibility for the emergency throttle support and emergency throttle rack lay with AP and not RMS.

[45] The Korean court noted that the engine repair costs and the rental fees under the lease agreement for the alternate helicopter engine were being addressed in this B.C. action. The Korean court found that AP's claim against RMS to recover repair costs and rental fees for the alternate helicopter engine was baseless, given that those costs resulted from the work of AP's own engineers.

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[46] In the B.C. action, AP seeks to amend its defence. In analyzing the application of *res judicata*, I will address the proposed amended response to civil claim to allow for the totality of the AP claims to be assessed. I note that the proposed amended response to civil claim is prolix in the extreme, pleads evidence, is disorganized and repetitive, and fails to plead material facts for some of the more obscure claims advanced. Nevertheless, I have attempted to summarize below the defences which are either found in the filed response to civil claim or in the proposed amended response to civil claim.

2010 maintenance agreement and main gear box overhaul

a) In 2010, the parties entered into a maintenance agreement for a helicopter purchased by AP.

b) In 2010, various overhaul work was completed by RMS on the helicopter, including with respect to a main gear box.

c) In 2010, various problems arose with the helicopter, including with the main gear box and other parts, and various repairs were made.

d) In 2011, various tests were conducted on parts of the helicopter, and various repairs were made. In February 2011, RMS engineers came to Korea and replaced the main gear box. After the main gear box was replaced, there were no further problems.

e) AP alleges various acts of negligence and breaches of fiduciary duty associated with the original main gear box overhaul conducted by RMS in 2010.

f) AP alleges it is not barred by any limitation period from bringing the 2010 claim due to the fact that the president of AP at the time was dismissed in 2015, was in possession of all relevant documents in connection with the incident, and has not been forthcoming in supplying information. AP

alleges that only in January 2021 did AP find, in the company's old storage, the relevant files in connection with the 2010 incident.

2015 engine overhaul

g) In March 2015, RMS overhauled the engine. In October 2015 RMS returned the engine to AP in Korea.

h) There was a fuel leak incident following the engine overhaul.

i) RMS undertook to repair the fuel control unit, fuel divider, and bleed valve.

j) RMS failed to properly test, repair and install the fuel components, breached sections of the *Canadian Aviation Regulations*, SOR/96-433, and used defective parts to save money.

2016 installation of components and the Hot Start Event

k) In September 2016, RMS sent two engineers to Korea to replace the fuel control unit, fuel divider, and bleed valve, which had caused the engine to overheat and burn.

l) AP alleges the RMS engineers failed to properly reinstall the engine, resulting in an emergency fuel valve remaining open. Excessive fuel was supplied to the engine, causing the Hot Start Event, and a melt down of many components of the engine.

m) In the alternative, AP alleges that the fuel components installed by RMS were defective and caused the Hot Start Event and engine damage.

n) AP alleges negligence on the part of RMS in all of its work in repairing and installing the fuel components.

o) AP alleges RMS breached its implied duty of good faith to deal with AP in an honest manner, inform AP about the state of the engine, keep the AP engine safe and protected, and act in the best interests of AP. AP alleges

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RMS breached this duty of good faith in relation to both the March 2015 agreement to repair the engine and the installation of the repaired parts in 2016, by supplying defective fuel component parts.

2016 repair after the Hot Start Event

p) AP alleges the parties did not come to agreement on the repair of the engine components following the Hot Start Event.

q) AP alleges the parties agreed RMS could take the engine to B.C. to determine the cause of the Hot Start Event and issue an estimate for the cost of repairs.

r) AP alleges that RMS failed to repair the engine, took the engine apart, and leased engine components to other customers.

s) AP alleges RMS had a fiduciary duty which it breached in the inspection and repair of the engine components, and by replacing the fuel components with defective components.

t) AP alleges RMS breached its fiduciary duty by being dishonest about the state of repair of the engine and by leasing out parts of AP's engine for RMS's financial benefit.

u) AP alleges RMS has held AP's engine since 2016 without any legal or principled reason to do so.

v) AP alleges RMS breached its implied duty of good faith to deal with AP in an honest manner, inform AP about the state of the engine, keep AP's engine safe and protected, and act in the best interests of AP. AP alleges RMS breached this duty of good faith by leasing out the dissembled parts of the engine to other customers of RMS without the knowledge or consent of AP, and by representing to AP that the engine was repaired in December 2016, when it was not.

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w) AP alleges that RMS is unjustly enriched, without juristic reason, by retaining AP's helicopter engine since September 2016.

x) AP alleges damage caused by RMS's negligence, breach of fiduciary duty, breach of implied duty of good faith, breach of contract, conversion and detinue in connection with the damaged engine.

2016 rental agreement

y) AP alleges the parties entered into a rental agreement pending determination of the exact cause of the Hot Start Event and responsibility for same.

z) AP alleges damage caused by RMS's negligence, breach of fiduciary duty, breach of implied duty of good faith, breach of contract, conversion and detinue in connection with the costs of the substitute rental engine.

[47] AP also seeks to file a counterclaim against RMS, containing many of the same allegations I have set out above.

5. Does issue estoppel apply?

[48] The Korean court clearly determined the issue of whether RMS was negligent or in breach of any maintenance agreement in relation to the Hot Start Event. The Korean court found that RMS bore no responsibility for the installation of the repaired engine into the helicopter, and that AP's own engineers failed to properly install the engine resulting in the Hot Start Event and AP's subsequent loss. AP was wholly unsuccessful in its claim.

[49] I find that the Korean proceeding resulted in a final determination of all issues arising out of work done by RMS from 2015 to 2016. AP's response to civil claim, the proposed amended response to civil claim, and the proposed counterclaim all raise the same issues that were resolved in the Korean proceeding. The parties to the Korean proceeding and the claim before me are the same. In its response to civil

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claim and its proposed amended response, AP is attempting to relitigate issues which have already been determined by a competent court.

[50] In the result, I find that AP is barred by the doctrine of *res judicata* from raising defences related to any of the issues it put into issue in the Korean proceeding, which includes breaches of contract and negligence in the performance of any maintenance or repairs to the engine, from 2015 to 2016.

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6. Does cause of action estoppel apply?

[51] In addressing cause of action estoppel, the Court of Appeal in *Cliffs Over Maple Bay (Re),* 2011 BCCA 180 held:

> [27] *Res judicata* takes two forms in modern practice, cause of action estoppel (still sometimes called *res judicata*) and issue estoppel. Lange summarizes them as follows:
>
> > In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding. [At 1.]
>
> The distinction was described in more elaborate terms by Lord Denning, M.R. in *Fidelitas Shipping Co., Ltd., v. V/O Exportchleb* [1965] 2 All E.R. 4 (C.A.):
>
> > The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in *rem judicatam* ... But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances ... And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. ... But this again is not an inflexible rule. It can be departed from in special circumstances. ... [At 8-9; quoted with apparent approval in *Grandview v. Doering*, *infra*.]

> [28] Although grounded in the same basic considerations, each form involves, or has traditionally involved, criteria that have been expressed in slightly different terms. The traditional criteria for cause of action estoppel, confirmed in Canada in *Angle, supra*, were summarized by Chief Justice Hewak in *Bjarnarson v. Manitoba* (1987) 1987 CanLII 993 (MB KB) 1987, 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, *aff'd.* (1987) 1987 Can LII 5396 (MB CA), 45 D.L.R. (4th) 766 (Man. C.A.), as taken from *Grandview v. Doering* 1975 CanLII 16 (SCC), [1976] 2 S.C.R. 621:
>
>> 1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
>>
>> 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
>>
>> 3. The cause of action and the prior action must not be separate and distinct; and
>>
>> 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence. [At para. 6; emphasis added.]It is perhaps unnecessary to state that the doctrine contemplates two "causes" – the first having ended in a final judgment that bars a "second claim for the same cause": see *Mohl v. University of British Columbia*, 2006 BCCA 70 at paras. 23-4. In this context, "cause of action" does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy: see also Lange at 147; *Comeau v. Breau* (1994) 1994 Can LII 4469 (NB CA), 145 N.B.R. (2d) 329 (C.A.) at para. 18; and *Letang v. Cooper* [1965] 1 Q.B. 222 (C.A.) at 242-43.
>>
>> [Emphasis original.]

[52] I find that AP was required to bring forward in the Korean action all of the claims which are said to arise from the factual situation between the parties in 2015 and 2016, and which AP argues entitle it to relief, whether by way of defence, set-off, or claim.

[53] The Korean judgment is a final decision of a court of competent jurisdiction. The parties in both proceedings are identical. The causes of action raised in the Korean proceeding are not separate and distinct from the defences raised in the response to civil claim and the proposed amended response to civil claim in the B.C. action.

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[54] Finally, and importantly, the basis for the defences which AP seeks to advance in the B.C. action were either argued or could have been argued with reasonable diligence in the Korean proceeding.

[55] I find that AP is barred by cause of action estoppel from raising any and all claims against RMS arising out of RMS's maintenance of AP's helicopter engine from 2015 to 2016, including claims for breach of contract, breach of fiduciary duty, breach of duty of good faith, constructive trust, unjust enrichment, or any of the myriad of defences raised or sought to be raised, or asserted by way of equitable set off or otherwise.

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7. Are any of AP's defences an abuse of process?

[56] I am satisfied that the pre-conditions of both issue estoppel and cause of action estoppel have been met with respect to all claims or defences that may be asserted arising out of the facts in 2015 and 2016 which culminated in the Hot Start Event and the resulting damage to AP's helicopter.

[57] I am satisfied that it is in the interests of justice that all such defences and claims be struck from the response to civil claim, and all such defences and claims contained in the proposed amended response to civil claim are disallowed.

B. Can AP raise issues with RMS's work in 2010 and 2011 as an equitable set off against the claims of RMS in this litigation?

[58] In the proposed amended response to civil claim, AP seeks to plead events in 2010 and 2011 related to the repair and replacement of the main gear box on the helicopter. After 31 paragraphs setting out how the gear box was removed, overhauled, repaired, tested, and ultimately replaced, AP pleads, "After this exchange of the problematic MGB [main gear box] with another there was no longer any problem."

[59] AP asserts various facts relating to the gear box issue, which may be broadly summarized as:

a) RMS assumed responsibility for inspecting and repairing the gear box,

b) RMS failed to properly assess, test, analyze, etc. the parts used in overhauling the gear box, including by employing people without the requisite skill to do the work, and by failing to identify the origin of the mechanical defects,

c) RMS breached the *Canadian Aviation Regulation* in performing the overhaul,

d) RMS failed to ensure that the appropriate airworthiness directives and information were properly issued by manufacturers or merchants who sold used parts RMS installed in the helicopter,

e) RMS used defective, used, and uncertified parts to save costs,

f) RMS failed to warn AP that the gear box was unsafe, and

g) RMS knew the gear box was unsafe.

[60] AP's claims asserted in relation to the 2010 and 2011 gear box issue may be summarized as:

a) RMS breached an implied duty of good faith to properly repair the helicopter and its gear box,

b) RMS had a fiduciary duty to AP in connection with the repair and overhaul of the gear box, which it breached by using defective parts,

c) AP claims an equitable set off against RMS calculated as the revenue RMS earned on the exchange of the defective gear box in December 2010 and the revenue earned based on the repair contract in connection with the gear box and engine repair in December 2010 and January 2011.

d) Alternatively, AP claims an equitable set off against RMS calculated as the deductible paid to the insurer or RMS, the increase in insurance premiums

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paid by AP in subsequent years, and the amount AP paid to RMS for the exchange of the overhauled gear box.

[61] AP pleads that the relevant documents were inaccessible to it because AP's president, who was dismissed in 2015, had those documents. However, AP also pleads that in 2021 it found the relevant documents, not with the former president, but within AP's own old storage files. At the hearing, AP presented no evidence to support a finding that it was unable to discover a cause of action regarding the issues in 2010 and 2011 in order to meet the two-year limitation period. Instead, AP submitted an affidavit from one of its helicopter maintenance technicians, Mr. Sung-Deok Kim, who worked during the 2010 and 2011 period.

[62] Mr. Kim details the complaints AP had at the time, including allegations that parts were defective. Mr. Kim details how AP reported to its insurer, and its insurer issued an investigation report on May 4, 2011. The investigation report is appended to his affidavit. The report sets out the loss and damage arising from the problems which arose during the repair, overhaul, and testing of the gear box by RMS. The report sets out the positions of RMS and AP, including AP's allegations that the damage was attributable to the overhaul problems by RMS. The insurer concluded:

> Judging from all the above circumstances, we are of the opinion that the damage to MGB [gear box] and No.2 Engine etc of the S-61N aircraft (HL-9490) sustained at the temporary helipad at Dongducheon-si, Gyeonggi-do, Korea at about 0840hrs on 10th Dec. 2010 just before take off the ground was caused by poor/lack of lubricating oils to the right forward sleeve bearing of the main gear box and the cause of lubricating oil starvation was attributable to negligence and/or mistake of MGB overhaul by the repairer [RMS].

[63] In his affidavit, Mr. Kim also details how in 2010 he himself investigated with General Electric, a manufacturer of parts used in the gear box repair.

[64] In other words, AP knew or ought to have known in or about 2010 and 2011 that it had suffered loss or damage in relation to the gear box, that RMS was responsible for the repair and overhaul of the gear box and associated parts, and that AP could commence a claim against RMS to recover its alleged loss.

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[65] Leaving aside the numerous difficulties and inadequacies of the pleaded claims; AP's claims are statute barred. The previous *Limitations Act*, R.S.B.C. 1996, c. 266, required AP to commence its action against RMS for the issues raised in 2010 and January 2011 within two years of the date of the accident in December 2010, or at the latest within two years of the report from the insurer.

[66] AP argues that it is not seeking to recover on its claims, but is merely seeking to assert a set off against the claims asserted by RMS in this litigation. As such, AP argues that these claims are not subject to any limitation periods.

[67] A defence of equitable set off is not generally subject to a statutory limitation period. AP relies on *Pierce v. Canada Trustco Mortgage Co*. (2005), 254 D.L.R. (4th) 79 (Ont. C.A.) where the court reviewed English and Australian law on equitable set off, and at para. 43 quoted with approval from Lord Denning as follows:

> Although it is often described as an 'equitable set-off', it would, I think, be more accurately stated to be an 'equitable defence'… When the contractor sues for the contract price, the employer can say to him: 'You are not entitled to that sum because you have yourself broken the very contract on which you sue, and you cannot fairly claim that sum unless you take into account the loss you have occasioned to me.' It is on a par with the case of a defendant who says that the plaintiff has repudiated the contract by an anticipatory breach, or that the plaintiff has been guilty of a breach going to the root of the contract. On accepting it, the defendant is discharged from further performance and can set up the breach as a defence. So also with any breach by the plaintiff of the selfsame contract, the defendant can in equity set up his loss in diminution or extinction of the contract price. It is in the nature of a defence. As such it is not subject to time-bar.

[68] The difficulty for AP in the application of the defence of equitable set off, is that the set off must relate to the same event which is being sued upon by the plaintiff.

[69] In *Holt v. Telford*, [1987] 2 S.C.R. 193, the Supreme Court cited with approval five principles summarized by Macfarlane, J.A. in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd. and Tsang*, [1985] 6 W.W.R. 14:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).

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> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
>
> 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: . . . [*Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani.*
>
> 5. Unliquidated claims are on the same footing as liquidated claims: *Nfld. v. Nfld. Ry. Co.*, [1888] 13 App. C. 199 (P.C.)].

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[70] While AP relies on numerous cases in support of the proposition that equitable set off is available, the cases only support the propositions set out in the above quotations. In each case the court will look to whether the contracts or claims are so interrelated that it would be unjust to allow the plaintiff to proceed without recognizing the competing claim of the defendant.

[71] The issues raised in relation to the gear box in 2010 and 2011 bear no relationship to the issues with the fuel components in 2015 and 2016. Other than the fact the parties are the same, there is no factual or legal connection between the two. The claims in relation to the 2010 and 2011 events do not go to the very root of RMS's claim in the B.C. action. Indeed, the earlier gear box issue was fully resolved and has absolutely nothing to do with RMS's claim to recover rental fees and repair costs following the 2016 Hot Start Event. I do not agree that AP has shown an equitable ground to be protected against the claims of RMS that would allow it to raise the events of 2010 and 2011 in response.

[72] While AP tries to argue that both events occurred during the time RMS held a maintenance contract for AP's helicopter, I am not satisfied that is a sufficient connection to allow for issues which were resolved to the apparent satisfaction of AP in or about 2011 to now be brought forward as a defence to RMS's claim for its costs in repairing an engine which the Korean court has found was damaged as result of the work performed by AP's own engineers.

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[73] Further, I find that RMS would be prejudiced if I were to allow these claims to be brought forward as an equitable set off.

[74] In the Korean proceeding, which was filed on July 3, 2017, AP alleged that RMS had a maintenance agreement with AP since 2010, and that RMS was exclusively responsible for the maintenance of the helicopter since it was purchased in 2010. AP alleged that RMS was involved in introducing AP to the vendor of the helicopter in 2010. AP alleged that it entrusted RMS with the expert maintenance of the helicopter, and with regular checking and maintenance such as overhaul from 2010 to the present. AP admitted in its pleading, "For this reason, both engines of this helicopter have been well managed and used as the defendant [RMS] executed the regular checking and maintenance (Light overhaul) per every 1,000-hour operation and etc."

[75] In the Korean claim, AP made an admission that RMS well managed its maintenance work on the helicopter from 2010 to the present, subject to the express complaints raised in 2015 and 2016. AP recounted the long history of maintenance done by RMS, and admitted, essentially, that it had no complaints with RMS's work other than the work done in 2015 and 2016. I find it would not be fair or equitable for AP to raise allegations which contradict the position it took in litigation in Korea.

[76] Finally, I find that it would be prejudicial for AP to raise the 2010 claims in the claim before me because of the lengthy passage of time and the loss of evidence held by RMS. Mr. Mark Kelly, the Chief Financial Officer of RMS, provided an affidavit in which he states that two of the RMS employees involved in the earlier work are no longer employees of RMS, and the digital records from that period have been purged.

[77] For all of the reasons set out above, I find that the allegations proposed by AP in relation to events in 2010 and 2011 may not be raised as an equitable set off to the claims advanced by RMS in this litigation.

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C. Do the proposed amendments to the response to civil claim disclose a reasonable defence in relation to a breach of fiduciary duty?

[78] I have already found that any claims of fiduciary breach in relation to the Hot Start Event are barred by the doctrine of *res judicata*, and AP may not assert any claims of fiduciary breach in relation to the events of 2010 and 2011 as an equitable set off.

[79] AP also seeks to amend its response to civil claim to assert that RMS breached its fiduciary duty in repairing the engine following the Hot Start Event in 2016. RMS argues that the pleading as drafted does not disclose a reasonable defence, and should be struck. Rule 9-5(1)(a) has application where a party pleads no reasonable claim or defence. Rule 9-5(1)(a) requires the court to accept the pleadings as if proven, and to determine based on the pleadings alone whether a reasonable defence has been made out.

[80] While AP asserts a breach of fiduciary duty as a defence, presumably it intends to assert this as a claim to be set off against the claims by RMS.

[81] To establish a claim of breach of fiduciary duty, a party must plead three essential elements: 1) the fiduciary must have scope for the exercise of some discretion or power, 2) the fiduciary has the ability to exercise that power or discretion unilaterally so as to affect the beneficiary's legal or practical interests, and 3) the beneficiary is peculiarly vulnerable to the fiduciary holding the discretion or power: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

[82] In *Galambos v. Perez*, 2009 SCC 48, the Supreme Court of Canada has most recently revisited the fundamental principles of fiduciary law. Cromwell, J. set out the basic principles, and outlined two important elements. First, an "important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances": *Galambos* at para. 67.

Second, "a critical aspect of a fiduciary relationship is an undertaking of loyalty: the fiduciary undertakes to act in the interests of the other party": *Galambos* at para. 69.

[83] Fiduciary duties do not arise in ordinary commercial relationships, where what is truly being alleged is that one party failed to meet the obligations assigned to it pursuant to the agreement.

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[84] The allegations made by AP that RMS had and breached a fiduciary duty to AP in relation to the repairs post the Hot Start Event may be summarized as follows:

a) RMS had a duty to keep and maintain the engine parts, and not lease parts without the consent of AP,

b) RMS had absolute power and discretion over the engine entrusted to it for the purposes of issuing an estimate,

c) AP was not informed that RMS would lease out parts of the engine to its customers and RMS's decision to lease out the parts was a breach of its fiduciary duty,

d) RMS's power and discretion could be exercised unilaterally so as to affect or prejudice AP's legal or practical interest,

e) There was an implied undertaking on the part of RMS to act in the best interests of AP in inspecting the engine to determine the cause of the Hot Start Event and to keep the engine for that purpose, and

f) AP remains vulnerable to the discretionary power RMS has exercised to date and continues to possess.

[85] Other than simply copying the language of the test from *Lac Minerals*, AP has not actually pleaded material facts relating to the case before me which could properly found a claim in breach of fiduciary duty. What the material facts pleaded by AP could reasonably advance is a claim in breach of contract relating to the repair work done after the Hot Start Event in 2016. Such facts do not adequately advance

a claim in breach of fiduciary duty. AP has not pleaded any material facts which would take RMS's performance, or non-performance, of its obligations outside the bounds of an ordinary commercial agreement. AP has not pleaded how RMS undertook to act in the interests of AP, or how RMS abused the power it had over AP. AP has not pleaded what discretionary power RMS allegedly has, or the basis upon which it says AP is particularly vulnerable to RMS's exercise of such undefined discretionary power.

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[86] The fact that the RMS engineers had specialized expertise to perform maintenance, and AP relied on them to perform their work competently, is not sufficient to create a fiduciary relationship. If it was, fiduciary relationships would be established in all contracts where one party is hired because of their specialized expertise. This cannot be the case.

[87] I am not satisfied that AP has properly pled the material facts required to advance a claim for breach of fiduciary duty, nor am I satisfied that the pleadings could be amended to properly plead a claim for breach of fiduciary duty and, as such, its pleadings in relation to breach of fiduciary duty are not allowed.

D. Do the proposed amendments to the response to civil claim disclose a reasonable defence in relation to any remaining issues?

[88] The proposed amended response to civil claim attempts to plead claims in unjust enrichment, breach an implied duty of good faith, breach of contract, and conversion and detinue. These claims are intertwined with the claims I have disallowed, and it is not possible for me to disentangle the disallowed claims from the remaining pleading to properly consider whether AP has pleaded material facts to support such claims.

[89] In addition, I note that the Korean court has already determined that AP cannot recover from RMS the cost of repairs or the rental costs after the Hot Start Event. As such, AP is barred by *res judicata* from raising such claims in this proceeding. Due to the drafting of the proposed amended response to civil claim, I

cannot discern whether any of the amounts sought to be set off against RMS's claims are the same amounts already disallowed by the Korean court.

[90] The proposed amended response to civil claim is extremely convoluted and repetitive. It is prolix. It is often difficult to understand what defences relate to what pleaded facts. Defences join together unrelated events. Evidence is improperly pleaded (including in paragraphs 21.2 to 21.5 and paragraph 33).

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[91] It may be possible for AP to plead proper defences in relation to RMS's claim for the costs of repair following the Hot Start Event and for the cost of the helicopter engine rental since 2016. It may be that AP can advance defences in relation to breach of contract, unjust enrichment or conversion. However, it is not possible for me to allow the proposed pleading in its current form, nor is it possible for me to perform the kind of surgical edit that would be required to extract a reasonable defence from the current proposed pleading.

[92] In the result, I find the proposed amended response to civil claim to be so confusing that it is difficult to understand what is being pleaded and, it would be an abuse of process to allow them to stand: *Lu v. Shen*, 2020 BCSC 490 at paras. 54-59.

[93] I do not grant leave to AP to file the proposed amended response to civil claim. I grant AP leave to bring this application on again with a narrow, revised form of pleading that is compliant with these reasons, if AP so chooses. Such an amended response to civil claim must be limited to events following the Hot Start Event and may not advance any defence or claim which asserts or implies or relies on any liability of RMS for damage to the engine, nor may it advance a claim by way of set off to recover from RMS any amounts owing for the repair of the engine or the rental of a helicopter engine, following the Hot Start Event.

E. Should AP be permitted to file the proposed counterclaim?

[94] In the proposed counterclaim, AP sets out a number of claims which are not allowed for the reasons expressed above. These are set out in Part 1, paras. 12-19,

25, 27, 29 and the references in para. 26 to paragraphs 25, 26 and 30 of the amended response to civil claim.

[95] The proposed counterclaim also adopts all of the paragraphs of the amended response to civil claim. First, that is not a proper pleading as it does not allow the defendant by counterclaim to know exactly what facts are being pled in support of the different causes of action advanced in the counterclaim. Second, the amended response to civil claim is not allowed.

[96] AP seeks to advance claims in breach of contract and breach of implied duty of good faith, conversion and detinue, and unjust enrichment. To the extent these claims address facts arising after the Hot Start Event only, it may be possible that, a claim could be drafted. However, as the draft counterclaim is reliant upon the proposed response to civil claim, which I have not allowed, the draft counterclaim is also fundamentally flawed.

[97] The proposed counterclaim suffers from much of the same deficiencies as the proposed amended response to civil claim. In addition, it is not possible to consider the counterclaim as a stand-alone pleading because AP has bound the counterclaim to the amended response to civil claim in an impermissible way by simply importing the whole of the response. For the reasons expressed above in relation to the amended response, I find AP has not produced a counterclaim which enables the court or RMS to determine the material facts upon which the various claims are asserted, nor to discern which aspects of the counterclaim can survive once claims barred by *res judicata*, and the claims of breach of fiduciary duty, have been removed. As such, it would be an abuse of process to allow AP to file the proposed counterclaim in its current form.

[98] Given my conclusion on the form of the proposed counterclaim, I make no findings on whether AP is out of time to file a counterclaim, or whether the court ought to exercise its discretion to allow the counterclaim to be filed outside of time limits.

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IV. DISPOSITION

[99] Paragraphs 1-13, 18 and the words "caused by the plaintiff's negligence" in paragraph 22 of the response to civil claim be struck from the response to civil claim as an abuse of process.

[100] AP's application to amended its response is denied, with leave to re-apply in accordance with these reasons.

[101] AP's application to file a counterclaim is denied, with leave to re-apply in accordance with these reasons.

[102] RMS is entitled to its costs of both applications on this hearing, and for its costs thrown away on the first application brought by AP to file an amended response and counterclaim, which did not proceed.

"W.A. Baker J."

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