

CANADA / JUDGMENT

Pan v. Kelly

2023 BCSC 208

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 208 Pan v. Kelly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pan v. Kelly,

2023 BCSC 208

Date: 20230213

Docket: S192979

Registry: Victoria

Between:

Nicole Pan

Plaintiff

And

Rone Lynn Kelly and William Bryan Kelly

Defendants

And

Eugene Pan

Defendant by Counterclaim

- and -

Docket: S162478

Registry: Victoria

Between:

Nicole Pan

Plaintiff

And

Kathy Marie Schrader, Glenn Christopher Schrader,

doing business as Glenn's Upholstery and Blinds

Defendants

- and -

Docket: S191095

Registry: Victoria

Between:

Nicole Pan

Plaintiff

And

Keaton Hare and John Doe

Defendants

Before: The Honourable Justice Mayer

Reasons for Judgment

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Introduction

- [1] The plaintiff Nicole Pan applies for orders consolidating three actions commenced by her and allowing her to file an amended notice of civil claim in the consolidated action, which includes a claim for conspiracy against the defendants (the "consolidated pleading"). In the alternative, Mrs. Pan seeks an order that the three actions be tried at the same time with leave to amend the notices of civil claim in each action so that they are substantially similar.
- [2] The three actions commenced by Mrs. Pan include the following:
- a) The action commenced by Mrs. Pan against her neighbours Kathy and Glen Schrader in June 2016, as amended, Action No. S162478 (the "Schrader Action");
 - b) The action commenced by Mrs. Pan against her neighbour Keaton Hare in March 2019, Action No. S191095 (the "Hare Action"); and
 - c) The action commenced by Mrs. Pan against her then neighbours Rone and William Kelly in July 2019, Action No. S192979 (the "Kelly Action");
- [3] All of the actions concern events alleged to have taken place starting approximately one year after Mrs. Pan and her family moved into their home in a Victoria neighbourhood in February 2015. At that time the Schraders, Kellys and Mr. Hare had lived in the same neighbourhood for some time and were friends. Mr. Schrader operated an upholstery and blind business from the Schrader property, Glenn's Upholstery and Blinds, and lived next door to the Pans. The Kellys also lived next door to the Pans. Mr. Hare lived on a nearby street and his backyard was across the street from the front of the Schrader, Kelly and Pan homes. The Kellys moved away from the neighbourhood in March 2020.
- [4] In the Schrader Action, Mrs. Pan alleges that as a reprisal for Mrs. Pan making complaints to city officials regarding the operation of Mr. Schrader's business, starting in 2016, the Schraders took various actions which constituted nuisance or trespass. In the Hare Action, Mrs. Pan alleges conduct by Mr. Hare, including theft and vandalism. In the Kelly Action, Mrs. Pan alleges conduct by the Kellys, including nuisance.
- [5] Despite references in these pleadings to harassment, in written submissions Mrs. Pan confirmed that she is not seeking to advance a claim for harassment as a separate cause of action.

- [6] As set out above, Mrs. Pan wishes to amend her pleadings to advance a claim for conspiracy against all of the defendants in a consolidated action. In summary, Mrs. Pan seeks to advance a claim that the defendants jointly conspired to and did employ a variety of tactics for the primary purpose of harming her and her family as retaliation for the bylaw complaints she made against the Schraders.
- [7] All three groups of defendants filed responses opposing the applications brought by Mrs. Pan. In addition, both the Schraders and Mr. Hare have filed cross-applications seeking dismissal of Mrs. Pan's claims against them for want of prosecution.

Issues

- [8] The first issue to be decided in these applications is whether the pleading amendment sought by Mrs. Pan, alleging conspiracy, should be allowed.
- [9] If this Court determines that it is appropriate to allow Mrs. Pan to amend her pleadings, the next issue is whether it is appropriate to consolidate the three actions or alternatively, to order that the actions be heard at the same time. The defendants concede that if the pleading amendment is allowed it is logical that the three actions be consolidated.
- [10] Finally, if this Court declines to allow the pleadings amendment and to grant an order for consolidation or that the actions be heard at the same time, this Court must consider whether either the Schrader Action or the Hare Action should be dismissed for want of prosecution.

Amendment of Pleadings

- [11] The notice of civil claim in the Schrader Action was amended on June 17, 2019. Pursuant to Rule 6-1(1)(a) of the Supreme Court Civil Rules, leave of the court is required for a further amendment to be made.
- [12] A helpful summary of the applicable legal principles to be considered in an application to amend pleadings was set out by Justice MacNaughton in 0742848 B.C. Ltd. v. Squamish (District), 2018 BCSC 1046 [Squamish]:
- [17] The court should take a generous approach to the question of amendments to ensure that, so far as possible, all matters in controversy between the parties may be completely and finally determined. The court will not allow useless amendments or amendments that are in violation of the rules that govern pleadings. These rules include the requirements relating to conciseness, material facts and particulars and the prohibition against pleadings that disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious: *Navarro v. Doig River First Nation*, 2016 BCSC 2006 at para. 62.

- [18] Nonetheless, any doubt on the facts or the law should favour allowing the amendments and allowing those doubts to be resolved at trial. Amendments should be permitted unless actual prejudice can be shown by the opposing party, which cannot not be compensated for by costs: *Gill et al v. Gill*, 2003 BCSC 801 at para. 18; *Jace Holdings Ltd. v. Trademark Property Group Ltd.*, 2010 BCSC 1575 at para. 9; *Morriss v. British Columbia*, 2010 BCCA 95 at para. 17; and *Gardner v. Viridis Energy Inc.*, 2014 BCSC 204 at paras. 76-77.
- [19] Applications to amend pleadings are considered on the same basis as applications to strike pleadings under R. 9-5: *McNaughton v. Baker*, [1988] B.C.J. No. 515 (C.A.).
- [20] In *Kent v. Translink*, 2016 BCSC 224 at para. 8, the court cited, with approval, the summary of the cases under R. 9-5 by Justice Garson (as she then was) in *Dempsey et al v. Envision Credit Union et al.*, 2006 BCSC 750 at para. 13:

[8]

[13] In summary, a pleading will be struck out if:

- (a) the pleadings are unintelligible, confusing and difficult to understand;
- (b) the pleadings do not establish a cause of action and do not advance a claim known in law;
- (c) the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time;
- (d) the pleadings are not bona fides, are oppressive and are designed to cause the Defendants anxiety, trouble and expense;
- (e) the action is brought for an improper purpose, particularly the harassment and oppression of the Defendants.

[Citations omitted.]

- [21] When exercising discretion to amend pleadings, the court will consider the expiration of a limitation period.
- [13] The defendants advance two grounds for opposing the amendment alleging conspiracy, first that Mrs. Pan has failed to plead sufficient material facts to support this claim and second that the claim is time barred.

Adequacy of Proposed Consolidated Pleading

- [14] Mrs. Pan attached a draft of the consolidated pleading to her notices of application which include pleadings with respect to conspiracy. Relevant pleadings are summarized as follows:
- a) Paragraph 12: Once Mrs. Pan started filing complaints against Mr. Schrader's business the defendants started acting in concert and individually to retaliate against her and her family;
 - b) Paragraph 13: That the defendants' actions constitute a conspiracy;

- c) Paragraph 17: That the defendants "jointly decided, either explicitly or implicitly, to employ a variety of tactics for the primary purpose of harming [Mrs. Pan] and her family";
- d) Paragraphs: 18-65 Set out what Mrs. Pan alleges were various coordinated retaliations by the defendants:
 - i. Paragraphs 18-24: That the Schraders filed a police report concerning Mrs. Pan's use of security cameras on February 20, 2016, the Kellys also filed a police report concerning the cameras on February 22, 2016 and both the Schraders and Kellys filed a further police report concerning the cameras on April 1, 2016;
 - ii. Paragraph 25: That on November 10, 2016, Mrs. Kelly and Mr. Schrader were in their respective yards jointly [verbally] harassing Mr. Pan across the Pan property;
 - iii. Paragraphs 27-30: That between February 24 and March 13, 2017, Mrs. Kelly, Mr. and/or Mrs. Schrader and Mr. Hare each adopted different tactics to harass Mrs. Pan and her family including verbal harassment, filing bylaw complaints, theft of outdoor lights and vandalism to Mrs. Pan's vehicle;
 - iv. Paragraphs 31-36: That some time after March 13, 2017, the Kelly's and the Schraders "were leveraging their relationships in the neighborhood to exclude [Mrs. Pan] and her husband from" the neighborhood Block Watch;
 - v. Paragraphs 37-39: That on May 15, 2017, Mrs. Kelly and Mr. Hare collaborated to file a false police report, alleging trespass, against Mr. Pan;
 - vi. Paragraphs 40-48: That the Schraders and Kellys installed windchimes on their homes, close to the Pan home, in June and November 2017, respectively and that the Schraders installed another windchime in June 2020; and
 - vii. Paragraphs 51-65: That the defendants individually took various retaliatory actions, in the nature of nuisance, vandalism, theft, harassment and trespass, to force the Pans to move out of the neighborhood.
- [15] Under the heading Legal Basis, Mrs. Pan pleads at para. 2 that "[t]he Defendants jointly decided to employ a variety of tactics for the primary purpose of injuring [Mrs. Pan]" and that the defendants "acted both in concert and individually in furtherance of their agreement to injure [Mrs. Pan]" and at para. 3 that Mrs. Pan has suffered damages as a result of their conduct.

Law - Civil Conspiracy

- [16] Chief Justice McEachern in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 96 B.C.L.R. (2d) 156 at 158, 1993 CanLII 6870 (C.A.) [Can-Dive] distilled the formulation of civil conspiracy set out in *Cement LaFarge v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 1983 CanLII 23 into the following elements:

[5] the following elements must be proved:

1. an agreement between two or more persons;
2. concerted action taken pursuant to the agreement;
3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
(ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
4. actual damage suffered by the plaintiff.

[17] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, the Supreme Court of Canada described the two branches of conspiracy as follows:

[74] Predominant purpose conspiracy is made out where the predominant purpose of the defendant's conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss caused by the defendant's conduct. Where lawful means are used, if their object is to injure the plaintiff, the lawful acts become unlawful (*Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, 1983 CanLII 23 (SCC), [1983] 1 S.C.R. 452, at pp. 471-72).

[80] The second type of conspiracy, called "unlawful means conspiracy", requires no predominant purpose but requires that the unlawful conduct in question be directed toward the plaintiff, that the defendant should know that injury to the plaintiff is likely to result, and that the injury to the plaintiff does in fact occur (*Cement LaFarge*, at pp. 471-72).

[Emphasis added.]

[18] Predominant purpose conspiracy may include lawful acts which become (civilly) unlawful in the combined intent of two or more parties to cause damage. Since lawful actions are included, the actions must be shown to have been for the predominant purpose of harming the plaintiff. In contrast, unlawful means conspiracy only includes unlawful acts, and therefore only requires constructive intent: *Bidwell v. McGregor*, 2022 BCSC 1234 at para. 16.

[19] It is apparent that Mrs. Pan seeks to advance a predominant purpose conspiracy. This is made clear in Part 3, para. 2 of the consolidated pleading where she describes the legal basis for her claim under the heading Civil Conspiracy to Injure stating that "Defendants jointly decided to employ a variety of tactics for the primary purpose of injuring" her.

Pleading Civil Conspiracy

- [20] Two recent BC Court of Appeals decisions have considered the sufficiency of civil conspiracy pleadings, *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 [FORCOMP] and *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 [H.M.B Holdings].
- [21] Combining the pleading requirements, as outlined in FORCOMP at paras. 48-54 and H.M.B. Holdings at paras. 69-70, a plaintiff claiming civil conspiracy must plead material facts which support the following:
- a) The parties to the conspiracy;
 - b) The agreement between those parties;
 - c) The concerted action taken by the parties pursuant to the agreement;
 - i. For predominant purpose conspiracy: the actions may be lawful or unlawful;
 - ii. For unlawful means conspiracy: the actions must be unlawful;
 - d) The Intent:
 - i. For predominant purpose conspiracy: that harm to the plaintiff was intentional and the predominant purpose;
 - ii. For unlawful means conspiracy: that the parties to the conspiracy knew, or ought to have known, that the injury to the plaintiff was likely to result; and
 - e) The actual damages suffered by the plaintiff.
- [22] Pleadings alleging civil conspiracy must be as specific as possible: *Can-Dive* at 159; *H.M.B. Holdings* at para. 67; *Sandhu v. Surrey (City)*, 2021 BCSC 2519 at para. 53. Facts must be stated with precision and clarity; bald or speculative conclusions or lumping all defendants together into a general allegation of conspiracy are insufficient, and must be struck: *Gong v. O'Neill*, 2022 BCSC 2119 at para. 66; *Ontario Consumers Home Services Inc. v. Enercare Inc.*, 2014 ONSC 4154 at paras. 24-29.
- [23] In *Can-Dive* at 159, Chief Justice McEachern quotes with approval an excerpt from J.I.H. Jacob & Iain S. Goldrein, eds., *Bullen & Leake & Jacob's Precedent of Pleadings*, 13th ed. (London, U.K.: Sweet & Maxwell, 1990) at 221-22 which outlines the specificity required of pleadings in civil conspiracy:

The statement of claim should describe who the several parties to the conspiracy are and their relationship with each other. It should allege the conspiracy between the defendants giving the best particulars it can of the dates when or dates between which the unlawful conspiracy was entered into or continued, and the intent to injure. It should state precisely the objects and means of the alleged conspiracy to injure and the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy, and lastly, the injury and damage

occasioned to the plaintiff

[24] The Court in *Watson v. Bank of America Corporation*, 2015 BCCA 362 stated:

[133] . What may be pleaded by a plaintiff depends, of course on the scope of information reasonably available to the plaintiff. Can-Dive does not contain much detail of the case, but it appears to address a narrow allegation of conspiracy that one could expect to be better particularized than a mere allegation of conspiring "lawfully or unlawfully".

Application to the Consolidated Pleading

[25] In my view, the pleadings fail to set out civil conspiracy in that they fail to sufficiently plead an agreement between the parties, the predominant purpose of the parties, and the actual damage suffered by the plaintiff.

Failure to Adequately Plead an Agreement Between the Parties

[26] Pleadings must "identify an agreement between or amongst the defendants or other co-conspirators. It cannot be a bare assertion": *H.M.B. Holdings* at para. 76.

[27] The existence of an agreement must be expressly pleaded and cannot be left to be inferred by the reader: *XY, Inc. v. International Newtech Development Incorporated*, 2012 BCSC 319 at para. 268; *Sandhu* at paras. 54, 56. *Can-Dive* at 159 provides that parties must plead "the best particulars it can of the date when or dates between which the unlawful conspiracy was entered into or continued".

[28] Since the nature of conspiracy often results in the absence of direct evidence of an agreement, the existence of an agreement may be proven on circumstantial evidence. However, "the point is not whether you can draw that particular inference, but whether the facts are such that they cannot fairly admit of any other inference being drawn from them": *Golden Capital Securities Limited v. Rempel et al*, 2004 BCCA 565 at para. 46.

[29] The consolidated pleading makes four statements which, while suggesting common action, merely make bald assertions of an agreement between the parties:

a) Part 1, para. 12:

once the Plaintiff started filing complaints against Mr. Schrader's Business, the Three Neighbours started acting both in concert and individually to retaliate against the Plaintiff and her family.

Among other things, the Defendants' actions constitute a conspiracy to harm the Plaintiff and her family.

b) Part 1, para. 17:

Subsequently, the Three Neighbours jointly decided, either explicitly or implicitly to employ a variety of tactics for the primary purpose of harming the Plaintiff and her family as retaliation for the bylaw complaints. Specific examples of the coordinated retaliation undertaken by the Three Neighbours are detailed below.

c) Part 1, para. 51:

In addition to these examples of coordinated retaliation undertaken by the Three Neighbours, the Three Neighbours individually took retaliatory actions against the Plaintiff and her family in furtherance of their joint effort to remove the Pans from the neighbourhood.

d) Part 3, para. 2:

The Defendants jointly decided to employ a variety of tactics for the primary purpose of injuring the Plaintiff. The defendants acted both in concert and individually in furtherance of their agreement to injure the plaintiff.

[Emphasis added.]

[30] In addition, the timing of formation of an agreement is not pleaded with sufficient detail. Although the authorities are clear that the requirement for specificity of time must be considered in the context of the case, the consolidated pleading leaves the defendants guessing when Mrs. Pan is alleging the conspiracy was formed. The earliest date it could have occurred is on or before February 20, 2016, when the Schraders and Kellys are alleged to have made an improper by-law complaint against Mrs. Pan as part of a coordinated retaliation by all parties. The first retaliatory act of Mr. Hare is alleged to have occurred in March 2017. The timeline seems to support that the Kellys and Schraders had an initial agreement in 2016, which Mr. Hare joined in 2017, but this is not specifically pleaded. This adds to the insufficiency of the allegations.

Failure to Plead Predominant Purpose

[31] Justice Moldaver, wrote in *Harris v. GlaxoSmithKline Inc.* 2010 ONCA 872 at para. 36:

To make out a conspiracy to injure, the defendant's predominant purpose must be to inflict harm on the plaintiff. It is not enough if harm is the collateral result of acts pursued predominantly out of self-interest. The focus is on the actual intent of the defendants and not on the consequences that the defendants either realized or should have realized would follow.

[32] Plaintiffs claiming predominant purpose conspiracy must plead the material facts to support that the predominant purpose of the combined actions was to cause injury to the plaintiff: *Watson* at para. 136; *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at para. 35. Speculative and conclusory statement are insufficient to meet this bar: *Ontario Consumers Home Services* at paras. 28-29. As set out in *Can-Dive* at 159, pleadings should state "precisely the objects and means of the alleged conspiracy to injure".

- [33] The consolidated pleading alleges that the defendants either explicitly or implicitly decided to employ a variety of tactics for the primary purpose of harming Mrs. Pan and that they acted in furtherance of a joint effort to remove her from the neighbourhood.
- [34] The pleading that the defendants "implicitly" intended to harm Mrs. Pan is problematic. I appreciate that the nature of conspiracy often results in the absence of direct evidence. Mrs. Pan contends that the evidence may allow the trial judge hearing the trial of this matter to infer the defendants predominant purpose.
- [35] The consolidated pleading lacks the precise "objects and means" of the alleged conspiracy to injure. In FORCOMP, the pleadings alleged a specific purpose, that the defendants "intended to cause harm to [the appellants] by depriving them of contracts and opportunities, and damaging their reputation": at para. 51. In contrast, the pleadings of intention in the consolidated pleading sought to be filed by Mrs. Pan are bald assertions. Even if an agreement was found, there are insufficiently specific allegations as to what form of harm the parties intended to cause.

Failure to Plead Actual Damage

- [36] The consolidated pleading fails to set out material facts with respect to damages suffered by Mrs. Pan or the causal connection of the damages to the alleged conspiracy but rather, in general, simply states that the plaintiff suffered damages.
- [37] Mrs. Pan is in the best position to know how the defendants' actions have impacted her, and the harm she has suffered because of them, yet her pleadings are impermissibly vague.
- [38] The injuries that the plaintiff claims at Part 1, para. 66 of the consolidated pleading are:
- a) Emotional upset and stress;
 - b) Fear and anxiety;
 - c) Sleep disturbances;
 - d) Concern about the impact of the constant windchime noise and sleep disturbances on the health of her two young children;
 - e) Substantial and unreasonable interference with the use, enjoyment, and comfort of the Pan Property;
 - f) Loss of amenities and ambiance;
 - g) Damage and destruction of the property;
 - h) Special damages, including the cost of seeing a counselor;
 - i) Legal fees; and

j) Such further and other particulars of damage as shall be provided in advance of the trial of this matter.

[39] In the consolidated pleading, in addition to injunctive relief, Mrs. Pan seeks general, aggravated and punitive damages against the defendants relating to civil conspiracy and special damages.

[40] As outlined at para. 92 of in H.M.B. Holdings:

It is true that general damages and punitive damages may arise from a successful claim for civil conspiracy; however, before those damages may be considered, there must be actual damages causally connected to the unlawful actions before the underlying claim is successful.

[41] Some of the injuries listed by the plaintiff are not actual injuries, such as legal fees and special damages. The consolidated pleading fails to set out how any of the alleged injuries resulting in damages are causally connected to the alleged conspiracy. The actual damages appear to stem from Mrs. Pan's claims against the defendants individually.

Conclusion on the Adequacy of the Consolidated Pleading

[42] I conclude that the consolidated pleading fails to adequately plead material facts supporting a claim in civil conspiracy. In summary, the consolidated pleading fails to sufficiently plead an agreement between the parties, the predominant purpose of the parties, and the actual damage suffered by Mrs. Pan.

[43] Had the consolidated pleading also set out a claim of unlawful civil conspiracy, it would have also failed on the basis that it fails to sufficiently plead an agreement between the parties and the actual damage suffered by Mrs. Pan.

[44] Even if Mrs. Pan was allowed to make further efforts to remedy the shortcomings in the consolidated pleading, for the reasons set out below I do not consider that it would be just and convenient to allow her to do so.

Limitation Issue

[45] The defendants say that the amendments sought by Mrs. Pan should be refused as they involve a new claim, civil conspiracy, which is statute barred.

[46] The test to be applied in considering whether to allow a pleadings amendment when a limitation issue may exist was summarized by Justice Taylor in *Eastern Platinum Limited v. Cameron*, 2020 BCSC 1353:

[37] With respect to the issue of a potentially expiring limitation period on an application to amend pleadings, the first question to be addressed is whether the proposed amendments raise a new cause of action: *Swiss* at para. 21, and *Taylor v. Blenz The Canadian Coffee Company Ltd.*, 2019 BCSC 906 at para. 35. If the amendments do not raise a new cause of action, there will be no issue as to the potential expiry of a limitation period. If they do raise

a new cause of action, and it is possible that the limitation period applicable to the new cause of action has expired, the court should determine whether it is just and convenient to allow the amendments assuming that the limitation period has expired: *KPMG Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317 at paras. 47-49; *Blenz* at para. 37.

New Cause of Action

[47] I have little difficulty concluding that Mrs. Pan is seeking, primarily, to advance a new cause of action, the tort of civil conspiracy. The causes of action in the existing claims include, for example, nuisance and trespass. The fact that, for the most part, Mrs. Pan seeks to rely on many of the same facts to support her claim of conspiracy does not mean that the claim of conspiracy is not new. Fundamental to a claim of conspiracy are allegations that the conspirators agreed to carry out actions intending to harm a claimant and did so, resulting in damage. These allegations are not included within the existing notices of civil claim. To the extent that such pleadings are found in the proposed consolidated pleading they constitute a new claim: *Beruschi v. British Columbia*, 2020 BCSC 1531 at para. 61.

The Limitation Period

[48] Since I have found that the claim of civil conspiracy is a new cause of action, I must now determine whether it is time barred. The Limitation Act, S.B.C. 2012, c. 13 [Limitation Act] at s. 6 sets out the basic limitation period:

6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

[49] The general discovery rules in the Limitation Act are as follows:

General discovery rules 8 Except for those special situations referred to in sections 9 to 11, 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.

[50] The defendants' analysis considers the limitation period in respect of individual events which occurred starting in late 2015 or early 2016 and afterwards. In my view, it is not appropriate to consider a limitation period for each of the individual events which are the subject of Mrs. Pan's proposed conspiracy claim. The events taken as a whole comprise the conduct which Mrs. Pan alleges arise from the conspiracy. The question is, when did Mrs. Pan know, or should reasonably have known, that a conspiracy may exist and that litigation

was warranted?

- [51] The series of events which Mrs. Pan contends give rise to a claim in civil conspiracy took place some time between February 20, 2016, when the Schraders filed what Mrs. Pan alleges was an untrue police report concerning her security cameras, and June 21, 2020, when the Schraders put up another windchime close to the property line they shared with the Pans. Most of the alleged events are clustered around the spring and summer of 2017. In particular, Mrs. Pan alleges that a series of concentrated retaliations against her by her neighbours took place between February 24 and March 13, 2017. The event which is closest to July 2019, when the Kelly Action was commenced, is alleged to have occurred on or about May 1, 2019, when Mrs. Pan says Mr. Hare made a false complaint to police that Mr. Pan was videotaping him from across the street the night before.
- [52] Mrs. Pan deposed that in between commencement of the Schrader Action in June 2016, and the Hare Action and Kelly Action in March and July 2019, respectively, she was advised by her lawyers to commence separate actions against her neighbours and then apply to consolidate the individual actions. Further, she deposed that as the defendants have "been working in concert to retaliate against [her] and [her] family, it has always been [her] intention to have the Three Actions consolidated into one action".
- [53] Based on the evidence summarized above, I find it possible that the limitation period for commencement of an action for conspiracy most likely commenced as early as March 13, 2017, after the alleged "concentrated retaliations", and possibly as late as May 1, 2019, after the alleged false report to police was made by Mr. Hare. By this time, having regard to the nature of the injury, loss or damage, Mrs. Pan should have been aware that a court proceeding would be an appropriate means to seek a remedy. As a result, the limitation period probably expired as early as March 13, 2019 and no later than May 1, 2022--the latter date resulting from the combined one-year suspension of limitation periods resulting from the COVID-19 pandemic: see Ministerial Order M086 and COVID-19 (Limitation Periods in Court Proceedings) Regulation, B.C. Reg. 199/2020.
- [54] In summary, I conclude that it is possible that the limitation period for commencement of an action in civil conspiracy may have expired over three and one-half years ago.

Amendment Notwithstanding Expiry of a Limitation Period

- [55] Under Part 4 of the Limitation Act the court has the discretion to allow an amendment of an existing pleading to raise a new claim, even where the new claim is statute barred. The relevant section, s. 22(5), is as follows:

Counterclaim or other claim or proceeding

22 (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.

[56] Where a limitation period for a new cause of action has expired since the commencement of the action the court will consider the factors set out in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (2d) 282, 1996 CanLII 3033 (C.A.) in deciding whether to allow an amendment pleading the new cause of action: *Squamish* paras. 67-68.

[57] In *Letvad v. Fenwick*, 2000 BCCA 630 at para. 29 [Letvad], the Court of Appeal summarised the factors set out in *Teal* at 299 as follows:

- the extent of delay;
- the reasons for the delay;
- any explanation put forward to account for the delay;
- the degree of prejudice caused by the delay; and
- the extent of the connection, if any, between the existing claims and the proposed new cause of action.

[58] The overriding consideration is whether a decision allowing an amendment would be just and convenient: *Teal* at 300.

Extent of Delay

[59] The case law concerning how to calculate the period of delay is not entirely consistent. Length of delay has been calculated from the expiry of the limitation period plus one year for service of a writ, to the date of an application to either amend pleadings or add a party. Length of delay has also been calculated from the period between the time that the plaintiff became aware of the requirement to amend pleadings or add a party and the date of the application: *Brandt v. Volkswagen Group Canada Inc.*, 2014 BCSC 2380 at paras. 24-25.

[60] As I have already found Mrs. Pan was probably aware of the requirement to amend her pleadings to allege conspiracy by, at the earliest, March 13, 2017, and at the latest, May 1, 2019. In my view it is appropriate to calculate a range for the length of delay from these dates. The applications enclosing the proposed consolidated notice of civil claim were filed on April 26, 2022 and therefore, the period of delay is between, approximately, three and five years.

Reasons for Delay

- [61] Mrs. Pan submits that a primary reason why the present application has been delayed is because she has had to focus her time and resources addressing what she says are retaliatory actions undertaken by the defendants. In addition, she says delay resulted from the requirement that she change lawyers on several occasions. Finally, she submits that the resulting delays were exacerbated by the COVID-19 Pandemic.
- [62] I do not consider that Mrs. Pan's explanation for delay has been forthright, which this Court has found is required: see Brandt at para. 27.
- [63] Mrs. Pan has not articulated how the retaliatory actions of the defendants caused delay, or the extent of that delay. Although I accept it is possible that Mrs. Pan's requirement to change counsel on several occasions and the COVID-19 Pandemic contributed to delays, Mrs. Pan has again not provided any evidence with respect to how these events resulted in delays.
- [64] It appears from the materials before me that Mrs. Pan made a purposeful choice to delay bringing her application to consolidate the three actions and to amend her pleadings to include a conspiracy claim. The evidence establishes that Mrs. Pan received advice from her counsel to commence separate actions against her neighbours and then consolidate these actions. In a Case Plan Proposal filed by Mrs. Pan in the Kelly Action on November 3, 2020, Mrs. Pan indicated that having the Kelly Action heard with the Hare Action was discussed. As well Mrs. Pan has sworn that she always intended to have her claims against her neighbors heard in one consolidated action.
- [65] Instead of seeking to consolidating the existing actions in July 2019, the Schrader Action and Hare Action, Mrs. Pan instead amended the Schrader Action on June 17, 2019 and commenced the Kelly Action approximately one month later. Mrs. Pan clearly made a choice to advance three separate claims against each of the defendants.
- [66] As well, I note that during the period of time following the "concentrated actions" in March 2017, the Pans commenced a human rights complaint against the Kellys alleging harassment, in December 2018, which was eventually withdrawn in or about May 2019--one month before Mrs. Pan commenced her claim against the Kellys - and then filed a new human rights complaint on July 9, 2020.

Prejudice

- [67] If a party seeks to amend pleadings to set up a new cause of action after expiry of a limitation period the court must presume prejudice to the defendants: *Med Finance Co. S.A. v. Bank of Montreal* (1993), 79 B.C.L.R. (2d) 222 at para. 24, 1993 CanLII 1428 (C.A.). Substantial dilatoriness which smacks of voluntary delay, as I consider is the case here, even where there is no other prejudice other than loss of a limitation period, can weigh large in the scales of justice. *Med Finance* at 232-233.

- [68] Even where no new factual issues are raised the amendment may be refused where there is excessive unexplained delay: Letvad at para. 46. In this case, the allegations of conspiracy raise new factual allegations--being the formation of an agreement between the defendants to harm Mrs. Pan, which weighs more heavily in favour of refusal.
- [69] I am satisfied that it is appropriate to presume prejudice to the defendants as a result of delay.
- [70] The defendants contend that in addition to presumed prejudice, they have suffered actual prejudice as a result of Mrs. Pan's delay in bringing this application. The evidence establishes that the defendants first became aware of Mrs. Pan's intention to allege conspiracy as a cause of action in or about April 2022. They say that they are now being asked to recall and respond to allegations of conspiracy in respect of events which occurred starting in the fall of 2015, over six years ago. They say that Mrs. Pan's vague allegations of conspiracy, combined with the common-sense proposition that memories fade over time, means that if the pleadings amendment sought by Mrs. Pan is allowed the defendants will have to reconstruct events stretching back a considerable time.
- [71] I agree that the allegations of conspiracy set out in Mrs. Pan's proposed consolidated pleading are vague. What is relevant is the extent of actual prejudice to the defendants in allowing the pleadings amendment. In this respect, it is unclear to me what loss of memory has been suffered by the defendants which gives rise to actual prejudice. The defendants have denied that they entered into a conspiracy. I am not sure what evidence concerning the lack of a conspiracy may have been "lost" as a result of faded memories which gives rise to actual prejudice--and logically, the defendants do not point to any. I am not satisfied that actual prejudice to the defendants has been clearly made out in this case.

Connection of Existing Claims to New Cause of Action

- [72] As I have stated above, the pleading of conspiracy is a new cause of action. Mrs. Pan seeks to fundamentally change the nature of the litigation from claims against her neighbours primarily alleging individual incidents of nuisance or trespass, to a claim that the neighbours formed a conspiracy to harm Mrs. Pan. The claim of conspiracy is fundamentally different than the claims set out in the existing three actions.

Would it be Just and Convenient to Allow the Amendment?

- [73] In my view the Teal factors outlined above, when considered together, lean slightly towards refusing the post limitation pleadings amendment sought by Mrs. Pan. As the authorities make clear the ultimate consideration is whether it would be just and convenient to all parties to allow the amendment.
- [74] If the conspiracy amendment is not allowed Mrs. Pan will not be driven from the judgement seat as, subject to the applications for dismissal for want of prosecution, she is still able to continue her claims of nuisance and trespass in the Schrader, Kelly and Hare actions. If the

conspiracy amendment is allowed, the Schraders, Kellys and Mr. Hare will have to respond to what are notably vague allegations of a conspiracy which Mrs. Pan alleges arise from alleged separate incidents of nuisance, trespass and harassment by individual neighbours starting in 2015.

- [75] In my view, on balance, it would not be just and convenient to allow the pleadings amendment sought by Mrs. Pan.
- [76] This order is without prejudice to Mrs. Pan's ability to seek to amend her pleadings in the Kelly Action to include the new allegations of trespass included at paragraph 65 of the consolidated pleading.

Consolidation of or Having the Three Actions Heard Together

- [77] Given my ruling dismissing Mrs. Pan's application to amend her pleadings to advance a conspiracy claim, I do not consider that common claims exist between the parties, which are so interwoven as to make separate trials undesirable: see *Grewal v. Grewal*, 2017 BCSC 291 at para. 15, referring to the decision in *Funk v. Harder*, 2015 BCSC 2152 at paras. 16-18.
- [78] The individual claims against the defendants concern a series of alleged actions which are not connected by time, party or arguably, place. I do not consider that there will be any significant time saving if the three actions are heard together. It would be unreasonable to require Mr. Hare, who is alleged to have committed acts which took place in mid-2017, to participate in a trial concerning actions allegedly committed by the Schraders and Kellys over a period of five years or more.
- [79] Mrs. Pan's applications for consolidation of the Schrader, Kelly and Hare Actions, or alternatively to have these actions heard together, are dismissed.

Dismissal for Want of Prosecution Applications

- [80] I now turn to the applications brought by the defendants in the Schrader and Hare Actions to have those actions dismissed for want of prosecution.
- [81] Both the Schraders and Mr. Hare apply for dismissal of the claims against them pursuant to Rule 22-7 of the Rules. Rule 22-7(7) provides this Court with the authority to dismiss a claim if "it appears to the court that there is want of prosecution in a proceeding".
- [82] As has been recently confirmed by the Court of Appeal, the defendants are required to show the following for this Court to dismiss an action for want of prosecution:
- a) That there has been inordinate delay;
 - b) That the inordinate delay is inexcusable;
 - c) That the defendants have been prejudiced by the delay (though this can be presumed); and,
 - d) That the balance of justice requires an order dismissing the plaintiff's claim.

Wiegert v. Rogers, 2019 BCCA 334 at para. 31-33; Drennan v. Smith, 2022 BCCA 86 at para. 16.

- [83] The party seeking dismissal bears the onus of showing inordinate delay for which there is no credible excuse. If successful, "a presumption of prejudice arises" and the respondent to the application for dismissal bears the onus to rebut the presumption of prejudice by showing that the applicant has not been prejudiced in their ability to have a fair trial or that it would be unjust to terminate the action: Drennan at para. 17.
- [84] The first question to be answered is whether delay has been inordinate without a credible excuse. If the answer to this question is no, the application for want of prosecution should be dismissed.

Has the Delay in Advancing the Schrader Action been Inexcusably Inordinate?

- [85] The Schraders contend that the delay by Mrs. Pan in advancing her claims against them has been inordinate. They say that Mrs. Pan has taken no steps to advance the litigation since the filing of the notice of civil claim in June 2016. They say that nearly three years passed between the filing of the response to civil claim and the filing of the amended notice of civil claim in June 2019, despite a request from defence counsel for the list of documents. They say that a further two years passed between the filing of the amended notice of civil claim and the request that the Schraders admit facts concerning whether or not they were members of a neighbourhood Block Watch group, which they contend is irrelevant to the litigation. They say that a further ten-months passed between that exchange and Mrs. Pan's April 2022 application to consolidate the Schrader, Kelly and Hare Actions and to amend her pleadings to allege conspiracy. They also say that Mrs. Pan has only produced documents after an application to dismiss for want of prosecution was made. Finally, they say that the entire litigation is approaching seven years since its initiation without completion of discoveries or setting trial dates.
- [86] In Wiegert, the Court of Appeal described inordinate delay as follows:
- [32] Inordinate delay is delay that is immoderate, uncontrolled, excessive and out of proportion to the matters in question: Azeri at para. 8; Sahyoun v. Ho, 2015 BCSC 392 at para. 17. As Justice Saunders explained in Sun Wave Forest Products Ltd. v. Xu, 2018 BCCA 63 at para. 25, the concept is relative: some cases are naturally susceptible of fast carriage or call for more expeditious prosecution than others. Although there is no universal rule as to when time starts to run, the date of commencement of the action is typically identified as the point from which delay is measured. The delay should be analysed holistically, not in a piece-meal fashion, and the extent to which it may be excusable is highly fact-dependent: Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation, 2014 BCCA 52 at para. 38; 0690860 at para. 29.

- [87] Although the claim against the Schraders was commenced in June 2016, in June 2019, Mrs. Pan filed an amended notice of civil claim setting out further material facts with respect to her original claims and allegations of more recent, on-going nuisance activities. In particular Mrs. Pan alleges that in August 2018, the Schraders installed surveillance cameras which were intentionally angled toward the Pan property.
- [88] This is not a situation where Mrs. Pan is advancing a claim for damages arising from a single action which occurred in the distant past. She is seeking damages arising from a course of conduct by the Schraders which has taken place over time. Mrs. Pan alleges that the event involving surveillance cameras occurred in August 2018. She amended her pleadings to reflect this and other allegations of nuisance relatively quickly.
- [89] In my view the context of this claim, being an on-going dispute between neighbours, justifies a somewhat more flexible standard in determining whether a delay in advancing a claim has been inordinate. I consider that it is reasonable to measure the extent of delay from the date of filing of the amended notice of civil claim in this matter. With respect to the end date for calculating delay I find it appropriate to apply the date April 26, 2022, the date when Mrs. Pan filed her application to consolidate actions and file the consolidated pleading. As a result, the period of delay is not seven years, as argued by the Schraders, but closer to two and one-half years. In my view, two and one-half years is not inordinate.
- [90] I wish to be clear that an on-going dispute, in which new allegations of wrongful conduct by a defendant arise, may not necessarily justify a plaintiff avoiding dismissal for want of prosecution order. At some point a plaintiff should get on with their claim as it stands. A defendant has the right to expect that a plaintiff will advance a claim with reasonable despatch.
- [91] In this case there has been no prior warning made to Mrs. Pan that if she did not advance this litigation that the defendants would be seeking dismissal for want of prosecution. Even if I had found inexcusable, inordinate delay and resulting prejudice, I consider that it is in the interests of justice that Mrs. Pan should be given an opportunity to get on with her existing claim against the Schraders. Of course, if she does not do so, there is nothing preventing the Schraders from bringing on another application to dismiss.
- [92] In conclusion I do not find, in the particular circumstances of this case, that a delay of two and one-half years is inordinate. As a result, it is not necessary to review the other factors set out in Wiegert.

Has the Delay in Advancing the Hare Action been Inexcusably Inordinate?

- [93] Mr. Hare contends, somewhat weakly, that the delay by Mrs. Pan in advancing her claims against him has been inordinate. He concedes that the period of delay after filing of the notice of civil claim against him in March 2019, approximately two and one-half years[1], is not as egregious as in the Kelly and Schrader Actions.

- [94] Mr. Hare submits that it appears that the claim against him is related to the actions against the Schraders--it appears for the purposes of creating a further justification for dismissal of the claim against him. This argument, if I understand it correctly, is without merit. Any delay in advancing the Schrader Action is irrelevant--and in any case, I have declined to dismiss that action for want of prosecution.
- [95] In my view, a delay of two and one-half years in advancing the action against Mr. Hare is not inordinate. Again, if Mrs. Pan does not get on with this action, there is nothing preventing Mr. Hare from bringing on another application to dismiss.

Conclusion on Dismissal Applications

- [96] The applications for dismissal of Mrs. Pan's claims against the Schraders and Mr. Hare are dismissed.

Conclusion

- [97] Mrs. Pan's applications to consolidate the Schrader, Kelly and Hare Actions and to file the consolidated pleading alleging conspiracy, or alternatively to have these three actions heard together with leave to amend pleadings in those actions, are dismissed.
- [98] The applications of the Schraders and Mr. Hare for dismissal of Mrs. Pan's claims against them for want of prosecution are dismissed.

"Mayer J."

- [1] Mr. Hare concedes that Mrs. Pan was unable to serve Mr. Hare for approximately six months after the filing the notice of civil claim against him and that it is appropriate to deduct this period from the calculation of delay--resulting in a total delay of two and one-half years.

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