

CANADA / JUDGMENT

Clark v. Kasper

2024 BCSC 1369

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1369 Clark v. Kasper

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clark v. Kasper,

2024 BCSC 1369

Date: 20240730

Docket: S208956

Registry: Vancouver

Between:

Donald Berton Woollatt Clark

Plaintiff

And:

David Keith Kasper, Executor of the Estate of Judith Mary

Lockhart Kasper, Deceased and David Keith Kasper, Litigation

Representative of Jacob Kasper, Deceased

Defendants

Before: The Honourable Justice D. MacDonald

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

P. De Bruyn

Counsel for the Defendants:

S.D.G. Orstad

Place and Date of Hearing:

Vancouver, B.C.

May 14, 2024

Place and Date of Judgment:

Vancouver, B.C.

July 30, 2024

Table of Contents

Overview.. 3

Procedural History. 3

The Instant Application.. 5

Issues. 5

Legal Principles. 6

Striking Pleadings. 6

Admissions. 8

New Causes of Action and Limitation Periods. 9

Analysis. 11

Striking Admissions. 11

Loan #1. 11

Loan #4. 12

Striking Claims Barred by the Former LA. 14

Were new causes of action introduced in the ANOCC?. 17

Should I grant leave to amend?. 19

Disposition.. 20

Overview

- [1] This is an application by the defendants to strike certain paragraphs of the amended notice of civil claim ("AN OCC"), which the plaintiff, Donald Clark, filed on October 11, 2023. The defendants are David Keith Kasper, Executor of the estate of Judith Mary Lockhart Kasper ("Judith"), and David Keith Kasper, litigation representative of Jacob Kasper ("Jacob").
- [2] Both Judith and Jacob are deceased. Jacob passed on July 22, 2021 and Judith on December 3, 2021. I use their first names for clarity only and mean no disrespect in doing so.
- [3] Based on the reasoning below, I dismiss the defendants' application.

Procedural History

- [4] This proceeding relates to historical debt claims brought by the plaintiff against the defendants.
- [5] In his notice of civil claim ("NOCC"), filed September 10, 2020, Mr. Clark claimed the following:
 - i. On February 25, 2005, the plaintiff loaned \$90,000 to Kasper Diving and Marine Services Ltd. [a non-party to the NOCC] ("Loan #1") by a written, signed agreement. Loan #1 did not specify a date for repayment but there was an implied term that it would be repaid on demand.
 - ii. On June 4, 2009, the plaintiff loaned \$5,000 to Jacob ("Loan #2"). The agreement was not in writing, but there was an express or implied term that Loan #2 would be repaid on demand.
 - iii. On June 27, 2009, the plaintiff loaned \$1,000 to the defendants ("Loan #3"). There was no written agreement, but there was an express or implied term that Loan #3 would be repaid on demand.
 - iv. On August 1, 2009, the plaintiff loaned \$100,000 to the defendants ("Loan #4"). The written agreement, dated October 24, 2009, stated the parties agreed that Loan #4 was to be invested in a property owned by the defendants (the "Property").
 - v. On November 30, 2009, the plaintiff and Jacob executed an addendum to Loan #1 in which they agreed that the debt owed by the plaintiff would be invested in the Property. There was an express or implied term of the addendum that Jacob was personally liable for the debt owed by Kasper Diving and Marine Services Ltd.
- [6] I note that there was a fifth loan in 2011 that has been repaid.
- [7] On September 10, 2020, the same day the NOCC was filed, the plaintiff filed a certificate of pending litigation ("CPL") against the defendants. This aspect of the application was adjourned generally as the parties did not have time to make submissions regarding this issue when they were before me on May 14, 2024.

- [8] On November 22, 2021, default judgment was granted against Jacob with damages to be assessed. On July 17, 2023, the defendants filed a notice of application to set aside the default judgment and substitute an executor and litigation representative as defendants in place of Jacob and Judith. This request was granted.
- [9] On August 9, 2023, the defendants filed their response to the NOCC (the "Response"). In their Response, the defendants denied all of the loans but made an admission, in the alternative, that Loan #1 was advanced on February 25, 2005. Similarly, the defendants denied that Loans #2, #3, and #4 were entered into but agreed, in the alternative, to the dates on which they were entered into. They additionally set out that all four loans included an express or implied term that they would be repaid on demand. The defendants also acknowledged that - if the loans were indeed advanced - it was an implied term that they were advanced on an interest-free basis.
- [10] In their Response, the defendants provided that s. 3(5) of the former Limitation Act, R.S.B.C. 1996, c. 266 [Former LA] applies to all loans which are the subject matter of these proceedings. They aver that the Former LA provides for a six-year limitation period that begins to run on the date on which the right to bring the action arose. It is the defendants' position that the limitation period for a demand loan, as alleged here, begins to run from the date of the advancement of the funds and not from the date of a demand. To this extent, a demand is not necessary in order for the cause of action to arise.
- [11] On October 11, 2023, after the Response was filed, the plaintiff filed the ANOCC.

The Instant Application

- [12] On March 21, 2024, the defendants filed the current application pursuant to Rule 7-7(5) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules], to request that certain paragraphs of the ANOCC be struck on the basis that the plaintiff withdrew admissions without consent and without leave of the court. The defendants allege that the withdrawal of admissions in the ANOCC is an abuse of process under Rule 9-5(1)(a)(c). The defendants further argue that all the claims should be struck because they are statute-barred under the Former LA.
- [13] The plaintiff maintains that the defendants have breached the terms of the loans by failing to pay the balances owed. Before me, the plaintiff abandoned his claims with respect to Loan #2 and Loan #3, which were referred to at paragraphs 7 and 8 of the NOCC and former paragraphs 7 and 8 in the ANOCC. As a result, I need not address the paragraphs relating to these two loans.

Issues

- [14] There are four distinct issues before me:
- i. Whether certain paragraphs of the ANOCC should be struck on the basis that they retract admissions?

- ii. Whether certain paragraphs of the ANOCC should be struck for being bound to fail because they are time-barred by virtue of the Former LA?
- iii. Whether new causes of action are introduced in the ANOCC that should be struck?
- iv. If parts of the ANOCC are struck, whether leave should be granted to the plaintiff to amend his pleadings?

Legal Principles

Striking Pleadings

- [15] Pleadings are foundational because they guide the litigation process from discovery through to the trial itself: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at para. 21. While in their pleadings a plaintiff must identify the material facts relied on to support each cause of action, they must not plead evidence. Rather, a plaintiff must set out, in a reasonable way, the relief claimed against each named defendant. The plaintiff should also include a concise summary of the legal basis for the relief sought: Rules at R. 3-1(2).
- [16] Rule 9-5(1) governs the striking of pleadings. It provides:
- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,
- and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
- [17] In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [Imperial Tobacco], the Court explained the value of striking pleadings:
- [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

- [18] The test under R. 9-5(1)(a) is settled. A claim will only be struck if, assuming the truth of the facts pleaded, it is plain and obvious that the pleading discloses no reasonable cause of action or has no reasonable prospect of success: *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 64. The threshold to strike is high: *FORCOMP Forestry Consulting Ltd v. British Columbia*, 2021 BCCA 465 at paras. 20-21. As Justice Majawa set out in *Homma v. University of British Columbia (School of Music)*, 2023 BCSC 1926:
- [46] No evidence is admissible in an application under R. 9-5(1)(a). The application under R. 9-5(1)(a) proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven. A claim will only be struck under R. 9-5(1)(a) if it discloses no reasonable claim or defence, which has been variously described as "plain and obvious", "beyond a reasonable doubt", and having "no reasonable prospect of success"
- [Citations omitted.]
- [19] Although *Homma* was in the context of a summary judgment, the same principles apply. As I stated in *Goel v. Dhaliwal*, 2021 BCSC 2382:
- [49] In an application to strike, pleadings are read liberally. The test for striking pleadings is high: *Drummond v. Moore*, 2012 BCSC 496 at para. 21. The pleadings should not be struck if they are inadequate but could be amended to disclose a cause of action: *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 30. A court should be reluctant to strike pleadings if they can be amended: *Drummond* at paras. 22-23.
- [20] Applications under R. 9-5(1)(b) to (d) can rely on evidence: *Krist v. British Columbia*, 2017 BCCA 78 at para. 24; *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24 at para. 20; *Shuswap Lake Utilities Ltd. v. Mattison*, 2008 BCCA 176 at para. 34.
- [21] When relying on R. 9-5(1)(b), the applicant must establish that it is plain and obvious that the allegations contained in the pleadings are unnecessary, scandalous, frivolous, or vexatious. A pleading is unnecessary if it does not establish the plaintiff's cause of action, if it is obvious the action cannot succeed, if it does not advance any claim known in law, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Grosz v. Royal Trust Corporation of Canada*, 2020 BCSC 128 at paras. 62-63, *aff'd* 2022 BCCA 57.
- [22] When determining whether a pleading is an abuse of process, the court should consider whether its process is being used dishonestly or unfairly, or for some ulterior or improper purpose. The court should consider whether there have been multiple or successive related proceedings that are likely to cause vexation or oppression: *Grosz* at para. 65.

Admissions

- [23] Admissions serve a critical purpose in our adversarial system of litigation. They are concessions which are deliberately, clearly, and without any ambiguity made by a party. They are intended to limit - and often remove - issues in the case.
- [24] An admission is a fact that is agreed to; it no longer needs to be proven at trial. There is no need for the parties to adduce evidence in support of a fact which is admitted, no need to produce documents related to the admission, and no need to examine the opposing party on that issue at discovery or at trial: *Mand v. Cheema*, 2023 BCSC 1388 at paras. 24-25 [*Mand* 1388].
- [25] Once made, an admission of fact or law may not be withdrawn by a party without either consent by the opposing party or leave of the court: Rules at R. 7-7(5)(c). This applies even where the party has a right to file an amended pleading. For example, under R. 6-1(1), a party is entitled to amend a pleading once, without consent or leave of the court, before the notice of trial has been issued. Nevertheless, the party is not entitled to withdraw an admission when amending their pleadings: *Mand* 1388 at para. 26; *Mand v. Cheema*, 2023 BCSC 521 at paras. 17-18 and 38.
- [26] Amending a pleading which withdraws admissions made in earlier pleadings may constitute an abuse of process and any offending portions, if so found, should be struck: *Mand* 1388 at para. 14.

New Causes of Action and Limitation Periods

- [27] The whole or any part of a pleading filed by a party may be amended by a party once without leave of the court, at any time before service of the notice of trial, other than to change the parties or withdraw an admission: Rules at R. 6-1(1)(a).
- [28] When considering the alleged addition of a cause of action, the factual circumstances are critical. As Justice Hori set out in *Cicada Ventures Ltd. v. KGHM Ajax Mining Inc.*, 2023 BCSC 1746:
- [14] In my view, the facts upon which the plaintiff seeks a legal remedy define the cause of action not the remedy sought by the plaintiff. The Ontario Court of Appeal in 1100997 Ontario Ltd. v. North Elgin Centre Inc., 2016 ONCA 848, accepted the definition of a "cause of action" from *Morden & Perell*, *The Law of Civil Procedure in Ontario*, 2nd ed. at para. 20:
- [20] In *Morden & Perell*, *The Law of Civil Procedure in Ontario*, 2nd ed. (Markham: LexisNexis Canada Inc., 2014), at p. 142, the authors state:

A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.

[Footnotes omitted.]

[29] In *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122, the Court of Appeal reviewed *Wells Cartage Ltd. v. Goodyear Aerospace Corp.*, 1987 CanLII 2625 (BC CA), 40 D.L.R. (4th) 169 where:

[30] This Court concluded that "the proposed amendments raise nothing which can realistically be called a new cause of action": para. 19. The Court acknowledged that, as against one of the defendants, the amendments may "take the cause of action from being one entirely in contract to being one also in tort": para. 23. However, the amendment did "not change the substance of the issues": para. 23. In coming to this conclusion, the Court noted that the proposed amendment was a "natural, almost inevitable response" to the expert's assertion that the plaintiff had pushed the product beyond its limits: para. 22.

[30] A party must seek leave in order to introduce a new cause of action outside of a limitation period: *Cicada Ventures Ltd.* at paras. 10-11. Section 3(5) of the Former LA provides the limitation period for debts/loans as follows:

Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

[31] The limitation period for a demand loan begins to run from the date of the advancement of the funds, not from the date of the demand: *Leatherman v. 096908 B.C. Ltd.*, 2018 BCCA 33 at para. 22. A demand is not necessary in order for the cause of action to arise: *Kong v. Saunders*, 2014 BCCA 508 at paras. 20-21.

[32] In *Ahamed v. The Great Canadian Landscaping Company Ltd.*, 2021 BCSC 197 at paras. 18-19, Associate Judge Elwood, as he then was, stated that a claim may be struck out under R. 9-5(1)(a) on grounds that it is barred by the Limitation Act, S.B.C. 2012, c. 13. In my view, the same logic applies to the Former LA. However, the expiry of the time limit must be plain and obvious on the face of the NOCC; it must not be subject to issues such as discoverability or postponement that may provide a defence.

[33] In *Ahamed*, this Court explained how rare this remedy is:

[14] In *Fuoco Estate v. Kamloops (City)*, [2001] BCCA 325, the Court of Appeal held that statutory limitations is a defence that normally must be pleaded before it arises, and, accordingly, an application to strike is generally not an appropriate procedure to resolve a limitations defence (para. 15). The Court stopped short, however, of stating "categorically" that a limitations argument cannot be advanced under what is now Rule 9-5(1)(a).

- [16] In *MacLean Estate v. Arsenault*, 2016 BCSC 1894, Master Bouck declined to strike out a claim that was brought after the time for such a claim under s. 61 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13. The claimant sought to raise promissory estoppel in response to the limitations argument, and Master Bouck determined this issue should not be decided on an application to strike.
- [34] Associate Judge Elwood nevertheless found that in appropriate circumstances, an order striking out a pleading that is clearly barred by the Limitation Act serves the purpose of R. 9-5. Striking a provision that is manifestly out of time can promote efficacy by "weeding out the hopeless claims and ensuring that those that have some chance of succeeding go to trial": *Imperial Tobacco* at para. 1.

Analysis

Striking Admissions

- [35] The two remaining claims in the ANOCC are those found at new paragraph 8 and its subparagraphs (Loan #1) and new paragraph 7 and its subparagraphs (Loan #4). I will address each in turn.

Loan #1

- [36] In Part 1 of the NOCC, Loan #1 was described as follows:

6. The First Loan specified that the amount was to be repaid in full plus interest at 2.5% per annum. The First Loan did not specify a date in which the loan had to be repaid, but there was an implied term that the First Loan would be repaid on demand. The Defendant Kasper signed on behalf of Kasper Diving and Marine Services LTD.

- [37] This, alone, would constitute an admission of an implied term that the loan would be repaid on demand. Later in the NOCC, however, the plaintiff stated as follows:

10. On November 30, 2009, the Plaintiff and the Defendant Kasper executed an addendum (the "Addendum") to the First Loan in which they agreed that the debt owed to the Plaintiff (\$108,445.88) would be invested into the Property. There was an express or implied term of the Addendum that the Defendant Kasper was personally liable for the debt owed by Kasper Diving and Marine Services Ltd. to the Plaintiff.

- [38] Based on these two paragraphs, prior to November 30, 2009, there was an implied term that Loan #1 was due on demand. In light of the noted addendum, after November 30, 2009, I find that it is not plain and obvious that the loan continued to be due on demand.

- [39] The ANOCC states as follows:

8. On November 30, 2009, the Plaintiff and the Defendant Jacob Kasper, for and on behalf of [the Defendants] and duly authorised thereto, executed an addendum (the "Addendum") to the First Loan in terms of which:

8.1 It was an express term that the debt owed to the Plaintiff on the First Loan plus interest, in total the sum of \$108,445.88 would be regarded as an investment by the Plaintiff in the Property, and; There was an express or implied term of the Addendum that the Defendant-Kasper was personally liable for the debt the debt [sic] owed by Kasper Diving and Marine Services Ltd. to the Plaintiff.

8.2 It was an implied term that the debt owed on the First Loan plus interest, in total the sum of \$108,445.88, is converted into an interest in the Property which the Borrowers [the Defendants] will hold in trust for the benefit, and on behalf, of the Plaintiff;

8.3 Alternatively it was an implied term that the Property is given as security for the debt owed on the First Loan.

[40] I do not read these amendments as withdrawing any admissions made in the NOCC. Paragraph six of the NOCC recounted the nature of Loan #1 at its inception, and paragraph 10 recounts a shift in that nature as effected by the addendum.

[41] While not dispositive, I note also that the defendants' acceptance of the alleged admission that Loan #1 was a "loan on demand" was only in the alternative. Their primary position was that "if [Loan #1] was advanced to Kasper Diving, which is not admitted but specifically denied" [emphasis added], then the defendants would agree that there was "an implied term of the First Loan that it be repaid on demand". In other words, the defendants were primarily of the view that no loan was advanced.

[42] I find that the plaintiff did not make an admission in his NOCC that was withdrawn in the ANOCC. The application to strike the pleadings as they relate to Loan #1 is dismissed.

Loan #4

[43] The defendants allege the plaintiff is attempting to withdraw its admission that Loan #4 was a demand loan. The plaintiff disagrees. He argues that the NOCC did not state that Loan #4 was a demand loan, and instead stated that the loan "was to be invested in the property owned by the Defendants".

[44] The NOCC stated:

9. On August 1, 2009, Plaintiff loaned \$100,000.00 to the Defendants (the "Fourth Loan") by a written, signed agreement. As a term of a written agreement dated October 24, 2009, the Plaintiff and the Defendants agreed that the Fourth Loan was to be invested in the property owned by the Defendants located at 9602 Catherwood Road, Mission, BC V0M 1H0

[45] The ANOCC states:

7.1 It was an express term that the Fourth Second Loan [Loan #4] would be regarded as an investment in the property owned by the Borrowers located at .

7.2 It was an implied term that the debt owed on the Second Loan [Loan #4] is regarded as an interest in the Property which the Borrowers will hold in trust for the benefit, and on behalf, of the Plaintiff;

7.3 Alternatively it was an implied term that the Property is given as security for the debt owed on the Second Loan.

- [46] I agree with the plaintiff that paragraph 9 in the NOCC says nothing about Loan #4 being due on demand. Rather, it appears that as of October 24, 2009, Loan #4 converted to a loan invested in property through a change to the original terms and conditions.
- [47] The defendants rely on paragraph 18 in the NOCC where the plaintiff, when referring to all the loans, states the loans would "be paid on demand." The full paragraph 18 states: "An express or implied term of the Loans was that the balance would be paid on demand."
- [48] I note also that in paragraph 12, in Part 1 of the NOCC, the plaintiff defined the term "Loans" as follows: "the First Loan (and the Addendum), Second Loan, Third Loan, Fourth Loan, and Fifth Loan ([c]ollectively the "Loans"). These loans correspond with those defined above as Loans #1 - #4.
- [49] The plaintiff claims that, to the extent paragraph 18 could be construed as applying to Loan #4, this would constitute a mistake owing to uncareful drafting. The plaintiff emphasizes that the reference to "Loans" in paragraph 18 was under a separate Part from the above-excerpted pleadings on Loan #4 stating that the "Fourth Loan was to be invested in the property owned by the Defendants".
- [50] The defendants ask me to interpret paragraph 18 as overriding the specific wording in paragraph 9 of the NOCC.
- [51] I appreciate that paragraph 18 could create some confusion regarding Loan #4. I agree with the plaintiff, however, that paragraph 18 - to the extent it could apply to Loan #4 - appears to be a simple drafting mistake. In any event, a principle of contract and statutory interpretation is that a specific description overrides a more general description. As Justices La Forest and McLachlin (as she then was) held in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 24, 1993 CanLII 145 (SCC), considering circumstances where there are apparent inconsistencies in a contract, a "frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms -- or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term."
- [52] The specific term regarding Loan #4 provides that it is to be invested in property owned by the Defendants. In my view, the reference to provisions in plural in paragraph 18 is a general description and does not override the specific terms in paragraph 9 of the NOCC.

[53] The threshold to strike a claim is high; it must be certain to fail: FORCOMP Forestry at paras. 20 - 21. In the case before me, the plaintiff's claim that Loan #4 is not a demand loan is not, in my view, certain to fail. The defendants have failed to meet the high threshold.

[54] I decline to strike sections 7.1, 7.2, or 7.3 of the ANOCC on the basis that the plaintiff was improperly withdrawing admissions.

Striking Claims Barred by the Former LA

[55] Pursuant to s. 3(6)(a)(b) of the Former LA, the limitation period for the debts is six years. The defendants contend that the limitation period to commence an action with respect to Loan #1 expired six years from February 25, 2005, being February 24, 2011. The defendants argue that it is plain and obvious on the face of the NOCC, which was filed on September 10, 2020, that the limitation period for Loan #1 has expired.

[56] The defendants raise, in the alternative, that the limitation period could be ten years if the claim is to recover trust property pursuant to s. 3(3)(d) of the Former LA. Even if I accept that the Addendum was valid, the defendants argue that Loan #1 was due on November 30, 2009, and that the limitation period would have expired on November 30, 2019. This was approximately nine months before the NOCC was filed.

[57] In terms of Loan #4, which the defendants contend was a demand loan, the limitation period would have elapsed on August 1, 2015, five years before the NOCC was filed. Loan #4 was entered into on August 1, 2009.

[58] Regardless of the dates set out by the defendants, I find that there is a live issue as to whether the plaintiff's claims are statute-barred. The threshold to strike pleadings due to a limitation act issue is higher than it is to strike other deficiencies in pleadings. The Court of Appeal has consistently held that an application to strike is generally not an appropriate procedure to resolve a limitations defence: *Fuoco Estate* at para. 15; *Aubichon v. Grafton*, 2022 BCCA 77 at para. 41; *Jensen v. Ross*, 2014 BCCA 173 at para. 42.

[59] In *Ahamed*, this Court explained:

[19] [A] claim may be struck out under Rule 9-5(1)(a) on grounds it is barred by the Limitation Act, but the expiry of the limitation period must be plain and obvious on the face of the notice of civil claim and it must not be subject to an issue, such as discoverability or postponement, that should only be decided on full pleadings and evidence.

[60] The defendants argue that the plaintiff has not pleaded any facts or law in his NOCC, his ANOCC, or in a reply disputing that the Former LA applies. The defendants stress that no material facts were pleaded to support an issue of postponement or discoverability. This is, however, the defendants' application to strike and the question before me, under Rule 9-5(1)(a), is whether it is plain and obvious that the pleadings disclose no cause of action or are otherwise an abuse of process.

- [61] In this analysis, I am guided by the numerous authorities on the applicable question, and in particular, Justice Goepel's analysis from Jensen that:
- [44] [t]he limitation issue only arises if it is pleaded in defence. Even then, the issue cannot be resolved in an evidentiary vacuum. The Limitation Act contains provisions pursuant to which the running of time is postponed. Pursuant to s. 8(1)(c) of the Limitation Act the ultimate postponement is 30 years from the date on which the right to bring the action arose.
- [62] In Jensen the plaintiff proposed to rely on the postponement provisions of the Former LA: at paras. 42 to 45. As a result, the Court of Appeal overturned the decision of the chambers judge to strike an action because it was brought out of time under the Former LA.
- [63] Generally, limitation issues only arise if pleaded in defence. In result, "it is usually inappropriate to address limitation periods" where "limitation defences are not raised on the claimant's pleadings and the party responding to the amendments has not yet delivered a response raising the defence: *Kasian Estate v. Kasian*, 2021 BCSC 1654 at para. 12. Here, however, the limitations' issue was addressed in the defendants' Response. Regardless, Jensen still instructs that these claims should not be adjudicated in an evidentiary vacuum.
- [64] There are defences to the application of the Former LA, such as postponement and the discoverability principle that the plaintiff could well seek to rely on. Applications to strike on the basis of a limitation act have been dismissed where no material facts were pleaded by the respondent to support the defence: *Vassilaki v. Vassilakakis*, 2022 BCSC 763 at para. 57. Furthermore, the plaintiff argues that both Loan #1 and Loan #4 raise an interest in land, either through an equitable mortgage or a constructive trust. These alleged equitable interests could also impact the limitations' analysis.
- [65] The defendants have not satisfied me that this is one of the rare instances where a claim should be dismissed under Rule 9-5(1) on the basis of a limitations issue. Having considered the applicable law, I am not satisfied it is plain and obvious that the pleadings disclose no cause of action or are otherwise an abuse of process with respect to the limitations' issue.

Were new causes of action introduced in the ANOCC?

- [66] The defendants argue that paragraphs 7.2 and 7.3 of the ANOCC introduce new causes of action based on transactions that occurred between 15 and 19 years ago. The defendants argue these new causes of action are likely to avoid the defence to debt claim (and try and shore up the CPL that the plaintiff has registered against the defendants' property). The defendants argue the new claims continue to be statute-barred under the Former LA and ought not to be allowed.
- [67] It was open to the plaintiff to file the ANOCC at the time he did. As noted above, the whole or any part of a pleading filed by a party may be amended by a party once without leave of the court, at any time before service of the notice of trial, other than to change the parties or withdraw an admission: R. 6-1(1)(a). Having found that this is not an appropriate context in

which to determine whether the plaintiff's claims were statute-barred by the Former LA, I need not consider whether the plaintiff introduced "new" causes of action in the ANOCC that would be statute-barred.

[68] Alternatively, I would find that the plaintiff did not, in fact, introduce any new causes of action in the ANOCC. I base this on the fact that after receiving the Response, the plaintiff filed the ANOCC alleging that there are implied terms in Loan #4 resulting in proprietary, trust, and security claims against the defendants' property.

[69] To repeat, the ANOCC states at paras. 7.2 and 7.3:

7.2 It was an implied term that the debt owed on Loan [#4] is regarded as an interest in the Property which the Borrowers will hold in trust for the benefit, and on behalf, of the Plaintiff;

7.3 Alternatively it was an implied term that the Property is given as security for the debt owed on the Second Loan.

[70] As the defendants suggest, there is new wording in the factual part of the ANOCC to add that Loan #4 is regarded as an interest in the Property that the defendants hold in trust for the benefit, and on behalf, of the Plaintiff. In the legal basis Part of the NOCC, however, it states that a "signed, written agreement by which any property is made as security for a debt, creates an equitable charge on the property." It also states "there is a valid contract creating an equitable charge on the Property."

[71] Lastly, in the NOCC the plaintiff pleaded, in the alternative, that there was unjust enrichment. The plaintiff states that "due to the unique nature of the Property, the remedy should be that of a constructive trust."

[72] In my view, there is sufficient basis in the plaintiff's pleadings to ground an argument that there was an express or implied term that the debt was regarded as an interest in property which the defendants held in trust for the benefit of the plaintiff. There is also an alternative argument that the Property was given as security for the debt owed.

[73] The defendants also contend paragraphs 8, 8.1, 8.2, and 8.3 of the ANOCC allege new causes of action against Judith Madsen by holding her personally responsible for Loan #1 to the extent that Jacob was her authorized agent. The defendants suggest the amendments introduce new causes of action by alleging new implied terms with respect to Loan #1 in that it was converted into an interest in the Property that the defendants hold in trust for the Plaintiff and that the Property was "given as security for the debt owed on" Loan #1.

[74] To repeat, the ANOCC states as follows:

8. On November 30, 2009, the Plaintiff and the Defendant Jacob Kasper, for and on behalf of [the Defendants] and duly authorised thereto, executed an addendum (the "Addendum") to the First Loan in terms of which:

8.1 It was an express term that the debt owed to the Plaintiff on the First Loan plus interest, in total the sum of \$108,445.88 would be regarded as an investment by the Plaintiff in the Property, and; There was an express or implied term of the Addendum that the Defendant-Kasper was personally liable for the debt the debt [sic] owed by Kasper Diving and Marine Services Ltd. to the Plaintiff;

8.2 It was an implied term that the debt owed on the First Loan plus interest, in total the sum of \$108,445.88, is converted into an interest in the Property which the borrowers [the Defendants] will hold in trust for the benefit, and on behalf, of the Plaintiff;

8.3 Alternatively it was an implied term that the Property is given as security for the debt owed on the First Loan.

[75] Applying the same reasoning as in respect of paragraphs 7.2 and 7.3, I find that it is arguable that the claims alleged as new by the defendants were part of the NOCC. It is not plain and obvious that new claims have been advanced in this respect. Moreover, I do not see new causes of action against Judith Madsen as alleged by the defendants.

[76] In *Holland v. Saskatchewan*, 2008 SCC 42, Chief Justice McLachlin considered whether a paragraph in the government's pleadings should be struck as having not pleaded sufficient facts. While not a perfect analog to the instant circumstances, McLachlin C.J., taking a "generous view", held that the paragraph should not be struck insofar as the pleadings had sufficiently "put the government on the notice of the essence of the appellant's claim": *Holland* at para. 15.

[77] On the facts before me I would similarly find, having taken a generous view of the NOCC, that the defendants were on notice of the essence of the plaintiff's claim. Based on the applicable standard, I am not persuaded the "new claims" alleged by the defendants are 'new'.

[78] It was open to the plaintiff to amend his NOCC. This application is not one on which I can properly determine whether the addition of any alleged new cause(s) of action are statute-barred. Alternatively, I find that no new cause(s) of action were introduced in the ANOCC.

Should I grant leave to amend?

[79] The plaintiff requested leave to amend if I were to strike any aspect of the ANOCC. Given my findings, leave to amend is not necessary.

Disposition

[80] Given that the plaintiff narrowed the issues, the defendants' application is dismissed in its entirety.

"D. MacDonald J."

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