IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trigon Pacific Terminals Ltd. v. Prince Rupert Port Authority,* 2025 BCSC 1687

Date: 20250829
Docket: S237527
Registry: Vancouver

Between:

Trigon Pacific Terminals Ltd.

Plaintiff

And

Prince Rupert Port Authority and Ridley Island Energy Export Facility Limited Partnership, by its General Partner, Ridley Energy Export Facility GP Inc.

Defendants

Before: The Honourable Justice Maisonville

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. April 30, May 1–2, 2025
Written Submissions of the Defendant, Prince Rupert Port Authority:	June 4, 2025
Written Submissions of the Plaintiff:	June 13, 2025
Reply Submissions of the Defendants:	June 27, 2025

Place and Date of Judgment: Vancouver, B.C.
August 29, 2025

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INTRODUCTION

[1] This decision concerns the appropriateness of summary judgment pursuant to Rule 9-6(4) of the *Supreme Court Civil Rules* for judgment and dismissal of the notice of civil claim filed by the plaintiff in 2023 as further amended in 2024. The facts revolve around the lease between the claimant and the defendant of certain lands at the port of Prince Rupert.

[2] The defendants submit that there is no genuine issue for trial with respect to the claim and that summary judgment should be granted in their favour and the claim of the plaintiff dismissed.

BACKGROUND

[3] The plaintiff, Trigon Pacific Terminals Ltd. (“Trigon”) leases lands from the Prince Rupert Port Authority (“PRPA”) at the Port of Prince Rupert, British Columbia pursuant to a lease agreement originally entered into (the “Lease Agreement”).

[4] Trigon’s Lease Agreement with PRPA only permits Trigon to export certain commodities including coal. Trigon currently operates export facilities within the Port but cannot itself export bulk liquids, including liquified petroleum gas (“LPG”) under the terms of the Lease Agreement. Trigon does not have the right to export any other commodities without PRPA's consent. Any expansion of permitted uses requires the written consent of PRPA on terms and conditions as may be stipulated. The Lease Agreement states that such approval is not to be unreasonably withheld. This action concerns the decision by PRPA to withhold consent to a request for expanded uses under the Lease Agreement, and the actions preceding that decision.

[5] In 2015, PRPA signed a project development agreement (“PDA”) with Vopak Development Canada Inc. (“Vopak”) granting them time-limited exclusivity rights for the export of bulk liquids in the Port (the “Exclusivity Rights”).

[6] Vopak later formed a limited partnership with AltaGas LPG Limited Partnership (“AltaGas”) and Ridley Island Energy Export Facility Limited Partnership,

through its General Partner, Ridley Energy Export Facility GP Inc. (“REEF”) and REEF currently holds the exclusivity rights.

[7] REEF’s agreement with PRPA through its predecessor, Vopak, grants REEF the exclusivity rights to export bulk liquids, including LPG. REEF is presently developing an energy export facility for that purpose which will cost in excess of $1 billion.

[8] AltaGas also operates the Ridley Island Propane Export Terminal (“RIPET”) on Port lands subleased from Trigon where export of bulk liquids is permitted (the “Petroleum Handling Area”).

[9] Trigon requested the consent of PRPA to expand the permitted uses under the Lease Agreement with PRPA to enable Trigon to receive, handle, form, store, and load LPG onto vessels in all areas of the lands leased to Trigon at the Port of Prince Rupert (the “LPG Request”).

[10] PRPA withheld consent to the request; Trigon started an action in this court alleging breaches of the Lease Agreement. Trigon has pleaded that PRPA breached the Lease Agreement by:

a) unreasonably failing or refusing to consent to the LPG Request, contrary to clause 5(1) of the Lease Agreement;

b) engaging in post-contractual conduct to deny or deprive Trigon from the benefits of its rights under the Lease Agreement, including (but not limited to) entering into a project development agreement with Vopak (the “Vopak PDA or the “Vopak Agreement”) and extending or renewing the terms of the Vopak PDA; and

c) such further and other particulars as counsel for the plaintiff may advise.

[11] Trigon seeks specific performance of the Lease Agreement or, in the alternative, damages in lieu of specific performance.

[12] In overview, PRPA argues that Trigon's entire claim is premised upon PRPA granting exclusivity rights to REEF. Trigon, however, has been aware since August 20, 2015, or in the alternative since November 2018, that REEF was granted the exclusivity rights to export LPG and, as such, Trigon's claims are statute-barred and must be summarily dismissed.

[13] With respect to Trigon's other argument that PRPA unreasonably withheld its consent to the LPG Request, PRPA argues that there are no allegations of fact to suggest why it was unreasonable in the circumstances for PRPA to deny the LPG Request. PRPA further argues that there are no facts that lend any support to Trigon's argument that denying the LPG Request was unreasonable and, consequently, there is no genuine issue for trial with respect to this claim and the matter must be dismissed.

FACTS

[14] The facts underlying these proceedings are summarized as follows.

[15] The Lease Agreement was originally entered into on December 18, 1981 (the "Original Lease") between RTI (now Trigon) as lessee and Canada Port Corporation (the predecessor to PRPA) as lessor. The Original Lease provided:

> […] that the Lessee was permitted to use the designated premises for the design, construction, operation and maintenance thereon of a public terminal for tie receiving, handling, storage and loading of coal onto vessels, and for no other purpose save with the written consent of the Lessor and upon such terms and conditions as may be stipulated by the Lessor […]
> (the "Original Permitted Uses Clause").

[16] Between 1993 and 2019, the Original Lease was amended on a number of occasions. A 2009 Modification Agreement amended the Original Permitted Uses Clause to read as follows:

> 5(1) The designated premises shall be used by the Lessee for the design, construction, operation, and maintenance thereon of a public terminal for the receiving, handling, forming, storage and loading of coal, petroleum coke, anthracite and elemental sulphur in any form onto vessels. The Lessee shall use the designated premises for no other purpose save with the written consent of the Lessor and upon such terms and conditions as may be

> stipulated by the Lessor, such approval not to be unreasonably withheld or delayed.
>
> (the "Revised Permitted Use Clause").

[17] On October 1, 2014, RTI/Trigon and PRPA entered into a modification agreement with PRPA, which permitted RTI/Trigon to sublease a portion of the terminal lands (the "Petroleum Handling Area") for the receiving, handling, storage, and loading of specified petroleum products (condensates, diluents, bunker fuel, and fuel oil blend stocks) and the loading of such products onto vessels and rail cars (the "Sublease"). That permission was limited to the Petroleum Handling Area, which was approximately a nine acre portion of the Lease Agreement lands and did not extend to the remainder of the Trigon premises.

[18] In December 2018, AltaGas assigned its rights under the Sublease to Ridley Island LPG Export Limited Partnership ("RILE LP"), a joint venture partnership formed between AltaGas and Vopak. Vopak owns a 30% interest in RILE LP, and AltaGas owns the remaining 70%. As a result, RILE LP and REEF have the same two beneficial owners. RILE LP has continually operated RIPET on a portion of the Petroleum Handling Area.

[19] In December 2019, RTI and PRPA consolidated the Original Lease and amendments. The consolidated Lease (the "Consolidated Lease") contains the language of the Revised Permitted Use Clause. The consolidations updated the terms of agreements to reflect the various amendments that the parties had entered into after their original execution and remain in force to date.

[20] On August 1, 2015, PRPA and Vopak entered into the Vopak PDA for the development of a marine terminal on other lands within the port. Pursuant to the Vopak PDA, PRPA granted Vopak the exclusivity rights which were contained in s. 2.1 (the "LPG Exclusivity Clause") as follows:

> 2.1 PRPA will not, without the prior consent of the developer, directly or indirectly:
>
> […]

(d) solicit any proposals from, or engage in any discussions with, any person other than the developer that in any way relate to the development of the bulk liquids (other than liquid liquefied natural gas) or crude oil terminal anywhere in the port except that:

1) RTI may use the [petroleum handling area] to receive, handle, store and load petroleum products consisting of condensate (which does not include liquefied petroleum gas (LPG), diluent, bunker fuel, fuel oil blend stocks, caustic soda, and liquefied sulphur) all to the extent allowed in the Lease Agreement between RTI and PRPA in effect on the effective date;

2) A subtenant of RTI (the "subtenant") may use the [petroleum handling area] (but not any other area within the port) to construct a facility (such facility, the "RTI LPG facility") that is capable of receiving, handling, and storing LPG that is capable of receiving, handling, and storing LPG that is produced by the subtenant (but not LPG that is aggregated or purchased by the subtenant) provided that the following conditions precedent have been satisfied prior to the time that RTI enters into any sublease or similar agreement with the subtenant:

   (A) the Subtenant has agreed that any rail unloading racks utilized by the RTI LPG Facility must be exclusively located within the RTI Liquids Area and not on any adjacent land; and

   (B) the Subtenant has agreed to negotiate with Developer in good faith with a view to entering into an agreement with the Developer under which the Subtenant may utilize, on commercially reasonable terms, the Developer's rail racking facilities (whether in existence or to be built in the future) on Ridley Island (assuming that the Developer enters into the Lease); and

   (C) RTI has agreed to negotiate in good faith with the Developer with a view to entering into an agreement with the Developer under which the Developer will have access, on commercially reasonable terms, to RTI's berth on Ridley Island (assuming that the Developer enters into the Lease); and

3) Section 2.1(d) will no longer apply if the developer or any of its affiliates, directly or indirectly, enters into an agreement to acquire or acquires any facility located in British Columbia that is similar in use or purpose to the terminal;

4) Section 2.1(d)(2) will no longer apply (meaning that the subtenant will no longer have the right to construct the RTI LPG Facility) if RTI and the subtenant have not entered into a sublease or similar agreement with PRPA's consent by the date that is nine months following the effective date; …

[Emphasis added.]

[21] On August 20, 2015, RTI/Trigon's external counsel received from PRPA a document containing extracts from the Vopak PDA, including the entire text of the exclusivity rights above. Importantly, this provision has never been redacted in these proceedings, and it has been substantively unchanged from 2015 to present.

[22] On October 16, 2015, RTI/Trigon and AltaGas entered into a project agreement to construct RIPET on the Petroleum Handling Area.

[23] On December 9, 2015, PRPA granted consent to RTI/Trigon to enter into a sublease with AltaGas (the "Sublease") to permit AltaGas to operate the RIPET. In granting its consent to the Sublease, PRPA expressly referred RTI/Trigon to the fact that Vopak had been granted the exclusivity rights.

[24] On January 17, 2018, PRPA and Vopak entered into an amended and restated Vopak PDA. The exclusivity rights remained unchanged.

[25] Between November 14, 2018 and December 17, 2018, AltaGas and RTI/Trigon were engaged in negotiations regarding a project agreement amending agreement for RIPET (the "PAAA"). In the course of these negotiations, AltaGas and RTI/Trigon exchanged a number of versions of that agreement.

[26] The Exclusivity Rights are expressly referenced in both the preamble and the substantive provisions of the PAAA. Section 2.1 of the Vopak PDA was expressly cited and the parties contemplated revisions to the sections of the PAAA which directly referenced the exclusivity rights.

[27] RTI/Trigon's president and chief operating officer, internal and external counsel, and other employees were involved in the above-noted negotiations.

[28] In March 2021, the Government of Canada announced its intention to phase out thermal coal exports by 2030. As a result, RTI/Trigon renewed efforts to pursue other commodities to export, which it had been doing since at least 2012.

[29] On or about April 4, 2023, Vopak and AltaGas formed REEF, and Vopak transferred the Vopak PDA to REEF.

[30] On September 29, 2023, Trigon requested PRPA's consent to expand its permitted uses under the Lease Agreement to include LPG, specifically, Trigon requested that it be allowed to receive, handle, form, store, and load LPG onto vessels in all areas of the lands .

[31] PRPA responded by letter on November 6, 2023, denying consent to Trigon's LPG Request, mentioning the following:

a) REEF holds the LPG Exclusivity Clause and the rights to export LPG from the Port, and consenting to the Trigon LPG Request would expose PRPA to intolerable legal risk;

b) the REEF project has been in development for nearly 10 years with an estimated $70 million invested in project development to date, including but not limited to a lengthy and costly federal regulatory review process and

c) the commercial and regulatory realties of the marketplace, and the potential economic benefits of the REEF project, reveal that PRPA has reasonably conveyed land use rights to maximize the development utility and operational capacity of the Port.

PROCEDURAL HISTORY

[32] Two pre-trial decisions in this matter have already been the subject of appeals.

[33] In *Ridley Island Energy Export Facility Limited Partnership v. Trigon Pacific Terminals Limited*, 2024 BCCA 398, the Court of Appeal allowed an appeal from a chambers judge who dismissed an appeal from an associate judge who refused the appellant REEF's application be added as a defendant to the underlying action. Justice Iyer, for the Court of Appeal, overturned the chambers judge and allowed the appeal from the associate judge's order. Justice Iyer noted that:

> [33] It is clear from the pleadings that the interpretation and effect of the Vopak Agreement, in particular the Exclusivity Rights, are central to the

> underlying litigation. If REEF LP is not added as a party and the interpretation of the Vopak Agreement goes against its interests, it will have no right of appeal and its only recourse would be to sue the Port for damages. In these circumstances, adding REEF LP as a party ensures fairness and avoids the inefficiency of multiple proceedings.

[34] In *Trigon Pacific Terminals Limited v. Prince Rupert Port Authority*, 2025 BCCA 155 [*Trigon CA*], the Court of Appeal dismissed an appeal from Justice Giaschi's decision in this matter, indexed as *Trigon Pacific Terminals Limited v. Prince Rupert Port Authority*, 2024 BCSC 1914 (aff'd 2025 BCCA 155) [*Trigon SC*] in which Giaschi J. had indicated that he had discretion under the *Supreme Court Civil Rules* to deny an application for production of redacted documents where the redacted information was only of marginal or tangential relevance and where there is "good reason" for the redactions.

[35] Justice Giaschi's decision touched on the issue of the *Limitations Act*. He rejected Trigon's submission that the PRPA's pleaded limitations defence rendered the dates relevant, observing at paragraph 85 that "other than the fact that a limitation defence is determined by dates", the redacted dates bore no discernable relevance to the core legal issue of discoverability. He continued:

> That defence will be determined on the basis of when Trigon became aware of or discovered that exclusivity rights had been granted by PRPA to REEF. The dates, timelines and milestones are irrelevant to this.

[36] Shortly after the hearing of the present application, the Court of Appeal released its judgment in respect of the redactions of certain materials and in the course of doing so, made the below findings following the characterization of the issue. In *Trigon CA*, Justice Abrioux, for the Court of Appeal, held:

> [64] […] As framed by the Notice of Civil Claim and the PRPA's response (REEF's later-filed response largely endorsing the PRPA's), the legal issues between the parties concern:
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> a) The terms of the Lease Agreement, including the existence of several implied terms;
>
> b) Whether the PRPA breached the terms of the Lease Agreement by unreasonably withholding consent for Trigon to begin shipping and processing LPGs; and

> c) Whether the PRPA engaged in wrongful post-contractual conduct meant to deprive Trigon of the benefit of its entitlements under the lease, specifically by entering into the Vopak Agreement and entering into several subsequent agreements with Vopak/REEF.
>
> […]
>
> [72] I would also agree with the chambers judge that disclosure of the redacted dates will not assist Trigon in assessing the "intolerable legal risk" the PRPA has pleaded, because "that risk is a function of the size and duration of the project": at para. 83. Trigon also submits that the dates are relevant because the PRPA has pleaded a limitations defence. Whether the PRPA has established such a defence will turn, as the judge correctly noted, on the question of discoverability; the actual dates, timelines, and project milestones contained in the documents are irrelevant to that issue.
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> [Emphasis added.]

[37] The parties disagree about how these findings speak to the present application, as discussed later in this decision.

[38] Trigon sought to have me hear an application to further amend the NOCC. REEF and PRPA opposed the application given that the request to amend the pleadings was only filed after the *Trigon CA* decision. They oppose it on the basis that such an application is an abuse of process and is designed to frustrate the summary judgment process. They further submit that the Court should effectively decide the issue of whether Trigon can proceed at all with the application in suggesting that Trigon should have to apply to me for "leave". I rejected both requests and leave those issues to be determined by the presiding associate judge in that application.

LEGAL PRINCIPLES

Summary Judgment

[39] As noted by the Supreme Court of Canada in *Canada (Attorney General) v. Lameman*, 2008 SCC 14 [*Lameman*] the bar on a motion for summary judgment is high. As noted by the unanimous Court at para. 11:

> [11] […] The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario*

> *Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69 […]

[40] In *Lyons v. Canadian Imperial Bank of Commerce*, 2025 BCCA 22, Justice Dewitt-Van Oosten held:

> [2] Rule 9-6(5)(a) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 allows for summary judgment where a judge is "satisfied that there is no genuine issue for trial". To meet this test, a plaintiff must show beyond doubt that the defendant is bound to lose: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 65; *Sakwi Creek Hydro Limited Partnership v. Dickin*, 2023 BCCA 188 at para. 25. Consequently, if the defendant submits evidence that contradicts the plaintiff's claim in "some material respect", the application for summary judgment must be dismissed: *Sakwi* at para. 25. A judge is not permitted to weigh evidence on a R. 9-6 application "... beyond determining whether [the evidence] is incontrovertible: any further weighing may only be done in a trial ...": *Beach Estate* at para. 49 (internal references omitted).

[41] As noted by the Court of Appeal, the law is clear that where there is evidence that contradicts a claim for summary judgment in "some material respect", an application for summary judgment must be dismissed: *Sakwi Creek Hydro Limited Partnership v. Dickin*, 2023 BCCA 188 at para. 25.

[42] Further, the judge could only grant summary judgment if satisfied the evidence was incontrovertible and, as a result, it is beyond doubt that there is no genuine issue for trial.

[43] Moreover, if the applicant's evidence in support of the Rule 9-6 application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48; *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 at para. 46.

[44] The Court of Appeal in *Lyons* reaffirmed, "[t]his is a "high bar"", citing *Beach Estate v. Beach*, 2019 BCCA 27 at para. 16 and *Rahman v. Windermere Valley Property Management Ltd*., 2022 BCCA 258. The question is whether the

evidentiary record provides all of the facts necessary to grant an application for summary judgment and it would not be unjust to do: *R.G.H. v. British Columbia*, 2010 BCCA 220.

[45] The Court may make inferences of fact, but only if they are “strongly supported” by undisputed facts before the Court: *Lameman* at para. 11. While both parties must put their best foot forward, the Court should not generally draw inferences based on what has and has not been adduced.

[46] Issues of law are not well-suited for resolution by summary judgment, and they should only be decided if the issue of law is "well settled by authoritative jurisprudence": *Pearman v. Kuramoto*, 2024 BCSC 1953 at para. 36; *Haghdust v. British Columbia Lottery Corporation*, 2011 BCSC 1627 at para. 18.

[47] British Columbia courts are reluctant to make a summary determination on a portion of a party’s claim, since doing so risks “litigating in slices”: *Coquitlam School District No. 43 v. T.W.D.*, 1999 BCCA 164 at para. 35. Some of the problems with such an approach are it may lead the court to make findings on an incomplete record, give rise to multiple appeals at preliminary stages, and lead to inconsistent findings being made across different stages of the litigation: *Century Services Inc. v. LeRoy*, 2014 BCSC 702, at para. 89, var’d on other grounds 2015 BCCA 120.

[48] PRPA has not sought partial summary judgment and has not provided alternative argument as to why partial judgment could be appropriate here. To the contrary, their argument relies on the degree to which all of Trigon’s claims are intertwined. To succeed on their application, they must prove that summary judgment is appropriate for all of Trigon’s claims.

Limitations Defences

[49] Section 6(1) of the *Limitation Act*, S.B.C. 2012 c. 13 provides that parties must not commence a proceeding in respect of a claim more than two years after the day on which the claim is discovered.

[50] Section 8 of the *Limitation Act* notes that a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

> (a) that injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the person against whom the claim is or may be made;
>
> (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[51] Accordingly, given that Trigon filed its NOCC on November 7, 2023, any claims discovered before November 7, 2021 are out of time and must be summarily dismissed.

[52] The discoverability analysis was described by the Supreme Court of Canada in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31:

> [44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise (*Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).
>
> [45] Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. In this particular context, determining whether a plausible inference of liability can be drawn from the material facts that are known is the same assessment as determining whether a plaintiff "had all of the material facts necessary to determine that [it] had prima facie grounds for inferring [liability on the part of the defendant]" (*Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30). […]

[53] The British Columbia Court of Appeal has cautioned that limitations issues are often not appropriate for summary judgment. In *Rooney v. Galloway*, 2024 BCCA 8 the court noted, albeit in *obiter*:

> [167] Nor are limitation issues readily determined under a summary judgment application brought under R. 9-6 of the Rules, where the question is

> whether there is a "genuine issue of material fact requiring trial" (*Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 11, citing *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 1999 CanLII 664, at para. 27). Thus, on an application under R. 9-6, "if the evidence needs to be weighed and assessed, then...the application is to be dismissed" (*Beach Estate v. Beach*, 2019 BCCA 277 at para. 67).

[54] Similarly, in *Nourifard v. Emadzadeh*, 2024 BCCA 240, Justice Willcock, for the Court of Appeal, with respect to a summary judgment dismissal on a summary judgment application, noted that in that case:

> [27] These are inherently factual analyses. For that reason, as the respondents submit, findings that the statutory test has been met are subject to review on a deferential standard. However, for the same reason, it may be a reviewable error to find that a claim was discovered on a certain date on an application under R. 9-6 where there is an evidentiary contest. Legitimate factual contests are usually "genuine issues for trial".

[55] Nonetheless, limitations issues can be decided under Rule 9-6 if no evidence need be weighed and there is no triable issue of material fact: *Smith v. SaNOtize Research and Development Corp.*, 2024 BCSC 386 at para. 53.

ISSUES

[56] Trigon has pleaded that PRPA breached the Lease Agreement by:

a) unreasonably failing or refusing to consent to the LPG Request, contrary to Clause 5(1) of the Lease Agreement (the “LPG Request Claim”);

b) engaging in post-contractual conduct to deny or deprive Trigon from the benefits of its rights under the Lease Agreement, including (but not limited to) entering into the Vopak Agreement and extending or renewing the term of the Vopak Agreement (the “PDA Extension Claim”); and

c) breaching its duty of good faith performance of its contractual obligations under the Lease (the “Good Faith Claim”).

[57] To assess whether summary judgment is appropriate, it is necessary to determine whether there is a triable issue with respect to any of these three claims.

In light of the arguments made by all parties, the issues to be determined for each claim are:

a) Whether the limitations defence has been shown beyond a doubt to apply; and

b) If not, whether any triable issues of material fact remain.

POSITIONS OF THE PARTIES

[58] PRPA substantially adopted the arguments of REEF on this application. Where they argued together, they are referred to as the "Applicants".

[59] The Applicants argue primarily that Trigon's claims were all discoverable on August 20, 2015. In the alternative, they argue that they were discoverable on November 14, 2018.

[60] On their primary submission, the Applicants argue that Trigon received a copy of the Exclusivity Clause in August 2015, and should have been in a position to make its claims as of that moment. Specifically,

a) On or about August 20, 2015, PRPA's counsel sent extracts of the Vopak Agreement, including the LPG Exclusivity Clause, to Trigon's (formerly RTI) counsel.

b) The following day, on August 21 2015, George Dorsey, President of RTI at the time, e-mailed Don Krusel of PRPA attaching the same extracts of the Vopak Agreement including the LPG Exclusivity Clause.

[61] Trigon argues it was not in a position to discover any of its claims in 2015 because any knowledge it may have had upon being provided the extracted Exclusivity Clause was "extremely limited" since PRPA did not provide "sufficient (or consistent) information" to enable Trigon to understand the full effect of that clause. In particular, Trigon argues that, after receiving the Exclusivity Clause, it still did not know:

a) whether the Exclusivity Clause provided was "actually taken from the Vopak PDA";

b) whether the rights described in the Exclusivity Clause expired, continued to exist, were renewed, or were amended by subsequent agreement;

c) whether the product list under the exclusivity clause was amended;

d) whether there were any "default or 'off-ramp' provisions" elsewhere in the contract that would potentially allow PRPA to back out of the Exclusivity Clause or somehow otherwise grant a request from Trigon to process LPG as an approved use under the Lease Agreement; and

e) what certain of the defined terms used in the Exclusivity Clause meant.

[62] In their alternative submission, the Applicants claim that the Exclusivity Clause was explicitly cited and discussed during the negotiation of the terms of a 2018 project agreement amending agreement to which Trigon was a party (the "PAAA"). They argue that these communications show Trigon must have been aware of the Exclusivity Rights during these exchanges, and would not have spent months on these negotiations without understanding their impact on Trigon's operations: the claims must therefore have been discoverable as of November 14, 2018. As specific examples of these communications, the Applicants point to:

a) A list of responses from AltaGas to comments from RTI/Trigon in which RTI/Trigon states "Recital F(b) and Section 4.2 of the [PAAA] must be deleted. RTI is not a party to these agreements and cannot make the statements out." AltaGas responds, "… This Recital and Section 4.2 are merely a statement of fact to confirm that the rights being granted re: exclusivity to RILE LP [Ridley Island LPG Export Limited Partnership ("**RILE LP**")], a joint venture partnership formed between AltaGas and Vopak] in the PAAA are subject to the rights previously granted to Vopak. As Vopak is a limited partner of RILE LP, there can be no misconception

that they are agreeing to new rights that in any way diminish the rights they hold independently…"

b) A revised version of the PAAA sent from RTI/Trigon to AltaGas on December 3, 2018 with track changes from RTI/Trigon stating that "bulk liquids" in Recital G and section 4.2 need to be defined.

c) A revised version of the PAAA sent from RTI/Trigon on December 7, 2018, which includes notes to draft on Recital F and section 4.2, which both explicitly reference the Exclusivity Rights.

[63] Additionally, the Applicants argue that Trigon demonstrated its awareness of the LPG Exclusivity Clause on a number of occasions between 2015 and November 6, 2021:

a) On or about September 6, 2015, counsel for PRPA sent an e-mail, with Trigon's president at the time carbon copied, where he again references the fact that the Vopak Agreement "provides them with exclusivity for LPG".

b) On December 9, 2015, PRPA, AltaGas LPG Limited Partnership, and Trigon (as RTI) entered into a Consent to Sublease, under which PRPA provided its consent to RTI for RTI to sublet part of the Lands at the Port to AltaGas. The Consent to Sublease refers explicitly to the Vopak Agreement in recitals and in a substantive provision.

c) On or about April 16, 2018, Trigon personnel, including its President and Chief Operating Officer, Marc Dulude, attended a meeting with Vopak and PRPA. Trigon's internal notes from that meeting acknowledge that "Vopak has exclusive rights to both Parcel 0 and Parcel C on Ridley Island and exclusive rights to all LPG (end other liquids) exports an Ridley Island".

d) On or about March 8, 2021 PRPA's President and Chief Executive Officer, Shaun Stevenson, reminded Trigon that "[a] part of the authorization of the sublease for RIPET, Vopak was provided exclusive

> rights for 'bulk liquids/gases" in the agreements with PRPA, and that Vopak "[…] will not waive the exclusivity at this time".

[64] Trigon argues that it opposed the inclusion of those provisions because it could not speak to their validity and their completeness, and that in any event the provisions do not prove that Trigon had sufficient information upon which to base its eventual claims. As above, Trigon states that being aware of the Exclusivity Clause was not enough for its claims to be discoverable.

[65] These arguments were said to apply to all of Trigon's claims. Some more specific arguments were adduced with regard to each of the three specific claims in Trigon's Amended Notice of Civil Claim ("ANOCC"), and discussed below.

DISCUSSION: THE LPG REQUEST CLAIM

The Limitations Defence

[66] REEF's written submissions, adopted by PRPA, clearly demonstrate that the arguments mentioned above are meant to defeat all of Trigon's claims, including the LPG Request Claim:

> Regardless of whether it is the entering into of the Vopak PDA, the renewals of the Vopak PDA, or the denial of the LPG Request, Trigon knew or ought to have known they could have brought a claim upon first learning about the granting of the Exclusivity Rights…
>
> [Emphasis added.]

[67] In oral argument, counsel for PRPA confirmed their position that "Trigon knew or ought to have known the essential fact that its LPG Request, whenever it would make that request in time, would be denied. And it knew of that essential fact on August 20th of 2015…" [emphasis added].

[68] The Applicants further this argument in REEF's written submission, stating that "[w]hether or not Trigon specifically contemplated the LPG Request at the time it discovered the Exclusivity Rights is immaterial". They say that Trigon had long contemplated expanding its permitted uses under the Lease Agreement, and that Trigon's contemplated expansion included consideration of LPG. Therefore, when

Trigon was provided the Exclusivity Clause in August 2015, "it can be reasonably inferred that Trigon knew, or at the very least ought to have known, at those times that the Exclusivity Rights would have precluded PRPA's ability to consent to a request to expand Trigon's permitted uses into LPG (such as the LPG request)." Therefore, in their view, the LPG Request Claim was discoverable on August 20, 2015 (or in the alternative at the later times that they claim Trigon knew about the exclusivity).

[69] Trigon notes in response that, in 2015, it had only received the excerpted Exclusivity Clause—it did not receive the full (albeit redacted) copies of the PDA and amendments until 2023. It says it was not possible to know in advance that a request would be refused simply because they knew the language of the excerpted clause alone.

[70] Trigon argues more broadly that the LPG Request Claim was not discoverable at the time it found out about the exclusivity because this claim engages far broader concerns, namely the mixed question of fact and law of whether the withholding of consent was reasonable. Among other issues, this analysis requires an enquiry into the entire complex factual matrix relating to the parties' dealings with one another leading up to and including the moment of the refusal. It may also concern whether the Exclusivity Clause was validly in force at the time consent was withheld and whether PRPA withheld consent in order to secure a new advantage uncontemplated by the lease. Indeed, PRPA pleads in its notice of application that "reasonableness is not confined to matters which touch both parties to a lease. Rather a landlord may take into account its entire business in considering a request for consent under a lease, including whether its own financial interest will be adversely affected."

[71] In reply submissions, PRPA repeats that "the foundation of each of [Trigon's] claims," including the LPG request claim, is the granting of the Exclusivity Rights. PRPA argues that Trigon concedes this point in paragraph 24 of the ANOCC, which reads:

> By letter dated November 6, 2023, PRPA denied the LPG Request. The sole basis PRPA provided for the denial was that the LPG Request conflicted with PRPA's other commercial commitments, specifically, with the [REEF exclusivity contained in the PDA] […]

[72] Clearly, saying that "X is the sole reason *provided* for the refusal" is different than conceding that "X *is* the sole reason for the refusal". Trigon does not concede that the exclusivity is the only reason for the refusal. Even if it did, the claim concerns the reasonableness of that refusal. The reasonableness of the decision is not solely dependent on the reason given. It is determined by the circumstances surrounding the decision. The reasonableness of refusing on that sole basis would still be a complex mixed question of fact and law.

[73] The LPG Request Claim is clearly concerned with more than just the initial grant of exclusivity from 2015: it is concerned with the reasonableness of the withholding of consent overall. That reasonableness is grounded in the circumstances of the request and the withholding. It is not clear that those circumstances could be evaluated in 2015 or in the years afterwards as argued by the Applicants. They could only be evaluated, at the earliest, after Trigon had obtained sufficient context to make a plausible inference that PRPA's refusal was unreasonable. PRPA has not shown that Trigon had sufficient context to make that assessment at any time prior to November 2021. Indeed, their submissions focused almost exclusively on when Trigon obtained knowledge of the exclusivity, relying on their interpretation of paragraph 24 of the ANOCC. Knowledge of the extracted Exclusivity Clause, and the other fragments of knowledge that the Applicants have shown Trigon had prior to November 21, 2021, has not been shown to have put Trigon in a position to make a plausible inference of PRPA's liability: *Grant Thornton LLP* at para. 45.

[74] Trigon's arguments, when assessed in light of basic principles of discoverability, cast further doubt on the Applicants' argument. Section 8(a) of the *Limitations Act* states that a claim is not discovered until the first day when a person knows, or reasonably ought to have known, that injury, loss or damage has

occurred. The LPG Request Claim is that PRPA violated Clause 5(1) of the Lease Agreement by unreasonably withholding consent. That clause states:

> […] The Lessee shall use the designated premises for no other purpose save with the written consent of the Lessor and upon such terms and conditions as may be stipulated by the Lessor, such approval not to be unreasonably withheld or delayed.

[75] A breach of this provision cannot be said to have occurred at any point prior to the consent being withheld unreasonably. While the Applicants could perhaps more plausibly argue that Trigon's other claims are less closely tied to specific provisions, the LPG Request Claim is unambiguously anchored in Clause 5(1). Reading that provision plainly, it is not evident how, if at all, it could be breached by the landlord pre-emptively.

[76] Indeed, if Trigon had brought the LPG Request Claim in 2015, alleging that PRPA had breached Clause 5(1) of the Lease Agreement, a conceivable response that PRPA would have sought to strike that claim as premature, on the grounds that Trigon must first seek consent and have it withheld before claiming a breach of this provision. It is only after that point in time that a loss, injury or damage can be said to arise, triggering the start of the limitations period.

[77] I would also note that Trigon is seeking specific performance as its primary remedy, presumably meaning it asks the Court to compel PRPA to accede to the LPG Request. This relief could not sensibly have been sought prior to the making of such a request. From this perspective, the refusal itself is a material fact on which the claim is based: *Limitations Act* ss. 1, 8; see also *Grant Thornton LLP* at paras. 36–37, 40; *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122 at paras. 27–28.

[78] In sum, PRPA has failed to show that Trigon had sufficient context to know that its withholding of consent would be unreasonable before November 2021. In addition, PRPA has failed to show that the LPG Request Claim was discoverable before consent was actually withheld on November 6, 2023.

[79] Before discussing the consequences of this finding, it is necessary to address one final argument made by counsel for PRPA. The argument relies on para. 85 of the decision of Giaschi J. in *Trigon SC*, an application for production of unredacted documents:

> [85] In respect of the pleaded limitation defence, other than the fact that a limitation defence is determined by dates, I fail to see how the redacted dates in the agreement are relevant to the limitation defence. That defence will be determined on the basis of when Trigon became aware of or discovered that exclusivity rights had been granted by PRPA to REEF. The dates, timelines and milestones are irrelevant to this.
>
> [Emphasis added.]

[80] Counsel for PRPA argues that the Court is now bound by Giaschi J.'s comment, and should only depart from it in "compelling circumstances".

[81] Of course, that decision was made at a very preliminary stage, and from the perspective of document production. Justice Giaschi did not benefit from the evidentiary record now before me, nor from the three full days of argument in which counsel focussed almost exclusively on the nuances of the limitations defence. Justice Giaschi properly decided the narrow issue of whether certain dates were properly redacted. He did not make any final findings that would bind this court about the proper application of the limitations defence. Even if this were a final finding, para. 72 of the appeal decision, *Trigon CA*, supplants it, saying:

> […] Whether the PRPA has established such a defence will turn, as the judge correctly noted, on the question of discoverability; the actual dates, timelines, and project milestones contained in the documents are irrelevant to that issue.

[82] To be absolutely clear, I also make no final findings in this decision. On this application for summary judgment, based on a still-limited evidentiary record, I have found that it is not beyond a doubt that the LPG Request Claim will fail on the basis of the limitations defence. That finding is not incompatible with the findings made by Justice Giaschi. Nor, I would stress, is that finding incompatible with any other Justice of the Supreme Court making different findings with respect to the LPG

Request, based on a different evidentiary record and on a different standard than that applicable to a Rule 9-6 application.

Other Genuine Issues of Material Fact

[83] Having found that the limitations defence does not render the LPG Request Claim beyond doubt, it is necessary to determine whether any material issues of fact remain to be tried for this claim.

[84] PRPA stated in its notice of application that Trigon had "advanced no allegations of fact to suggest why… it was unreasonable for PRPA to deny the LPG Request". Oral submissions by all parties focussed mainly on the limitations defence.

[85] The onus is on the applicant to demonstrate that there is no genuine issue of material fact requiring trial. While it is true that the respondent may have to refute or counter the applicant's evidence, this is only the case if the applicant has sufficiently met their heavy burden by showing an absence of genuine issues for trial.

[86] In this case, I am not satisfied that PRPA and REEF have met their burden of showing beyond a doubt that there are no genuine issues in relation to the LPG Request Claim. As noted by Trigon, the reasonableness of the refusal is a complex question of mixed fact and law. The relevant circumstances must be taken into account. Trigon claims that the sole reason provided was PRPA's commitments to REEF. PRPA claims that this was only one of the reasons provided. While it is not entirely clear on this application which circumstances will be relevant to the reasonableness assessment, I am satisfied that there are material issues of fact on this point requiring trial.

CONCLUSION

[87] It is not beyond a doubt that the limitations defence will succeed with respect to the LPG Request Claim, nor is it beyond a doubt that PRPA did not withhold consent unreasonably. As discussed above, there was no argument that this application could or should result in a partial summary judgment. Having found the

summary judgment application inappropriate with respect to the LPG Request Claim, I dismiss the application.

COSTS

[88] Should the parties wish to address cost, they may contact Supreme Court Scheduling within 60 days of this decision to schedule a hearing before me.

"Maisonville J."