

CANADA / JUDGMENT

Al-Marzouq v. Nafissah

2022 BCSC 1670

COURT

Supreme Court of British Columbia

DECIDED

23 September 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1670 Al-Marzouq v. Nafissah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Al-Marzouq v. Nafissah,

2022 BCSC 1670

Date: 20220923

Docket: S1611729

Registry: Vancouver

Between:

Salem Khaled Dawoud Al-Marzouq

Plaintiff

And

Khalil Essa Mousa Nafissah

Defendant

Before: The Honourable Justice Kent

Reasons for Judgment

Counsel for Applicant / Defendant by counterclaim:

S. Hern, K.C.

Counsel for Respondent / Plaintiff:

K. Sherriff

N. Robinson-Dunning, Articled Student

Place and Date of Trial:

Vancouver, B.C.

August 24-26, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 23, 2022

Table of Contents

INTRODUCTION. 3

PROCEDURAL OVERVIEW.. 3

ADDITIONAL BACKGROUND FACTS. 5

IS THE CLAIM STATUTE BARRED UNDER KUWAITI LIMITATIONS LAW?. 9

IS THE CLAIM STATUTE BARRED UNDER BC LAW?. 14

Meaning of an order granting leave to amend pleadings "without prejudice to any limitation defence"?. 16

Application of the Old Act?. 19

Application of the New Act?. 23

Conclusion. 26

INTRODUCTION

- [1] The defendant applies for summary trial of a limitation defence. For the reasons that follow, the application is granted and the plaintiff's action is dismissed with costs.

PROCEDURAL OVERVIEW

- [2] This action concerns a tort which is alleged to have occurred many years ago in the State of Kuwait, a country located in the northwestern corner of the Persian Gulf in Western Asia. Both Mr. Al-Marzouq and Mr. Nafissah resided in Kuwait at the time although the latter has since moved to Canada.
- [3] Mr. Al-Marzouq launched his first tort action in the Kuwaiti courts in July 2013. It was never personally served upon Mr. Nafissah, who was deported from Kuwait shortly after the lawsuit was filed.

- [4] In March 2015, Mr. Al-Marzouq obtained an uncontested judgment in the Kuwaiti lawsuit in the amount of 130,000 Kuwaiti Dinars plus an additional 200 Dinars for legal expenses. That judgment has never been paid.
- [5] Once Mr. Al-Marzouq discovered that Mr. Nafissah was residing in British Columbia, he issued a Notice of Civil Claim in this Court on December 2016 to enforce recovery of the Kuwaiti tort judgment (and another debt judgment he had obtained against Mr. Nafissah but which is no longer in issue) (the "Claim"). Mr. Nafissah filed a Response to Civil Claim in May 2017 resisting enforcement of the Kuwaiti judgment as being contrary to public policy and the principles of natural justice. He claimed that he had never been served with the Kuwaiti lawsuit and had been given no opportunity to defend it.
- [6] In June 2019, Mr. Al-Marzouq applied for summary trial and recognition/enforcement of the Kuwaiti tort judgment. In the alternative, if the Court found the Kuwaiti tort judgment to be unenforceable in Canada on public policy grounds, then Mr. Al-Marzouq also sought leave to amend the Claim to sue on the (Kuwaiti) cause of action underlying the judgment.
- [7] Mr. Nafissah opposed the summary trial application along with the alternative application to amend the Claim to sue on the Kuwaiti tort. In his Response, he asked that, if leave was granted to amend the Claim, the amendment should be made "without prejudice to [his] right to advance a limitation defence" which he claimed to have accrued under Kuwaiti law.
- [8] On October 15, 2019, Madam Justice McDonald of this Court dismissed Mr. Al-Marzouq's application for summary judgment in respect of the Kuwaiti tort judgment but granted him leave to amend the Claim "to advance the tort Claim associated with the Kuwait Tort Judgment without prejudice to the Defendant's right to raise a limitation defence". Her Reasons for Judgment are indexed at 2019 BCSC 1759.
- [9] Mr. Al-Marzouq filed his Amended Notice of Civil Claim on April 21, 2020 (the "Amended Claim"). The amendments transformed a four-page pleading into an 11-page document setting out the history of the parties' business relationships in Kuwait from 1997 to 2007, and subsequent related lawsuits and criminal proceedings before the Kuwaiti courts, including the tort action ultimately giving rise to the tort judgment which Mr. Al-Marzouq had attempted to enforce in British Columbia.
- [10] The Amended Claim pleaded tort liability on the part of Mr. Nafissah "for a wrongful personal action pursuant to Article 227 of the Kuwait Civil Code" and sought damages pursuant to Articles 230 and 231 of that Code. The "wrongful personal action" was identified as an "unwarranted objection to the transfer" of a Concession Agreement which prevented Mr. Al-Marzouq from exploiting certain Ahmadi Lands owned by the Kuwaiti government.

- [11] In the alternative, should the tort claim not be determinable by this Court in accordance with Kuwaiti law, Mr. Al-Marzouq invoked the law of British Columbia as the basis for Mr. Nafissah's liability and, in particular, "the common law tort of intentional interference with economic relations", i.e. "unlawfully and intentionally trying to block the Concession Agreement in bad faith" for the purpose of depriving Mr. Al-Marzouq of its benefits for over six years.
- [12] On October 6, 2020, Mr. Nafissah filed an Amended Response to Civil Claim. He denied liability, whether under Kuwaiti law or BC law, pleaded estoppel by virtue of the damages claim having already been determined in a different proceeding in Kuwait and thus rendering it *res judicata*, and invoked the three-year limitation period provided by the Kuwait Civil Code as a statutory bar and a complete defence to the claim.
- [13] As indicated above, Mr. Nafissah now applies under Supreme Court Civil Rule 9-7 for summary trial of an issue which may be dispositive of the lawsuit, namely whether the action is statute barred pursuant to the law of Kuwait or, if necessary, British Columbia.
- [14] For the reasons that follow, I find that
- the issues raised by this application are suitable for disposition by way of a summary trial;
 - the evidence before the Court permits the finding of facts necessary to decide the matter and it would not be unjust to do so in the circumstances; and,
 - on the merits, the action is statute barred and must be dismissed with costs to the defendant.

ADDITIONAL BACKGROUND FACTS

- [15] There is a rather convoluted history of business dealings between the parties in Kuwait. It is not necessary to review that history in detail here. However, some context is required in order to ascertain the "start-date" for any limitation defence applicable under either Kuwaiti law or the law of British Columbia.
- [16] The parties were shareholders in two companies incorporated in Kuwait: Kinya Holding Company ("Kinya") and Marzouk Lube Oil Company WLL ("MLOC").
- [17] In 1999, by way of a Concession Agreement, MLOC obtained from Kuwait's Public Authority for Industry (which administers and regulates industrial plans on public lands) the rights to produce lubricant and oil in an area described as the Ahmadi Lands.
- [18] In October 2005, an agreement was made to transfer MLOC's rights under the Concession to Mr. Al-Marzouq. The process of obtaining the necessary approvals to transfer the Concession in Kuwait takes some time, and while it was underway, a share purchase agreement was made in August 2006, pursuant to which Kimya was to own 99% of the shares of MLOC and Mr. Al-Marzouq the remaining 1% of shares.

- [19] The share purchase agreement was later terminated when Kimya was unable to pay the required purchase price for the shares. A further agreement was made in October 2007 whereby Mr. Al-Marzouq would hold 85% of the shares and MLOC and Kimya would hold the remaining 15%.
- [20] A few days later, on October 21, 2007 the transfer of the Concession from MLOC to Mr. Al-Marzouq was "gazetted" by Kuwait's Public Authority for Industry. This provided an opportunity for interested parties to file objections to the transfer of the Concession. Mr. Nafissah filed such an objection. At the time, he was a shareholder in Kimya which in turn was a shareholder in MLOC. Two other shareholders also filed objections.
- [21] Mr. Al-Marzouq responded to the objections by filing two lawsuits.
- [22] In January 2009, the Court in Kuwait granted the relief sought by Mr. Al-Marzouq in one of the lawsuits and affirmed the transfer of the Concession from MLOC to Mr. Al-Marzouq. Thereafter he asked the Public Authority for Industry to authorize the transfer of the Concession from MLOC to himself. The Public Authority for Industry declined the transfer on the basis that the judgment of the Kuwaiti Court did not have the effect of overriding Mr. Nafissah's objection. This ultimately resulted in yet another action in the Kuwaiti Court to compel the Public Authority for Industry to complete the transfer of the Concession notwithstanding Mr. Nafissah's objection.
- [23] On May 10, 2012, the Kuwait Court granted the injunction sought and mandated the transfer of the Concession by the Public Authority for Industry. Mr. Nafissah then appealed that judgment and approximately one year later on April 16, 2013, the Kuwait Court of Appeal dismissed the appeal and upheld the injunction mandating the Concession transfer to Mr. Al-Marzouq.
- [24] The parties agree, as do their respective experts on Kuwaiti law, that the date of the appeal judgment, April 16, 2013, is the "start-date" for any limitation period under Kuwaiti law pertaining to Mr. Al-Marzouq's tort lawsuit in that country. That lawsuit was actually issued three months later, on July 16, 2013. As noted earlier, the cause of action was pursuant to Article 227 of the Kuwait Civil Code which, translated from Arabic into English, provides as follows:

Article 227

Anyone who, by his wrongful act, causes harm to others, shall commit to compensate him, whether the damage was caused directly or consequentially. The person is obligated to compensate for the damage resulting from his wrongful act, even if the person was not discerning.

- [25] As noted earlier, the Kuwaiti tort lawsuit was not personally served upon Mr. Nafissah who had been deported from Kuwait shortly after the lawsuit was issued. He was not aware of the lawsuit and did not contest it.

- [26] The Kuwaiti tort judgment was issued on March 26, 2015. It was not merely a default judgment for the amount claimed by Mr. Al-Marzouq. While Mr. Al-Marzouq's lawyer submitted a dossier of documents as evidence and made submissions, the Court of its own motion decided to appoint an expert to investigate the matter and report on the nature of the agreement between the parties and the value of the damages claimed.
- [27] The Kuwaiti Court issued a four-page judgment. It held Mr. Nafissah had acted wrongfully by maintaining his objection to the Concession transfer after having endorsed the transaction in a shareholders' meeting, and that he had effectively terminated his standing to make any objection after surrendering his shares in MLOC and "withdrawing from the company".
- [28] Mr. Al-Marzouq appealed the Kuwaiti trial judgment, presumably seeking to increase the amount of damages awarded, but his appeal was dismissed on October 26, 2015.
- [29] As noted above, this action was issued by Mr. Al-Marzouq in the Supreme Court of British Columbia on December 19, 2016 to enforce the Kuwaiti tort judgment against Mr. Nafissah who was by then a resident of this Province. The relevant litigation chronology thereafter is as follows:

May 12, 2017

Response to Civil Claim filed by the defendant.

December 14, 2018

Notice of Application filed by the plaintiff for summary trial of the Claim or, alternatively, leave to amend Notice of Civil Claim to plead the underlying tort cause of action.

June 5, 2019

Application Response filed by the defendant.

October 15, 2019

Order of Madam Justice McDonald refusing enforcement of Kuwaiti judgment but granting leave to amend without prejudice to the defendant's right to raise a limitation defence.

April 21, 2020

Amended Notice of Civil Claim filed by the plaintiff.

October 6, 2020

Amended Response to Civil Claim filed by the defendant.

August 17, 2021

Notice of Application filed by the defendant for summary trial of limitation period defence and dismissal of action.

September 8, 2021

Application Response filed by the plaintiff.

August 24-26, 2022

Hearing of summary trial application.

[30] It should also be noted that the parties entered into a "Tolling Agreement" leading up to the Kuwaiti judgment enforcement hearing before Justice McDonald. The agreement was required as a result of an injury suffered by counsel for Mr. Nafissah which delayed the application. Under the Tolling Agreement, the parties agreed to exclude the period from January 4, 2019 to June 26, 2019 (a total of 173 days) from the calculation of time applicable to any limitation defence.

IS THE CLAIM STATUTE BARRED UNDER KUWAITI LIMITATIONS LAW?

- [31] The parties agree that limitation periods are substantive law and as such, the plaintiff's claims in tort are subject to limitation periods applicable in the place where the tort is said to have been committed. This common law principle is now expressly provided for in s. 4 of the Limitation Act, S.B.C. 2012, c. 13 (the "New Act").
- [32] There is no dispute in this case that the alleged wrongdoing occurred in Kuwait. Accordingly, as per *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 SCR 1022, 1994 CanLII 44, the applicable limitation period is that of the *lex loci delicti* and Kuwait's limitation law applies.
- [33] The parties also agree on the principles applicable to proof of foreign law. Such law is a question of fact which must be proved by the evidence of experts in that law. The experts may refer to the relevant authorities, including codes and precedents that may explain the meaning and application of the foreign law. If the expert evidence conflicts or is obscure, it is permissible for the Court to make its own examination and construction of the cited authorities in order to arrive at a satisfactory conclusion regarding its content and application to the case before it: *Allen v. Hay*, 64 S.C.R. 76 at 80-81, 1992 CanLII 25, per Duff J; *Old North State Brewing Co. Inc. v. Newlands Services Inc.*, 58 B.C.L.R. (3d) 144, 1998 CanLII 6512 at para. 39 (C.A.).
- [34] No burden of proof lies on the parties to adduce evidence of the foreign law. If the foreign law is not proved, it is assumed to be the same as the law of the forum in which the case is heard, which is here, British Columbia.
- [35] In this case, the Court was provided with an affidavit by the plaintiff's lawyer in Kuwait, Mr. Husain Al-Ghareeb, an affidavit that was also before Madam Justice McDonald on the judgment enforcement summary trial. That affidavit includes a description of the legal and court system in Kuwait as well as the rules of civil procedure governing service of process in that country. The affidavit does not address the Kuwaiti law regarding limitation defences.

- [36] Each party retained its own expert to provide evidence regarding limitations law in Kuwait. The defendant's expert is Mr. Abdullah Al-Ayoub, whose two affidavits were sworn on March 9, 2021 and January 5, 2022. The plaintiff's expert was Mr. Abdulwahab Sadeq, whose two affidavits were sworn August 21, 2021 and June 7, 2022.
- [37] Both experts hold law degrees from Kuwait University, are practising lawyers within Kuwait, and are fluent in Arabic and English. Their affidavits include the Court's usual "certification" required of experts in order for their opinions to be admissible in a court proceeding in British Columbia. Neither expert was subjected to cross-examination, whether before the Court or otherwise, even though their opinions conflict on certain crucial points.
- [38] Both experts agree that the limitation period for an Article 227 claim in Kuwait is the three-year period specified in Article 253 of the Kuwait Civil Code:

Article 253

An action for damages arising from an unlawful act is prescribed after three years from the date upon which the injured knew of the injury and of the person responsible for it; or 15 years from the date on which the unlawful act was perpetrated, which expires first.

- [39] It is also common ground between the parties' experts that the latest date on which the three-year limitation clock began to run with respect to the plaintiff's tort claim in Kuwait was April 16, 2013, when the Kuwaiti Court of Appeal affirmed the trial court's order that the Public Authority for Industry transfer the Concession to Mr. Al-Marzouq. Obviously, the Kuwaiti tort action brought by Mr. Al-Marzouq in the Kuwait Court was filed a mere three months after the commencement of the limitation period and thus was filed in time.
- [40] It is common ground that Kuwaiti law contemplates a possible postponement or even a re-starting of limitation periods in certain circumstances. In Kuwait, these doctrines are known as "impediment" or "interruption" and are addressed in Articles 446, 448 and 450 of the Kuwait Civil Code as follows:

Article 446

The period prescribed for not hearing the case does not apply where there is an impediment that makes it impossible for the creditor to claim his right even if the impediment is moral, and it also does not apply between the principal and the representative.

Article 448

The prescription period is interrupted by legal proceedings even if filed with a court without justification, by notification of the execution instrument and the attachment, by the application of the creditor for the admission of his claim in the bankruptcy or to a distribution, or by any act of the creditor to claim his right in the course of legal proceedings in any court action.

Article 450

If the period set for the interruption of the prescription period is suspended, a new period commences from the time the effect of the cause giving rise to interruption has ceased. The term of the new period is the same as that of the former one.

[41] The two Kuwaiti law experts offer diametrically opposed opinions regarding the application of these Articles to the facts of this case.

[42] In his affidavit sworn March 9, 2021, Mr. Al-Ayoub says that the limitation period applicable to advancing a lawsuit in British Columbia under Article 227 of the Kuwait Civil Code was three years commencing April 16, 2013, and thus expired on April 15, 2016. According to Kuwait law, if a claim is filed after the expiry of the applicable limitation period, the claim must be dismissed and the court has no discretion to permit its continuance despite expiry of the limitation period.

[43] The plaintiff's expert, Mr. Sadeq, disagrees with his colleague's conclusion regarding expiry of the three-year limitation period. He states that his colleague has failed to account for the interruption of limitation periods under Articles 448 and 450 of the Kuwait Civil Code. He argues that the relevant limitation period is suspended by commencement of litigation and is re-set when that litigation ends, resulting in two such interruptions in this case:

- the limitation period was interrupted on July 16, 2013 when the plaintiff filed his tort action in the Kuwaiti Court, and the three-year limitation period was re-started when that litigation was concluded on October 26, 2015;
- similarly, the limitation period was interrupted when the plaintiff issued his lawsuit in British Columbia on December 19, 2016, and was re-started afresh when the Court issued its judgment on October 15, 2019 dismissing the claim to enforce the Kuwait tort judgment; and
- the filing of the plaintiff's Amended Notice of Civil Claim on April 21, 2020 was within the new three-year statutory limitation period and is thus not subject to dismissal on the grounds that it is statute barred.

[44] Mr. Al-Ayoub's affidavit sworn January 5, 2022 disagrees. He says that "properly interpreted and applied, Articles 448 and 450 do not have application in this case". He argues:

- interruption is "the period of not hearing the case" and that the actual adjudication on the merits that occurred in the Kuwaiti tort action is not an interruption but, to the contrary, is a "final resolution";
- the "B.C. enforcement action" also does not qualify as an "interruption" because it was a claim to enforce a judgment debt (which is subject to a completely different 10-year limitation period) and did not assert the "meaning of the actual Claim", i.e. the original tort claim itself, but only its result, i.e. the judgment giving rise to a judgment debt; and

· "the meaning of the actual Claim", i.e. the merits of the underlying tort claim, was only asserted in British Columbia when the Amended Notice of Civil Claim was filed on April 21, 2020, and even if the three-year limitation period re-started on October 26, 2015 (which Mr. Al-Ayoub strenuously denies), the limitation period had expired before the amended pleading was filed and the claim is thus statute barred under Kuwaiti law.

[45] Mr. Sadeq's June 7, 2022 affidavit not only further disagrees with his colleague's analysis but, for the first time, also raises Article 446 of the Kuwait Civil Code dealing with "impediment" ("impossibility for the creditor to claim his right"). Unlike his first affidavit, however, Mr. Sadeq does not actually express any opinion on how the impediment argument applies to the facts of this case. Instead, he stresses how impediment involves the exercise of a discretionary power by the court and a "subjective test to be applied, to determine whether a certain issue is valid enough to justify the creditor's omission to claim his right provided that his inaction is not a result of his own fault or negligence".

[46] Lastly, Mr. Sadeq concludes his affidavit with a single paragraph setting out Article 135 of the Civil and Commercial Procedures Law No. 36 which provides:

In the event that the appealed judgment was found to be null and void due to a reason related to the notification process of the statement of claim, the court must, along with voiding the judgment, rule to return the case to the court of first instance for consideration after notifying the litigants, and filing the appeal shall be considered a notice served with the demands contained within.

[47] Again, Mr. Sadeq does not explain the significance of this Article but presumably wishes for me to infer that Kuwait has a judicial policy of mandatory remittance for retrial of judgments that are not enforced because of notice defects, an inference that perhaps confuses or ignores the difference between judgments that are nullities and judgments that are unenforceable elsewhere on public policy grounds.

[48] In the course of argument, I made it quite clear to counsel that I did not think it appropriate, nor fair to either party, for me to determine the fundamental conflicts of expert opinion (technically, a determination of the "fact" of Kuwaiti law) without the benefit of cross-examination before the Court, including the opportunity for questioning by the Court itself if necessary. I indicated that I was inclined to dismiss the summary trial application in favour of the full trial (currently set for January 2023) unless the parties agreed that the merits of the limitation defence could and should be determined summarily with reference to BC law and not the Kuwait Civil Code.

[49] The parties agreed that if I were to find that the Kuwait tort law applicable to the claim is either not proven or is insufficiently proven so as to permit me to determine the matter summarily, then the BC law of limitations should apply as a default and the Court was invited to proceed accordingly.

[50] I therefore turn to an analysis of British Columbia law as it pertains to the limitation defence raised in this case.

IS THE CLAIM STATUTE BARRED UNDER BC LAW?

[51] This is perhaps an even more complicated inquiry than the one involving "real" Kuwaiti law regarding limitation of actions. The intricacies of British Columbian limitations law, particularly as it relates to "postponement" and "discoverability", were once described by McLachlin J. in *Novak v. Bond*, [1999] 1 S.C.R. 808, 1999 CanLII 685 at para. 34 as a "longstanding source of frustration" in the Province, on account of the "obscure provision(s)" found in the legislation. Other cases have used more colourful descriptors in expressing dismay.

[52] There is now almost 40 years of Supreme Court of Canada case law on the principles of "discoverability" extending from *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, 1984 CanLII 21 to *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 [Grant Thornton]. The latter case dealt with New Brunswick legislation which the Court held to be a codification of the common law rule of discoverability reflecting a general standard that "the limitation period is triggered when the plaintiff discovers or ought to have discovered through the exercise of reasonable diligence the material facts on which the claim is based" (para. 40).

[53] In *Grant Thornton*, the Court defined "discovery" of a claim as that point in time "when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn" (para. 42).

[54] At its most basic, determining whether any particular claim or action is statute barred by limitations legislation requires the court to determine the "start-date" and the "end-date" for the relevant limitation period. If the litigation is not started before the "end-date", the statutory bar is a complete defence to the claim. In this case, the parties dispute all these dates, whether under the Limitation Act, R.S.B.C. 1996, c. 266 (the "Old Act") or the New Act. The difference of opinion centres mostly on the interpretation of the amendment order and the application of "discovery" principles, whether at common law or as codified in the legislation.

[55] Questions which must be decided include:

1. What is the meaning and effect of an order granting leave to amend pleadings "without prejudice to any limitation defence"?
2. Does the Old Act or the New Act apply to this case for limitation defence purposes?
3. What is the "start-date" and the "end-date" of the limitation period under each Act in this case?

[56] I will address each question in the sections that follow.

Meaning of an order granting leave to amend pleadings "without prejudice to any limitation defence"?

[57] This question arises both in the context of: (1) related claims against the same or new parties in an action that has already been started (e.g. counterclaims, third-party proceedings, adding new parties, etc.) and; (2) applications to amend pleadings to raise a new claim or a fresh cause of action when the limitation period has expired.

[58] The relevant provisions of the Old Act read as follows:

4 (1) If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

- (a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim,
- (b) third party proceedings,
- (c) claims by way of set off, or
- (d) adding or substituting a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

- (4) In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, even if between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

[59] The relevant provisions of the New Act are:

22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

- (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;
- (b) third party proceedings may be brought;
- (c) claims by way of set off may be advanced;
- (d) new parties may be added or substituted as plaintiffs or defendants.

- (5) In any court proceeding, the court may, on terms as to costs or otherwise that the court considers just, allow the amendment of a pleading to raise a new claim even though, at the time of the amendment, a court proceeding could not, under section 6, 7 or 21, be commenced with respect to that claim.
- [60] The extensive case law regarding the court's discretion to add parties to an action or to allow amendments to pleadings to raise new claims, notwithstanding the expiry of the applicable limitation period, is discussed at length in David Crerar & Peter Waldkirch, *The Annotated British Columbia Limitation Act* (Toronto: Thompson Reuters Canada, 2022) (the "Crerar Text") at pp. 293-334 and I need not repeat it all here. Suffice it to say that the court's discretion to allow such amendments is governed by the "just and convenient" test established in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd*, 19 B.C.L.R (3d) 282, 1996 CanLII 3033 (C.A.) and *Letvad v. Fenwick*, 2000 BCCA 630.
- [61] While many of the principles have developed in the context of applications to add parties, they also apply to amendment applications as articulated in *KPMG Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317 [KPMG Inc.]:
- [47] Accordingly, I conclude that a chambers judge faced with an application to amend (which is otherwise proper), under Rule 24(1), and the possible expiration of a limitation period in respect of the cause of action raised in the new pleading in circumstances where it would be inappropriate to decide that issue summarily, should ask herself this question:
- Assuming that the limitation period has expired, in the exercise of my discretion under s. 4(4) of the Limitation Act would I nevertheless permit the amendment?
- [48] If the answer is "yes", the proposed amendment should be allowed, pursuant to the reasoning in *Brito*, supra. If the answer is "no" (i.e. the loss of a limitation defence would cause such prejudice as would not permit the exercise of the s. 4(4) discretion in favour of the amendment) then the amendment should be allowed without prejudice to the defendant raising the limitation defence at trial. Such was the order in *287993 B.C. Ltd. v. Nanaimo (Regional District)*, 2006 BCSC 1231, and *Strata Plan VR2000 v. Shaw* (1998), 39 C.L.R. (2d) 87 (B.C.S.C.).
- [62] The reasons for judgment of Madam Justice McDonald allowing the amendment to the plaintiff's pleadings in this case are brief and do not expressly undertake the step-by-step analysis suggested in *KPMG Inc.* or other cases such as *The Owners, Strata Plan No. VIS3578 v. John A. Nielson Architects Inc.*, 2010 BCCA 329 at paras. 47 and 48. I infer she determined it would not be just and convenient to permit an amendment that would extinguish an accrued limitation defence and instead decided the circumstances warranted preservation of any such defence, the merits of which would be determined at trial.
- [63] The "without prejudice to the limitation defence" term of the order raises issues about the date on which the action/proceeding on the new cause of action is deemed to have been started for limitation period assessment purposes. The possibilities include:

- the date on which the original action was commenced (in this case, December 19, 2016);
- the date on which the application was first filed for leave to amend the original action to raise the new cause of action (December 14, 2018);
- the date of the judgment granting such leave (October 15, 2019); or
- the date on which the amended pleading was actually filed (April 21, 2020).

- [64] The plaintiff argues that the deemed "litigation start-date" in these situations should be the date on which the application to amend is first filed. The defendant, on the other hand, submits that it should be the date on which the amended pleading is actually filed. Neither party cites any authority on the point.
- [65] Section 4(4) of the Old Act refers to a limitation bar accruing between the date of the original notice of civil claim and the application for amendment, but those words do not necessarily or even by implication preclude a later date being the deemed "litigation start-date" for limitation defence assessment purposes. Section 22(5) of the New Act refers to the accrual of limitation period defences as at the date of the amendment. And, in my opinion, it is this latter date which should be used under both Acts.
- [66] The whole purpose of limitations legislation is to bar the filing or commencement of an action or court proceeding with respect to a claim or cause of action, if such action/proceeding is not filed before a certain date. In other words, it is the filing of the claim which is the crucial step. Logically, unless otherwise ordered by the court granting leave, the same should also be true of any "without prejudice" amendments which raise a fresh cause of action against the defendant, i.e. the filing of the amended pleading.
- [67] Both parties agree that, absent postponement based on discovery principles, the latest date on which the limitation clock would have begun to run in this case was April 16, 2013, when the Court of Appeal in Kuwait ordered the Public Authority for Industry to transfer the Concession to Mr. Al-Marzouq. As of that date, the validity of the transfer transaction was affirmed, as was the invalidity of Mr. Nafissah's filed objection. These are the essential facts giving rise to Mr. Al-Marzouq's cause of action.
- [68] On April 16, 2013, the Old Act was still in force in British Columbia and any six-year limitation period under s. 3(5) of that Act would have expired on April 16, 2019, one year before the Amended Notice of Civil Claim was actually filed. The question, then, is whether, for the purposes of the British Columbia litigation, the statutory bar was somehow postponed by "discovery" principles, whether at common law or pursuant to either of the Acts.

Application of the Old Act?

- [69] The limitations regime under the New Act is now governed by the overarching principle of "discovery". The Old Act, however, provided for various limitation periods by classification of injury.
- [70] The parties in this case agree that Mr. Al-Marzouq's tort claim does not constitute "injury to property" within the meaning of s. 3(2)(a) of the Old Act--a claim governed by a two-year limitation period--but rather is the type of claim "not specifically provided for in this Act" which is governed by the six-year limitation imposed by s. 3(5) of the Old Act.
- [71] As noted, the six-year limitation period for Mr. Al-Marzouq's claim expired on April 16, 2019, one year before the Amended Notice of Civil Claim was filed, unless the "running of time" was "postponed" by operation of s. 6 of the Old Act. The relevant provisions provide:

Running of time postponed

6 ...

- (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
- (a) for personal injury;
 - (b) for damage to property;
 - (c) for professional negligence;
 - (d) based on fraud or deceit;
 - (e) in which material facts relating to the cause of action have been wilfully concealed;
 - (f) for relief from the consequences of a mistake;
 - (g) brought under the Family Compensation Act;
 - (h) for breach of trust not within subsection (1).
- (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
- (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
 - (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
- (5) For the purpose of subsection (4),

- (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
- (b) "facts" include
 - (i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and
 - (ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,
- (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

[72] The first point to note is that postponement under the Old Act only applies to certain enumerated causes of action, none of which capture the economic tort alleged by Mr. Al-Marzouq in his Amended Notice of Civil Claim; see *Weldon v. Teck Metals Ltd.*, 2013 BCCA 358 at para. 44 ff. In other words, s. 6 of the Old Act does not even apply to the type of claim advanced by Mr. Al-Marzouq and, even accounting for the Tolling Agreement between the parties, his claim must be dismissed as statute barred.

[73] Even if postponement under the Old Act could be said to be available with respect to the type of claim advanced by Mr. Al-Marzouq, the requisite elements for "discovery" were all met in this case as of April 16, 2013:

- the identity of the defendant (here, Mr. Nafissah), the person responsible for the loss underlying the claim, was clearly known to Mr. Al-Marzouq, and had been for many years;
- as of April 16, 2013, when the Kuwait Court of Appeal affirmed the validity of the Concession transfer transaction notwithstanding Mr. Nafissah's filed objection, Mr. Al-Marzouq knew of the losses he had incurred as a result of the delays caused by that objection; and
- Mr. Al-Marzouq not only was aware that he could bring an action against Mr. Nafissah that had a reasonable prospect of success, but in fact actually launched such an action almost immediately after delivery of the Court of Appeal's judgment.

[74] Counsel for Mr. Al-Marzouq submits the common law "discoverability" rules delayed the running of the limitation period under the Old Act:

The plaintiff only knew he had a right to bring a claim in British Columbia on the underlying tort once the Court refused to enforce the foreign judgment. Prior to that, any claim on the underlying tort would be ["legally inappropriate" as] *res judicata* or an abuse of process.

[75] With great respect for the advocacy, I cannot agree with this submission.

[76] This is a summary trial. Mr. Al-Marzouq bears the burden of adducing evidence sufficient to prove on the balance of probabilities that the "start-date" for the six-year limitation period applicable to his claim has been postponed. The only evidence tendered by Mr. Al-Marzouq on the postponement issue is his second affidavit where he swears that, although he was

aware Mr. Nafissah had a Canadian passport, he "did not know his whereabouts until towards the end of 2016 when [he] received information that he was in Victoria", British Columbia.

- [77] Counsel cites no authority that pairs the postponement of a limitation period with knowledge of the defendant's whereabouts. Mr. Al-Marzouq was well aware that at the time he issued his lawsuit Mr. Nafissah was in a Kuwaiti jail. Indeed, he attempted to serve Mr. Nafissah at that institution, only to discover that he had been released a few days earlier and had been deported from the country. He then made a strategic decision to pursue his Kuwaiti lawsuit to judgment even though he knew Mr. Nafissah had not been personally served with that lawsuit and likely had no knowledge of its existence.
- [78] Counsel submits that "there is no reason that the plaintiff or his counsel ought to have known that a valid Kuwait judgment would not be enforceable in British Columbia". Again, I must respectfully disagree.
- [79] Mr. Al-Marzouq has been represented by counsel throughout. Both he and his counsel knew Mr. Nafissah had been deported and was banned from returning to Kuwait. Whatever judgment might be obtained in Kuwait would have to be enforced in a foreign jurisdiction, quite possibly Canada, a country which has long required personal service for the enforcement of foreign judgments (see e.g. *Wanderers' Hockey Club v. Johnson*, 14 D.L.R. 42 at 43, 1913 CanLII 379 (BC S.C.), citing Halsbury's Laws of England).
- [80] Furthermore, the six-year limitation period applicable to suing on the Kuwaiti tort in the British Columbia courts had not expired when the judgment enforcement action was started on December 19, 2016. Mr. Al-Marzouq and his counsel knew, or should have known, there was a substantial risk that enforcement of the judgment might not be permitted because of the absence of personal service of the Kuwaiti proceedings upon Mr. Nafissah (as ultimately turned out to be the case). The alternative claim based on the underlying cause of action arising from the Kuwaiti tort could have and should have been pleaded at the outset of the litigation, but this step was not taken.
- [81] It follows that I do not agree with counsel's submissions that "it was not legally appropriate to bring a Claim on the underlying tort until the Kuwait Tort Judgment was declared unenforceable and leave was granted to sue on the underlying cause of action." The plaintiff had the ability to issue such suit, whether independently at some earlier date or as an alternative in the later judgment enforcement proceeding, either of which step would have been well within the applicable limitation period. In these circumstances, there is no injustice in holding that the late-filed tort claim is statute barred.

Application of the New Act?

- [82] The New Act received royal assent on May 14, 2012 and came into force on June 1, 2013 (B.C. Reg. 290/2012 and B.C. Reg. 80/2013).

- [83] The plaintiff's tort action in Kuwait was filed on June 16, 2013, a month and a half after the New Act came into force. While I have found that the Old Act applies and that the "start-date" for the six-year limitation period under that Old Act was April 16, 2013, I will nevertheless consider in the alternative the possibility that postponement under the Old Act occurred and that "discovery" principles triggered application of the New Act.
- [84] Section 30 of the New Act provides for "transition" between the two limitation regimes. Section 30(4)(c) essentially provides that a "pre-existing claim" such as Mr. Al-Marzouq's claim (i.e., one that was based on an act or omission that took place before the New Act came into force and in respect of which no court proceeding had been commenced before the New Act came into force) which was not "discovered" before the commencement of the New Act is governed by the new legislation.
- [85] Certain general principles regarding limitation periods continue to apply to the regime created by the New Act. As noted in the Crerar Text at p. 18, they include:
- no discretion is involved in determining whether a limitation defence arises. A claim is either time-barred by the New Act or it is not;
 - the court has no inherent jurisdiction to extend the period of time established by the New Act, as inherent jurisdiction cannot be exercised in conflict with the statute; and
 - an expired limitation period is an absolute defence to an action. The merits of an action are not a relevant consideration in determining if an action is statute barred, and this absolute bar applies even where the plaintiff just narrowly misses a limitation period.
- [86] As also noted earlier, the strictness of these general principles is somewhat ameliorated by s. 22 of the New Act which permits the addition of an otherwise statute-barred claim to an existing claim by way of an amendment so long as it is "just and convenient" for this to occur. This was the principle underlying the application before, and the order granted by, Madam Justice McDonald in this case.
- [87] There is a subtle but important distinction between the concept of "postponement" under the Old Act and "discovery" under the New Act. In both cases, the defendant bears the onus of proving the facts necessary to establish that the claim is statute barred on the usual "balance of probabilities" standard.
- [88] However, under the Old Act, the onus was on the plaintiff to establish postponement whereas it appears that under the New Act the onus is on the defendant to prove the date of discovery. I say "appears" because divergent views on the matter were expressed in obiter by the Court of Appeal in *Gautam v. South Coast British Columbia Transportation Authority*, 2020 BCCA 135, leave to appeal ref'd, 2020 Carswell BC 3328, 2020 CanLII 102972 (S.C.C.). See also the discussion on the topic in the Crerar Text at pp. 21-24.

[89] In any event, the New Act establishes a "two-year basic limitation period" for filing a court proceeding in respect of a "claim" (defined by s. 1 to mean "a claim to remedy and injury, loss or damage that occurred as a result of an act or omission").

[90] Discoverability is the defining feature of the New Act. In that regard, as the Crerar Text states at p. 130:

The essential question in any limitation period issue is: has time run out? That question, in turn, can only be decided by answering: when did time start to run?

For the basic limitation period, this is determined by identifying when the claim was "discovered". Section 8 of the Act sets out the general test for discovering a claim. The basic limitation period will run from the day on which the plaintiff first knew or reasonably ought to have known each of the four elements set out in section 8:

- (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; and,
- (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.

Once these elements exist the plaintiff must sue within two years (as per the basic limitation period at section 6 of the Act).

[91] Mr. Al-Marzouq's arguments with respect to "discovery" under the New Act are the same as his arguments with respect to "postponement" under the Old Act. I rejected those arguments for the reasons stated in the previous section of these reasons and I would reject them on the same grounds in so far as any discoverability analysis under the New Act is concerned.

[92] Even assuming that geography and knowledge of Mr. Nafissah's whereabouts can be taken into account as part of any discovery analysis under the New Act, any such requirements were satisfied when "towards the end of 2016, [Mr. Al-Marzouq] received information that [Mr. Nafissah] was in Victoria", British Columbia (as per his second affidavit). This was presumably some time before December 19, 2016 when he actually filed his Notice of Civil Claim in this Court. Any two-year limitation period starting "towards the end of 2016" expired "towards the end of 2018", before the January 4-June 26, 2019 Tolling Agreement took effect.

[93] I have already explained in the earlier section of these reasons why the date of Madam Justice McDonald's judgment cannot be and is not the "discovery start-date" for limitation purposes under the New Act. At a minimum, the alternative claim based on the underlying cause of action arising from the Kuwaiti tort could have and should have been pleaded as part of the Notice of Civil Claim filed on December 19, 2016. In my view, this is the very

latest date on which it can legitimately be argued that discovery might have occurred and that date also does not "save" Mr. Al-Marzouq from the limitation defence.

[94] In my view, even if the New Act applies to Mr. Al-Marzouq's litigation rights in British Columbia, the claim is nevertheless statute barred.

Conclusion

[95] In summary, for the reasons stated above, I conclude:

- (1) the determination of the Kuwaiti tort cause of action, including whether it is barred by any limitations law, is to be made in accordance with the law of Kuwait;
- (2) the Kuwaiti law has not been proven to the satisfaction of the Court and, with the consent of the parties, the law of British Columbia is therefore deemed to be the same as the law of Kuwait for the purposes of determining whether the tort action is barred by any limitation period;
- (3) the "without prejudice" term of Madam Justice McDonald's order granting the plaintiff leave to amend the Claim to relitigate the Kuwaiti tort cause of action means that the deemed "start-date" of that litigation for limitation defence assessment purposes is the date on which the Amended Claim was filed in this Court;
- (4) the limitation period applicable to the Amended Claim is the six-year period imposed by s. 3(5) of the Old Act, and that date is not postponed either by s. 6 of that Act or any common law principles of "discovery" - hence the claim is statute barred pursuant to the Old Act;
- (5) the result would be the same even if the limitation defence was determined with reference to the New Act;
- (6) the plaintiff's action must therefore be, and is, dismissed as statute barred; and
- (7) costs will follow the event and are awarded to the defendant to be assessed on scale B of appendix B of the Supreme Court Civil Rules.

"Kent, J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/16/2022BCSC1670.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/al-marzouq-v-nafissah-2022>

Prepared on 28 October 2026 · Esheria