

CANADA / JUDGMENT

Sperling v. Queen of Nanaimo (Ship)

2014 BCSC 326

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 326 Sperling v. Queen of Nanaimo (Ship)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sperling v. Queen of Nanaimo (Ship),

2014 BCSC 326

Date: 20140124

Docket: S125455

Registry: Vancouver

Admiralty Action in Rem against

the Ship "Queen of Nanaimo"

and in Personam

Between:

Zdenka Sperling

Plaintiff

And

The Owners and All Others Interested in the Ship "Queen of Nanaimo",

The "Queen of Nanaimo", British Columbia Ferry Services Inc.,

John Doe 1, Prime Mover Controls Inc., ABC Company and John Doe 2

Defendants

Before: The Honourable Mr. Justice Kent

Oral Reasons for Judgment

Counsel for the Plaintiff:

R.D.W. Dalziel

Counsel for the Defendants:

J. Thackeray

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 15 and 16, 2014

Place and Date of Judgment:

Vancouver, B.C.

January 24, 2014

Introduction

- [1] The plaintiff applies under the R. 6-1 and 6-2(7)(c) to correct a pleading "misnomer" by amendment or alternatively to add parties as defendants in the lawsuit. The proposed defendants oppose the application primarily on the ground that the plaintiff's claim is barred by the federal legislation governing maritime negligence law, namely the Marine Liability Act, S.C. 2001, c. 6 (the "MLA") and that this Court has no jurisdiction to "extend" the limitation period beyond that prescribed by the MLA.
- [2] For the reasons that follow I have decided to allow the application, at least in part. Certain of the proposed additional defendants will be added to the proceedings, albeit on terms respecting the form of the resulting amendment to the notice of civil claim ("NOCC").

Position of the Parties

- [3] The applicant plaintiff marshalls an impressive array of alternative arguments to accomplish its purpose including submissions that:
1. The two year limitation period incorporated into the MLA by way of the "Athens Convention" does not apply to the simple "products liability" claim made against the proposed additional defendants;
 2. The three year "ultimate" limitation period in s. 140 of MLA expires three years "after the day on which the cause of action arises", a concept which engages the common-law principle of discoverability to the benefit of the plaintiff on the facts of this case;

3. In any event, the former BC Limitation Act, R.S.B.C. 1996, c. 266, (along with its own concepts of discoverability and postponement) applies to the claim because (a) the products liability claim is in no way related to shipping or maritime law and (b) in the alternative, its application is constitutionally permissible by virtue of *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, a recent decision of the Supreme Court of Canada [Marine Services];
 4. Even assuming the MLA governs the claim and imposes a two or three year limitation period without the benefit of extensions, R. 6-2(7)(c) still permits the addition of parties if it is "just and convenient" to do so, which is claimed to be the case here; and
 5. Lastly, the proposed defendants can simply be substituted for the current named defendant ABC Company by way of amendment to correct a "misnomer" in respect of which no limitation objections apply.
- [4] The respondent proposed new defendants submit,
1. the only applicable limitation period is that under the MLA, a limitation period which has expired and which this Court has no jurisdiction to extend, whether under the rubric of "just and convenient" or otherwise; and
 2. having regard to the contents of the plaintiff's notice of civil claim, this is not an application to correct a misnomer, but rather is clearly and obviously an application to add parties (after the expiry of the relevant limitation period), an application which cannot succeed in the circumstances.

Background

- [5] By her notice of civil claim filed August 2, 2012, the plaintiff seeks damages for personal injuries sustained when the ferry "Queen of Nanaimo" hit the dock at the Village Bay Terminal on Mayne Island on August 3, 2010. The plaintiff was a passenger on the ferry and she alleges that the "hard docking" caused her to be thrown from her chair and to strike her head on a nearby pole.
- [6] The notice of civil claim, which is entitled at least in part as an "admiralty action in rem against the ship 'Queen of Nanaimo' and in personam", sues the ship itself, its owners, BC Ferry Services Inc., Prime Mover Controls Inc. and three loosely identified defendants called John Doe 1, ABC Company and John Doe 2 respectively.
- [7] In para. 3 of part 1 statement of facts of the NOCC John Doe 1 is identified as the master of the ferry (name unknown).
- [8] With respect to ABC Company and John Doe 2 the NOCC further states in part 1: statement of facts:

8. The Defendant ABC Company ("ABC"), is a commercial entity, whose identity and location are currently unknown to the Plaintiff.
9. At material times ABC was an independent contractor of BCF. Alternatively ABC was a sub-contractor of PMC, and/or an agent of PMC or BCF.
10. The Defendant John Doe 2, whose identity and location are currently unknown to the Plaintiff, was at all material times an independent contractor of BCF, PMC or ABC. Alternatively John Doe was a sub-contractor of PMC or ABC.
11. In the further alternative John Doe 2 was at all material times an employee and/or agent of BCF, PMC or ABC, and was at all material times acting in the course of his or her employment.
12. At all material times BCF, John Doe 1, PMC, and/or ABC Company, and each of them, their employees and/or agents, were responsible, wholly or in part, for the design, construction, installation, maintenance, service, inspection, refit and/or repairs of the operating systems, equipment and/or machinery of the Ferry, including but not limited to those relating to its propulsion, breaking and/or steering systems.
13. At all material times John Doe 2, his or her employees and/or agents, were responsible, wholly or in part, for the design, construction, installation, maintenance, service, inspection, refit and/or repairs of the operating systems, equipment and/or machinery of the Ferry, including but not limited to those relating to its propulsion, breaking and/or steering systems.

[9] Paragraph 18 of part 1: statement of facts of the NOCC states:

The incident was caused or contributed by acts or omissions of the Defendants, including the following:

- (a) the failure of the mater and/or crew of the Ferry to safely and properly decrease speed, steer or otherwise control the Ferry for docking;
- (b) the unseaworthiness of the Ferry, including
 - (i) mechanical breakdown of the propulsion, breaking and/or steering systems;
 - (ii) improper design, construction, installation, maintenance, service inspection, refit and/or repairs of components of the propulsion, breaking and/or steering systems, including the tapered dowels for the port side oil distribution box;
 - (iii) inadequate or improperly used ship communication systems and equipment; and
- (c) such further and other causes or contributing causes as may become known.

[10] In part 3: legal basis of the NOCC the following allegations of negligence appear:

8. The particulars of the negligence of PMC, ABC Company and/or John Doe 2 include but are not limited to the following:
- (a) failing to equip, maintain and repair the Ferry properly and in a seaworthy condition;
 - (b) failing to properly design, construct, install, maintain, service, inspect, refit and/or repair the operating systems, equipment and/or machinery of the Ferry, including but not limited to those relating to its propulsion, breaking and/or steering systems, and to ensure that they were adequate for the safe operation of the Ferry;
 - (c) failing to implement reasonable systems of maintenance and inspection on board the Ferry to diagnose and adequately address potential failures of machinery, equipment and/or other operating systems;
 - (d) permitting the wrong tapered dowels, without securing nuts, to be installed in port side oil distribution box;
 - (e) failing to notice, replace, repair, add securing nuts to, or otherwise prevent from falling the wrongly installed tapered dowels in the port side oil distribution box prior to the incident and failing to remedy the dangerous condition caused thereby;
 - (f) failing to design, construct, install and/or recommend a secondary braking system on the Ferry when it knew or ought to have known that the propulsion or primary braking system could fail and cause injury, damage, and/or loss;
 - (g) failing to adequately train, instruct and supervise employees servicing or working on the Ferry;
 - (h) failing to take reasonable measures to render the Ferry safe for its intended purposes;
 - (i) causing or permitting the Ferry to be, become, or to remain in a dangerous and/or defective condition at the time of the Voyage; and
 - (j) such further and other particulars of negligence which may become known to the Plaintiff.
- [11] BC Ferries convened a panel to conduct an internal investigation into the hard docking incident. The report was critical of various operational practices but particularly noted a "mechanical disconnect" which occurred when two tapered dowels loosened and fell out of the oil distribution box forming part of the ferry's propulsion equipment.
- [12] The ferry, which was built in the 1950s, has a diesel engine driving each of the two propeller shafts on the vessel. Each shaft line has an oil distribution box as part of the controllable pitch propeller system. The two tapered dowels secure the auxiliary servo piston and the lever on top of the control post which moves the valve rod for the propeller hub. Their absence (falling out) allowed the valve rod and the piston in the port propeller hub to drift to a full ahead pitch position, a condition that would have been unknown to the bridge crew. The report concluded the dowels had not been secured properly and, indeed, that "at some time in the past, the wrong tapered dowels were installed in the port OD box".

- [13] This investigation report was provided to the solicitor for the plaintiff on May 20, 2011. Over a year later, on July 17, 2012, plaintiff's counsel emailed the BC Ferries risk manager posing various specific inquiries regarding the persons involved in the installation and inspection of the tapered dowels and the OD boxes, and the identity of any non-BC Ferries personnel "responsible for the inspection, maintenance, and/or repairs" of same before the accident.
- [14] As indicated, the lawsuit was issued August 2, 2012 which named among others, ABC Company and the two John Does as defendants. Plaintiff's counsel says in his affidavit "I was not aware of the possible involvement of the proposed defendants in the installation, maintenance, inspection or repair of the ferry's port OD box and dowels. However, I did understand that the plaintiff might need to substitute or add further parties to her action going forward should sufficient evidence surface to warrant that".
- [15] In January 2013 plaintiff's counsel received a binder of BC Ferries documents. In the ensuing months the documents were reviewed by counsel and further queries went back and forth between counsel and the BC Ferries risk director respecting the identities of the persons/entities involved in the maintenance and repair of the Queen of Nanaimo's controllable pitch propeller system (including the oil distribution box). The invoices supplied and some of the answers provided clearly identified the involvement of two corporations, namely, Kamewa Canada Inc. and Rolls-Royce Canada Limited as well as an individual, Mr. Ken Burrows who may have been employed by one or both of them.
- [16] Corporate searches confirm Kamewa Canda Inc. amalgamated with Ulstein Maritime Ltd. in September 2000 and that the amalgamated company carried on under the latter name. Kamewa Canada Inc. no longer exists as a separate legal entity.
- [17] There is nothing in the affidavit or application materials which establish any meaningful involvement of the other two proposed added defendants, Rolls-Royce PLC and Vickers PLC. In their response, the respondents say Vinters Limited is a U.K. company formerly known as Vickers PLC. They also say that each of Vinters Limited and Roll-Royce PLC are separate legal entities from Rolls-Royce Canada Limited and Ulstein Maritime Ltd., and that Ken Burrows was never an employee of either company.
- [18] The present application was filed on August 2, 2013, three years less a day from the date of the accident.

The Law Respecting Misnomers and Addition of Parties

- [19] There is an important distinction between amendment applications to correct a "misnomer" in a pleading and applications to add a party to the lawsuit. The distinction can be of great significance where a limitation defence may have accrued in favour of the person sought to be named or added.

- [20] Where an amendment merely seeks to correct a misnomer in a lawsuit otherwise brought in time and in respect of which no limitation defence had accrued, the correction of the misnomer circumvents the application of any limitation defence that might otherwise apply. On the other hand, where the application is in truth an application to add a party in whose favour a limitation defence may have accrued, different considerations apply and the limitation defence will be one of the factors taken into account in the court's determination whether it is "just and convenient" to add the new party in all the circumstances of the case.

Misnomer

- [21] The naming of a "John Doe" defendant, obviously a fictitious name, is a common mechanism for issuing suit (usually before the imminent expiry of a limitation period) against an identifiable and identified person whose proper name is not actually known: *Jackson v. Bubela et al.* (1972), 28 D.L.R. (3d) 500 (B.C.C.A) [Jackson].
- [22] In *Jackson* a writ was issued in a motor vehicle negligence action just before the expiry of the applicable limitation period against the owner and driver of the motor vehicle. Because inquiries had failed to disclose the identity of the driver, he was named in the pleading as "John Doe". Once the true identity of the driver was ascertained, an application was made to amend the style of cause to change the name. The Court of Appeal held that the application should be granted and explained:
5. [...] The words "John Doe" to my mind are not restricted in connotation to a "fictitious" person or one not in existence. Traditionally the words were used in that limited sense in early ejectment suits, but for generations they have come to be accepted, used and understood, both in legal and common parlance as indicating a real person existing and identifiable but whose name is not known or available to the person referring to him. That is the situation here. The appellant was not purporting to sue a fiction to maintain or acquire some property right as was done in ancient times. On the contrary, she was suing a living man whom she alleged was at a particular defined time and place operating a described motor vehicle in such a negligent manner as to cause her injuries then and there. Her litigating finger v/as pointed at that driver and no one else, but she did not know his name. For the purposes of suit (and it was necessary to act quickly because of the imminent expiry of the limitation period) she gave that identifiable and identified man a name, using one that would clearly connote to all that it did not purport to be his real name. And, further, in the endorsement it was clearly stated that the real name of the defendant driver was not "John Doe" but was unknown except to the other defendant, the female respondent.
 6. Under these circumstances. I can see no elements of an addition of. or substitution for, a defendant. No new entity or person was involved. It was merely an application to change the name of a party from a patently incorrect one to his proper one.
 7. In my opinion, the proper test to be applied in such a situation has been outlined by Devlin, L.J., in *Davies v. Elsby Brothers, Ltd.*, *supra*, at p. 676:

The argument of counsel for the plaintiff, on the other hand, is that this is a misnomer because there can be no doubt that the person whom the plaintiff intended to sue was his employer, and his employer at the time of the accident was the company. I think that that is going to the opposite extreme on the other side and I could not assent to that. It is a general principle of English law, not merely applicable to cases of misnomer, that the intention which the framer of the document has in mind when he brings it into existence is not material. In that we differ from many continental systems. In English law as a general principle the question is not what the writer of the document intended or meant, but what a reasonable man reading the document would understand it to mean; and that is the test which ought to be applied as a general rule in cases of misnomer-which may embrace a number of other situations apart from misnomer a writ, for example mistake as to identity in the making of a contract. The test must be: How would a reasonable person receiving the document take it? If in all the circumstances of the case and looking at the document as a whole, he would say to himself: "Of course it must mean me. but they have got my name wrong", then there is a case of mere misnomer. If, on the other hand, he would say: "I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries", then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer.

8. Anybody in the world (except the driver of the offending vehicle-) reading the writ would immediately say "'John Doe' is not I". But that driver reading the writ would immediately and without hesitation say "I am the 'John Doe' sued. I was driving the vehicle at the place and time as alleged, but that, of course, is not my real name".
9. Although "misnomer" usually has reference to a wrong naming by mistake, whereas the wrong naming here was deliberate, I think the tests above set out with respect to misnomer generically have full application in this case. I can see no compelling reason why an advertent misnaming of a clearly identified person should be any less subject to the test relative to misnomer than an inadvertent one. This is particularly so when the conduct of that person has caused or contributed to the situation. I therefore conclude that the application was one of amendment to correct a misnomer and not for the addition or substitution of a new or different party.

[23] In *Broom v. The Royal Centre* at al, 2005 BCSC 1630 [Broom], the court further explained:

- [8] In *Oldridge* the important distinction between misnomer and an application to substitute a correct defendant is discussed at p.340. It is noted that the distinction is often vital because a limitation period may have accrued in favour of a defendant sought to be added, which would not apply in the case of misnomer, where a defendant has been mis-described. An amendment to the style of cause to correct a misnomer of one of the parties will be allowed after the expiration of the limitation period. The correction of the misnomer does not prejudice the other party because he was an identifiable party in the pleadings at the time that the action was commenced. The amendment simply corrects the misnomer by setting

out his actual name.

- [37] It seems to me, on the basis of Jackson, that in the case of an advertent misnaming of a party as John Doe, an amendment substituting the correct name should be almost automatic, provided, of course, that John Doe is sufficiently described in the pleading as an identifiable person or corporation, although not by name; for example, the driver of a motor vehicle involved in a particular accident, or a corporation responsible for the cleaning and maintaining of particular premises at the time that a person was injured allegedly as a result of the condition of those premises; provided also that the other party is not substantially prejudiced or injured, a situation which generally speaking is difficult to envisage. This Court has always considered misnomer to be an irregularity only, not a nullity, and has always allowed amendments which could be made without injustice to the other side. See for example *B.C. Furniture Company v. Tugwell* (1900), 7 B.C. Law Reports 361 (C.A.).
- [24] In the present case the parties do not really dispute the law set out above. Rather, it is in its application that differences arise. In particular, the contest is whether "ABC Company" is sufficiently described in the pleading as an identifiable and identified person, whether by role, responsibility or involvement in the particularized circumstances, such that on a reasonable and objective reading of the pleading the person in question would say "they do not have my name but they obviously mean me".
- [25] In *Chapman v. Canada (Minister of Indian and Northern Affairs)*, 2003 BCCA 665, it was held that a broad definition of multiple "Doe" defendants (any band member over a length of period of time who had anything to do with the underlying claims regarding lease hold lands) was not a case of a "true" misnomer:
- [53] It appears to me that the problem identified by the chambers judge is an over-broad use of the "Doe" device. The statement of claim contains no allegation which would permit an individual to know that the claim was against him or her. Other than a broad description of the class of persons to which the "Doe's" belong, no identifying characteristics of the individuals is pleaded and there is no allegation of time, place, circumstance, or event which could identify the conduct that is said to have wronged the leaseholders.
- [55] Looking at the picture from one direction, one sees insufficient particularity to point the litigating finger at any individual. Looking from the other, one sees that a reasonable claim against an individual is not pleaded. They add up to the same thing.
- [26] In the present case, the plaintiff's pleading lumps defendants together and makes blanket allegations against all of them without meaningful distinction. Part 1, para. 8 asserts ABC Company is a commercial entity, yet this application is to correct such "misnomer" by substituting four corporations. Part 1, para. 12 of the NOCC broadly alleges that one or more of four entities "and their employees and/or agents" were,

responsible, wholly or in part, for the design, construction, installation, maintenance, service, inspection, refit and/or repairs of the operating systems, equipment and/or machinery of the Ferry, including but not limited to those relating to its propulsion, braking and/or steering systems.

This alleges activities which are so broad that it could apply to a great many people.

- [27] Part 1, para. 18 of the NOCC alleges that the incident was caused or contributed by "acts or omissions of the Defendants" without distinguishing between the defendants in question. The particulars of negligence asserted in part 3, para. 8 of the NOCC are again aggregated as against one or more of "PMC, ABC Company and/or John Doe 2". The allegations are again extremely broad i.e. "failing to properly design, construct, install, maintain, service, inspect, refit and/or repair the operating systems, equipment and/or machinery of the Ferry".
- [28] The plaintiff hopefully points to the allegations specifying wrong doing in respect of the tapered dowels (e.g. part 3, para. 8 (d)(e) of the NOCC), but again these do not distinguish between the three defendants referred to in that paragraph and, indeed, the identical allegation is made against BC Ferries and the master of the ferry named as John Doe 1.
- [29] All in all, there is insufficient particularity to "point the litigating finger" at any distinct person and unlike the circumstances describes in the Jackson and Broom cases, this is clearly not a case of "true" misnomer but is in truth an application to add new parties.

Addition of Parties

- [30] The rule applicable to adding parties to an action is R. 6-2(7)(c) which provides as follows:

Adding, removing or substituting parties by order

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
- (i) any relief claimed in the proceeding, or
- (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

- [31] In this case it appears that the accident was caused or contributed to by the two tapered dowels falling out of the oil distribution box forming part of the ferry's propulsion system and it appears on the evidence that the servicing of that equipment was carried out over the years by the proposed defendants, Kamewa Canada Inc. (now, following amalgamation, Ulstein Maritime Ltd.) and Rolls-Royce Canada Limited. It is therefore apparent that there indeed may exist between the plaintiff and those two entities a question or issue relating to

or connected with both the subject matter of the proceeding and the relief claimed in that proceeding as required by R. 6-2(7)(c)(i) and (ii). The question, then, becomes whether it would be "just and convenient" to have those issues determined by adding the proposed defendants as parties.

[32] Fortunately, the general principles governing applications to add new defendants to an action pursuant to R. 6-2(7)(c) have been very usefully summarized by the Court of Appeal in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 [Neilson Architects] as follows:

1. The general principles

[43] The respondents maintain the six-year limitation period that governs the owners' claim against them has expired. The owners disagree. Consideration of whether new defendants may be added to an action in that situation begins with s. 4(1)(d) of the Limitation Act, R.S.B.C. 1996, c. 266, which states:

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

...

(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.

[44] Rule 15, which governs the addition of parties, is an applicable law. The relevant portion reads:

15(5) (a) At any stage of a proceeding, the court on application by any person may

...

(iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected

(A) with any relief claimed in the proceeding, or

(B) with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and that party.

[45] Subrule 15(5)(a)(iii) thus establishes two requirements that an applicant must prove to succeed in joining a new defendant. First, it must show that there is a question or issue between the plaintiff and the proposed defendant that relates to the relief, remedy, or subject matter of the proceeding. The threshold is low. It has been expressed as establishing simply that there is a real issue between them that is not frivolous, or that the plaintiff has a

possible cause of action against the proposed party. This requirement may be met solely on the basis of proposed amendments to the statement of claim, or the parties may provide affidavit evidence addressing it. If evidence is provided, the court is not to weigh it and assess whether the plaintiff could prove the allegations. It is limited to examining the evidence only to the extent necessary to determine if the required issue between the parties exists: *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578, 33 B.C.L.R. (4th) 69; *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.).

- [46] If this first requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in this proceeding. This is a discretionary decision, but that discretion is fettered to the extent that it must be exercised judicially, and in accord with the evidence adduced and the guidelines established in the authorities: *Letvad v. Fenwick*, 2000 BCCA 630, 82 B.C.L.R. (3d) 296. At para. 29 of *Letvad*, Esson J.A., writing for the Court, adopted the list of factors to be considered from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 71 B.C.A.C. 161, 19 B.C.L.R. (3d) 282, a decision that dealt with adding further claims under R. 24. These include the extent of the delay, the reasons and any explanation for the delay, any prejudice arising from the delay, and the degree of connection between the existing action and the new parties and claims contemplated. The overriding question is what is just and convenient in the circumstances of the particular case.
- [47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s. 4(1)(d) of the Limitation Act is to extinguish such a defence if the proposed defendant is added. In *Brito (Guardian ad litem of) v. Wooley* (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three step approach to considering a possible limitation defence, which was adopted by this Court in *Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:
1. If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.
 2. If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.
 3. If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the Limitation

Act.

- [48] There is also a fourth option, an alternative to the third step, set out by Lambert J.A. in *Lui v. West Granville Manor Ltd.*, [1987] W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.) [Lui No. 2]. He suggested that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Limitation Act, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial. That approach was considered and adopted in *Strata Plan No. VR 2000 v. Shaw*, [1998] B.C.J. No. 1086 (S.C.) [Shaw] and *Stone Venepal (Celgar) Pulp Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317, 83 B.C.L.R. (4th) 138.
- [33] As indicated above, the existence of a limitation defence is a relevant, but not necessarily determinative, factor in deciding whether to add a new party to the action. In this case the parties strenuously disagree whether a limitation defence has actually accrued and whether principles of constitutional law respecting paramountcy of federal legislation or interjurisdictional immunity render the provincial limitation legislation inapplicable.
- [34] With respect to the limitation defence issues, a preliminary point arises: the respondents argue that, if limitation defences under the MLA govern and have accrued to the benefit of the respondents, then this Court has no residual discretion to add the respondents as defendants whether under the rubric of "just and convenient" or otherwise. They say, in effect, if the MLA does apply as a complete defence to the plaintiff's claim, then the plaintiff's application must be dismissed.
- [35] I do not agree. It is true that s. 4(1)(d) of the "old" Limitation Act, R.S.B.C. 1996, c. 266 expressly provided that the accrual of a limitation defence was no bar to adding a new party as a defendant, but that section was not the sole factor animating the judicial exercise of discretion in determining what might be "just and convenient" in the particular circumstances. To be clear, in my opinion, even if a limitation defence under the MLA has accrued to the benefit of the proposed new defendants, the court still has a discretion to add those persons as new defendants in the litigation assuming, of course, it is just and convenient to do so.

The Limitation Issue

- [36] Maritime law falls within the federal governments exclusive jurisdiction over navigation and shipping under s. 91(10) of Constitution Act, 1867. Limitation periods applicable to various marine liability claims are provided for in the MLA. Of particular application to the present case are sections 37(1) and 140 of that Act which provide as follows:

Force of law

37. (1) Articles 1 to 22 of the Convention have the force of law in Canada.

Proceedings under maritime law

140. Except as otherwise provided in this Act or in any other Act of Parliament, no proceedings under Canadian maritime law in relation to any matter coming within the class of navigation and shipping may be commenced later than three years after the day on which the cause of action arises.
- [37] The Convention referred to in s. 37(1) above is the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974. Section 37(2) of the MLA extends the Convention to apply not only to international carriage, but also to domestic carriage of passengers by water, whether under a contract of carriage or not.
- [38] Article 3 of the Convention creates a right of action by a passenger against a carrier for personal injury occurring in the course of the carriage due to the fault or neglect of the carrier. Article 6 provides for contributory fault on part of the passenger to be taken into account. Articles 7 and 8 impose limits of liability on the part of the carrier for personal injury or damage to luggage respectively. Article 14 expressly bars actions against a carrier for damages for the personal injury of the passenger "otherwise than in accordance with this Convention".
- [39] Article 16 of the Convention addresses limitation periods as follows:

ARTICLE 16

TIME-BAR FOR ACTIONS

1. Any action for damages arising out of the death of or personal injury to a passenger or of the loss of or damage to luggage shall be time-barred after a period of two years.
 2. The limitation period shall be calculate as follows:
 - (a) in the case of personal injury, from the date of disembarkation of the passenger;
 3. The law of the court seized of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later.
 4. Notwithstanding paragraphs 1, 2, and 3 of this Article, the period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing.
- [40] The first question that arises is whether the two year limitation period pursuant to Article 16 of the Convention and which is in force by virtue of s. 37(1) of the MLA applies to the plaintiff's proposed claim against the new defendants. While many, indeed most, of the articles within the Convention expressly refer to "the carrier" it is noteworthy that Article 16

contains no such limitation. It simply refers to "any action for damages arising out of personal injury to a passenger". The words "any" and "arising out of" have broad application and, on one reading, could capture the proposed claim against the proposed new defendants.

- [41] Suppose one passenger injures another by accidentally spilling hot coffee or accidentally dropping luggage. Or suppose two passengers get into a fight and one wishes to sue the other for injuries sustained. Are these claims, even though they have nothing whatever to do with conduct, fault or neglect on the part of the carrier or its employees/agents, governed by the two year limitation period imposed by Article 16 of the Convention?
- [42] One would have thought that these types of incidents would have occurred many times, particularly in British Columbia where ferry traffic is commonplace. Rather remarkably, however, I am advised that there is no case law on this point in Canada. In fact, the only decision counsel could find was a Scottish case, *Cairns v. Northern Lighthouse Board*, [2013] CSOH 22. In that case the plaintiff was employed by the Northern Lighthouse Board and part of her job involved visiting lighthouses to inventory assets. She was travelling by boat to a lighthouse on the Isle of May when she suffered an injury to her lower back. She sued both her employer and the boat owner. The court held, among other things, "the [Athens] Convention has no application to the [employer], who are not a carrier but are liable to the [plaintiffs] as her employer consequently the claim against the [employer] is not time-barred, and the limitation on liability in the Convention does not apply".
- [43] This is not weighty authority in Canada but it does express one judicial view that the Convention, and Article 16 respecting limitation periods for personal injury actions, applies only to a "carrier" and its "servants or agents acting within the scope of their employment" (Article 3).
- [44] In my opinion, the correct interpretation of Article 16 of the Convention is indeed to limit its application to carriers. It is apparent from reading the entire Convention that its whole purpose is to address liability of carriers and it only makes sense for the limitation period provided in Article 16 to be similarly restricted.
- [45] But that does not end the matter; as indicated, s. 140 of the MLA provides, "no proceedings under Canadian maritime law in relation to any matter coming within the class of navigation and shipping may be commenced later than three years after the day on which the cause of action arises".
- [46] Two questions arise here:
1. is the claim against the proposed new defendants a "proceeding under Canadian maritime law in relation to a matter coming within the class of navigation and shipping" and, if so,
 2. on what day did the plaintiff's cause of action against the proposed new defendants arise?

- [47] The plaintiff submits that the negligent acts alleged against the proposed defendants, " have nothing to with act of navigating. The negligent acts consist instead of negligent repair and maintenance of a piece of machinery that happens to form part of a ship. At its heart, this is essentially an ordinary claim for negligent services and for products liability". The respondents, on the other hand, say that the subject matter of the claim (personal injury suffered by a passenger while a vessel was attempting to dock) "is squarely in the domain of federal maritime negligence law" and hence captured by the MLA.
- [48] It is difficult to draw the line between concepts of navigation and shipping on the one hand and causes of action related to events on a vessel that have nothing to do with navigation and shipping (eg. the scenarios in para. 41 above). In this particular case, however, it is not necessary to decide that point because, in my opinion, the second question referred to above ("discoverability" of the cause of action) is to be resolved in favour of the plaintiff.
- [49] The ferry accident occurred August 3, 2010 and the plaintiff's physical injuries were sustained at that time. The identity of the owner and operator of the ferry was immediately ascertainable and so the cause of action against that entity immediately arose, or, at least, was immediately "perfected".
- [50] In due course on May 20, 2011 the plaintiff (through her counsel) received the investigation report dated September 29, 2010 which identified the tapered dowels as the cause of the propeller pitch problem. The lawsuit was issued August 2, 2012, on the eve of any two year limitation expiry, and named the fictitious ABC Company and two John Does as defendants. In January 2013 the plaintiff (again through her counsel) was provided with a binder of BC Ferries documents that identified the involvement of Kamewa Canada Inc. and Rolls-Royce Canada Limited in the maintenance and repair of the ferry's pitch propeller system (including the oil distribution box).
- [51] The MLA itself does not expressly provide for postponement or extension of the ultimate three year limitation set forth in s. 140 of that Act. However, the limitation period starts on the day the cause of action arose and this, in turn, permits the application of the the common law "discoverability principle" articulated in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 ("Peixeiro").
- [52] The question in *Peixeiro* was "whether the discoverability principle applies to postpone the running of time until the material facts underlying the cause of action, including extent of the injury, are known". In that case the plaintiff was initially diagnosed as sustaining soft tissue injury in a motor vehicle accident and it was not until almost three years later that a CT scan revealed injury to the disk in the plaintiff's spine. The question was whether the two year limitation period barred the ensuing lawsuit.

[53] The court in *Peixeiro* noted that "discoverability as a general rule applied to avoid the injustice of precluding an action before the person is able to raise it" and that the concept was applicable to any limitation periods triggered by the date "when the cause of action arose". The court noted,

in balancing the defendant's legitimate interest in respecting limitation periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could have reasonably have discovered that he had a cause of action is a compelling consideration. The diligence rationale would not be undermined by the application of the discoverability principle as it still requires reasonable diligence by the plaintiff" [para. 39].

[54] One might question whether due diligence was exercised by or on behalf of the plaintiff in the period following May 20, 2011 when the investigation report was first provided to plaintiff's counsel. The report did not actually identify the persons responsible for the dowel problem on the oil distribution box and further investigation was required. Still, even if "discoverability" principles only trigger the "start date" for the ultimate three year limitation period in s. 140 of the MLA as early as May 20, 2011, that period has still not expired.

[55] In light of the above conclusion, it is not necessary to decide the intriguing question whether the application of BC's Limitation Act is available in this case and whether its application is constitutionally permissible by virtue of *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44. That case held that a Provincial law (worker's compensation legislation) could and did apply to bar a maritime negligence claim pursuant to the two-part test adopted since the earlier and now overruled decision of *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

[56] The two-part test that must be met to trigger the doctrine of interjurisdictional immunity was articulated in *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 and repeated in *Marine Services* to be,

1. to firstly determine the whether the Provincial law (here the Limitation Act) trenches on the protected "core" of a federal competence (here parliament's jurisdiction over navigation and shipping); and
2. if so, to determine whether the Provincial law's effect on the exercise of the protected federal power is sufficiently serious that it rises to the level of impairment.

[57] In my view, inasmuch as the Provincial Limitation Act directly impacts fundamental issues such as the timing and limitation periods applicable to marine liability lawsuits, it can indeed be said to trench on the core of parliament's navigation and shipping power. The more difficult question is whether any such impact rises to the level of "impairment".

[58] In *Marine Services*, the court reaffirmed that "impairment" suggests "an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power". Such "intrusion on the exercise of the federal power need not paralyze it, but it must be serious".

[59] In the result, the court in *Marine Services* held that although the worker's compensation legislation,

may affect the exercise of the federal power over navigation and shipping, this level of intrusion into the federal power is insufficient to trigger interjurisdictional immunity. The intrusion of s. 44 is not significant or serious when one considers the breadth of the federal power of navigation and shipping, the absence of an impact on the uniformity of Canadian maritime law, and the historical application of worker's compensation schemes in the maritime context.

[60] The third factor mentioned above, historical application of worker's compensation schemes, obviously does not apply to the present case. The second factor, absence of an impact on the uniformity of Canadian maritime law, may also not apply given the differing limitation periods specified by differing limitation legislation across the country. Indeed, it may well be the case, as the respondents in this application argue, that the legislation actually conflicts with the uniformity of the limitation periods specified in the MLA, a result that would not only trigger interjurisdictional immunity but also the doctrine of federal paramountcy discussed, albeit deemed inapplicable, in *Marine Services*.

[61] In any event, as indicated, it is not necessary to make a definitive ruling on these points as the earlier ruling respecting postponement of the s. 140 three year limitation period pursuant to the common law "discoverability" principle is dispositive of the application.

Application of the Neilson Architects Principles

[62] Having determined that the claim against the proposed defendants *Ulstein Maritime Ltd.* and *Rolls-Royce Canada Limited* are not barred by any limitation period in the MLA, the application of the general principles reviewed in the *Neilson Architects* case strongly militates in favour of adding those two entities as defendants in this action. As indicated above, the first low threshold requirement of R. 6-2(7)(c)(i) and (ii) is clearly met on the facts of the case.

[63] The second requirement, namely a determination whether it would just and convenient to decide the issues between the parties in this proceeding is also met. Once it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions, since the plaintiff will be able to commence a new action against the proposed defendants should it be unsuccessful in this application. In my view, especially since the present action has not proceeded very far, it is only common sense for all of the claims to be decided in the same action.

- [64] However, the same considerations do not apply insofar as they concern the other two proposed defendants, Rolls-Royce PLC and Vickers PLC (actually Vinters Limited). There is nothing in the evidence or the application materials which establishes any meaningful connection between these two entities and the allegedly negligent work of their subsidiaries. The evidence does not even meet the low threshold of establishing a question or issue connected with the plaintiff's claim. The threshold may be low, but completely unsubstantiated speculation does not alone suffice.
- [65] Even if the low threshold requirement of an issue in dispute between the plaintiff and these two entities were established on the face of the proposed amended pleadings, I would nonetheless hold that it is neither just nor convenient for such a claim to proceed. At best it would amount to a fishing expedition wasteful of time and expense. At worst, and I do not say this is the actual intent here, it might simply be designed to trigger such time and expense for tactical purposes unrelated to the merits of the claim. In either event, I am not prepared to put this Court's stamp of approval on that aspect of the plaintiff's application.
- [66] In result, it is ordered:
1. Ulstein Maritime Ltd. and Rolls-Royce Canada Limited are added as defendants in this action;
 2. The application to add as parties to this action Kamewa Canada Inc., Rolls-Royce PLC and Vickers PLC is denied;
 3. The plaintiff is granted leave to amend her notice of civil claim in the manner as set forth as schedule A to the amended notice of application except that:
 - (a) parties identified as ABC Company and John Doe 2 shall be deleted; and
 - (b) all allegations in the said notice of civil claim pertaining to ABC Company, John Doe 2, Rolls-Royce PLC, Vickers PLC and Kamewa Canada Inc. shall likewise be deleted.
- [67] Should anything have occurred between the parties that might affect any award of costs respecting this application, the parties may make submissions forthwith on same. Otherwise, since success on this application has been divided, each party will bear its own costs of this application.

"Kent J."

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