IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jaholkowski v. Polygon Construction Management Ltd.,* 2014 BCSC 589

Date: 20140407
Docket: S131927
Registry: Vancouver

Between:

Karol Jaholkowski by his Litigation Guardian, Thomas Jaholkowski

Plaintiff

And

Polygon Construction Management Ltd., Ramsay Worden Architects Ltd., Thomas Leung Structural Engineering Inc., Edward Michael LeFlufy, D.B.A. Edward Leflufy Urban Design & Architecture, Alma Mater Society

Defendants

Before: The Honourable Mr. Justice Wong

Reasons for Judgment

Counsel for the Plaintiff:	V. G. Critchley H. McMahon
Counsel for the Defendant, Polygon Construction Management Ltd.:	G. M. Bowman
Counsel for the Defendant, Ramsay Worden Architects Ltd.	S. H. Haakonson
Counsel for the Defendant, Thomas Leung Structural Engineering Inc.	T. Goepel
Counsel for the Defendant, Edward Michael LeFlufy	S. M. Gutiu
Place and Date of Hearing:	Vancouver, B.C. February 17 - 19, 2014
Place and Date of Judgment:	Vancouver, B.C. April 7, 2014

Introduction

[1] All defendants except the Alma Mater Society, seek to strike this cause of action.

[2] Earlier, the plaintiff in another cause of action against other defendants sought to add these defendants as additional parties. The application was opposed; Mr. Justice Greyell dismissed that attempt to add because the plaintiff's pleadings in support were deficient in that they lacked specificity in particulars. That decision was never appealed.

[3] The plaintiff reissued another claim against the defendants, basically repeating the previous allegations with slight modifications.

[4] In opposition the defendants raise the following issues: issue estoppel, abuse of process, and expiration of limitations periods for someone under legal disability.

[5] The defendants have failed to satisfy me that the strict requirements of issue estoppel are made out on this application, as it cannot be said that the issue of the expiration of the limitation period was fundamental to Mr. Justice Greyell's decision to dismiss the plaintiff's joinder application against the defendants. However, Mr. Justice Greyell's determination that the plaintiff accepted the expiry of the limitation period is binding, and it is an abuse of process for the plaintiff to attempt now to take a diametrically opposed position and argue that the limitation period has been postponed, outside an appeal of Mr. Justice Greyell's decision. On this basis, the claim against the defendants should be struck.

[6] Though a determination of whether the limitation period has been postponed is not necessary for the purpose of this decision, I nevertheless would find that the limitation period has in fact been postponed due to the plaintiff's disability, and would not accept the argument that either the appointment of a litigation guardian, or the commencement of an action would trigger the commencement of a limitation period against a person under a disability.

Background

[7] The facts relevant to the present application are fairly straight forward and not in dispute.

[8] On April 12, 2007 the plaintiff suffered a serious head injury when he fell from a second floor concrete over-hang at 2880 Westbrook Mall, a building forming part of the student housing complex known as Fraternity Village located at the University of British Columbia ("UBC").

[9] The plaintiff commenced an action in relation to the incident on April 7, 2009, naming as defendants another student involved in the accident as well as UBC and the DKE University, Scholarship, Bursary and Housing Association as the owners and occupiers of the building. Subsequently, the plaintiff changed counsel several times, and retained his current counsel at the end of January 2010. After issuing various interrogatories and conducting independent research, plaintiff's current counsel determined that other parties should be added as defendants to the original action.

[10] On April 9, 2010 the plaintiff issued a notice of motion seeking to add new defendants to the plaintiff's original claim, including Polygon Construction Management Ltd. ("Polygon"), Ramsay Worden Architects Ltd. ("Ramsay Worden"), and Edward Michael LeFlufy d.b.a. Edward LeFlufy Urban Design & Architecture ("ELUDA"). On April 22, 2010 the plaintiff issued a second notice of motion seeking to add other defendants, including Thomas Leung Structural Engineering Inc. ("Thomas Leung"). The above-named defendants are the four applicants on the present application.

[11] The application to add parties was originally heard before Mr. Justice Goepel on January 24, 2011 and March 4, 2011. However, amendments were made to the proposed pleadings between these hearing dates, and as such Mr. Justice Goepel granted leave for the plaintiff to file an amended notice of motion and have the joinder application re-heard on the basis of the amended pleadings. Subsequently,

the final hearing to add the various defendants came on before Mr. Justice Greyell on April 2, 2012 (the "Joinder Application").

[12] Mr. Justice Greyell dismissed the application to join the proposed defendants to the plaintiff's original action in oral reasons for judgment indexed at *Jaholkowski v. Gascoyne* (April 18, 2012) Vancouver S092652 (S.C.).

[13] On March 13, 2013 the plaintiff filed the present action against the named defendants.

[14] Between May 8, 2013 and October 9, 2013 the defendants each brought an application to strike the plaintiff's notice of civil claim and dismiss the individual claims made against them on the basis, generally, of issue estoppel, abuse of process, and the expiration of the relevant limitation period.

Defendants' Submissions

[15] All of the defendants rely on the doctrine of abuse of process in support of their application to strike the plaintiff's claim on the basis, generally, that the issue of whether the limitation period for the claims against these defendants expired was already settled in the Joinder Application, where the plaintiff took the position that it had expired. Polygon, Ramsay Worden and ELUDA also rely on the doctrine of issue estoppel, on largely the same basis of abuse of process, and Ramsay Worden made submissions on the issue of collateral attack. Additionally, Polygon, Thomas Leung and ELUDA make submissions on the issue of the possible postponement of the limitation period under s. 7 of the *Limitation Act,* R.S.B.C. 1996, c. 266.

Issue Estoppel

[16] Polygon, ELUDA and Ramsay Worden's submissions center on Mr. Justice Greyell's finding that the plaintiff had expressly conceded the expiry of the limitation period in the Joinder Application. The defendants submit that this concession was fundamental to Mr. Justice Greyell's decision not to permit joinder of the defendants in the Joinder Application. As a summary, I quote from the submissions of Ramsay Worden at para. 45:

> If a plaintiff takes the position that the limitation period has expired on a joinder application, success removes any limitation defence available to the defendants. If the plaintiff is unsuccessful on the joinder application, however, he ought not then be permitted to reintroduce the issue of postponement of the limitation period and take the complete opposite position that it has *not* expired.

[17] All three defendants cite and rely on the case of *Insurance Company of the State of Pennsylvania v. Global Aerospace, Inc.*, 2010 SKCA 96 [*Global Aerospace*], where the Saskatchewan Court of Appeal, in circumstances very similar to the case at bar where, after a failed joinder application, a separate action was commenced against the same defendants. The court found that the proceeding denying the joinder was predicated on the existence of a limitation defence, and therefore formed an indispensable part of that decision. As such, through the application of issue estoppel (and in the alternative abuse of process discussed below) the court struck the new action. The defendants argue that the same reasoning applies to the case at bar such that the plaintiff should not be permitted to resile from the position taken in the Joinder Action, a position that was fundamental to Mr. Justice Greyell's decision. In support, Ramsay Worley and ELUDA suggest that s. 4(1)(d) of the *Limitation Act* is predicated on the premise that the limitation period has already expired, and therefore, as in the *Global Aerospace* case, application of this subsection constitutes a functional determination of the limitation issue.

Abuse of Process

[18] All of the defendants submit that the plaintiff's claim constitutes an abuse of process, citing *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63, as the leading authority. Abuse of process is applicable where the strict requirements of issue estoppel are not met but where permitting litigation to proceed violates principles of judicial economy , consistency, finality or the integrity of the administration of justice (*C.U.P.E. Local 79* at para. 38). The defendants submit that the record is fixed by the decision of Justice Greyell, which clearly states that the plaintiff conceded that the limitation period had expired, and that outside an appeal of that decision, this court should not seek to undermine Mr. Justice Greyell's decision on the basis of the Joinder Application transcripts.

[19] The defendants further submit that conceding the expiration of the limitation period was a tactical decision made by the plaintiff in support of the Joinder Application, and as such it is an abuse of process for the plaintiff to now take the diametrically opposed position that the limitation period is postponed in an attempt to re-litigate a failed claim against the defendants.

Collateral Attack

[20] Ramsay Worden argues that to go behind the judgment of Mr. Justice Greyell to determine that the plaintiff in fact did not take the position that the limitation period had expired despite what appears in the judgment, is an improper collateral attack on this decision. The defendant submits that reliance on transcripts to "look behind reasons for judgment in support of challenges brought in later proceedings outside the appeal context" brings the administration of justice into disrepute as an abuse of process and collateral attack.

Limitation Period

[21] Polygon, Thomas Young and ELUDA submit, in the alternative, that if neither issue estoppel nor abuse of process is found to apply in the circumstances, then the court should find that nevertheless the claim should be dismissed on the basis that the limitation period has in fact already expired. The defendants' submissions center around the proper interpretation of s. 7, which postpones the commencement of any limitation period as long as the plaintiff is under a disability, defined in s. 7(1)(a)(ii) as "incapable of or substantially impeded in managing his or her affairs".

[22] Polygon distinguishes a line of Ontario cases addressing a similar postponement provision (in particular *St. Jean v. Cheung*, 2008 ONCA 815) on the basis that they dealt with whether limitation periods should commence upon a deemed discovery of claims by a litigation guardian, whereas the case at bar deals with whether limitation periods for a person under disability should start running against a specific defendant when those claims have actually been advanced against that defendant. They submit that this issue is novel, and not settled by the Ontario cases. Further, they submit that s. 7 should be read as protecting persons

under a disability who *have not yet acted* in relation to a cause of action, and therefore does not apply to a person who *has already acted* in pursuit of a claim. They submit this reading of s. 7 is consistent with the ameliorative purpose of the provision as it still ensures that rights of action are not foreclosed against persons while they are incapable of acting.

[23] Thomas Leung and ELUDA submit that, pursuant to the definition of disability in s. 7, the plaintiff stopped being under a disability after the appointment of a litigation guardian, which removes any impediment the person may have had in managing his or her affairs. Further, Thomas Leung argues that entering into a Representation Agreement pursuant to the *Representation Agreement Act*, R.S.B.C. 1996, c. 405, obviates the need for the protections against unfairness inherent in s. 7. As such, Thomas Leung argues that once a litigation guardian commences an action and there is an appointment under the *Representation Agreement Act*, a party ceases to be under a disability as their affairs are being managed and therefore it cannot be said the person is substantially impeded in this respect. The defendants argue that the plaintiff's interpretation shields a person under a disability from all applicable limitation periods, making them thereby immune to any limitation defence that could arise, which is inconsistent with the purpose the *Limitation Act* and fails to balance the competing interests of the parties.

Plaintiff's Submissions

Issue Estoppel

[24] The plaintiff submits that the expiration of the limitation period was not at issue, was not conceded and was not decided at the Joinder Application and therefore does not satisfy the "same question" precondition to issue estoppel. In support of this, the plaintiff submits that Mr. Justice Greyell's finding that the plaintiff acknowledged the expiration of the limitation period must be interpreted in the context of the Joinder Application alone, and therefore should be read as only an assumed expiration for the purpose of settling the issues of the Joinder Application. In support of this position, the plaintiff points to the transcripts of submissions and

submits that plaintiff's counsel did not concede, accept or admit that the limitation period had expired. Further, the plaintiff submits that the limitation issue was not necessarily bound up with nor fundamental to the decision of Mr. Justice Greyell, as he dismissed the Joinder Application on the basis of the plaintiff's failure to meet the first branch of the joinder test, namely that the amended notice of civil claim proposed by the plaintiff did not set out a cause of action against the defendants with sufficient particularity. A determination of whether the limitation period had expired was neither necessary nor fundamental to this decision.

[25] In relation to the proper interpretation of s. 4(1)(d) of the *Limitation Act,* the plaintiff submits that s. 4(1)(d) is not premised on an admission that a limitation defence exists, but rather merely permits joinder where a limitation defence is a possibility in the circumstances, without having to determine the limitation issue one way or another. As such, the plaintiff submits that the analysis of the court in *Global Aerospace* should be distinguished from the case at bar as the statutory scheme applicable in that case is fundamentally different. Further, the plaintiff submits that the Joinder Application was brought under Rule 6-2(7) and not under s. 4 of the *Limitation Act*, and therefore different considerations pertain.

[26] In the alternative, the plaintiff submits that if the court is satisfied that the defendants have established the preconditions to issue estoppel, the court should nevertheless exercise its discretion not to apply the doctrine as: no argument was made on this issue; all of the parties were aware there was an issue as to the expiry of the limitation period and the plaintiff's position as to expiry was equivocal at best; it was not within the reasonable expectation of the parties that the limitation issue would be determined before Mr. Justice Greyell at the Joinder Application; an appeal on the discrete issue of the limitation finding was not open to the plaintiff as this finding of fact played no part in the final order that was capable of being appealed; and there is clear prejudice to the plaintiff if the claim is struck, as he is under a disability and therefore falls within the postponement provisions of the *Limitation Act*.

Abuse of Process

[27] Bringing a new action against the same defendants after a failed application to have them joined to a separate proceeding is not an abuse of process, and further is a practice endorsed by the case law. The plaintiff submits that since plaintiff's counsel never admitted, acknowledged nor otherwise conceded that the limitation period had expired at the Joinder Application, they are now not taking a diametrically opposed position in this fresh action in asserting postponement. Nor is the plaintiff attempting to relitigate the issue decided at the Joinder Application, as those proceedings dealt exclusively with whether the defendants should be joined to the original claim, and not whether the plaintiff could bring a separate claim against the defendants nor whether or not this claim would be statute-barred if pursued. Finally, the plaintiff submits that, pursuant to Rule 6-2(7), when a limitation period is contested at an application to add parties, the court should proceed on the assumption that the limitation period has expired for the purpose of the joinder application. Therefore it would not have been appropriate for Mr. Justice Greyell to determine the limitation issue at the Joinder Application, though he could rightly assume its expiration, without deciding it, for the sole purpose of settling the joinder issue, which is what he in fact did.

Limitation Period

[28] The commencement, application and postponement of limitation periods are governed by the *Limitation Act* alone, and s. 7 establishes a mechanism for postponing limitation periods for persons under a disability as well as a mechanism for commencing limitation periods when the person ceases to be under a disability or upon service of a notice to proceed. The plaintiff submits that these are the only circumstances that will trigger the start of a limitation period against a person under a disability. The plaintiff refutes the position that an appointment under the *Representation Agreement Act* distinguishes this case from those Ontario authorities on the matter, particularly as a litigation guardian, however they are appointed, obtains authority to commence actions pursuant to Rule 20 of the *Supreme Court Civil Rules*.

Analysis

Issue Estoppel

[29] The test for issue estoppel is settled and requires establishing three preconditions (*Danyluk v. Ainsworth*, 2001 SCC 144 at para. 25):

1. that the same question has been decided;
2. that the judicial decision which is said to create the estoppel was final; and
3. that the parties to the judicial decision were the same persons as the parties to the proceeding in which the estoppel is raised.

[30] If the court is satisfied that these three preconditions have been established by the defendants, the court nevertheless retains discretion to determine whether or not issue estoppel ought to be applied in the circumstances of the case (*Danyluk* at para. 33). The factors the court can consider are not closed, but should "ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case" (*Danyluk* at para. 67).

[31] Neither the finality of Mr. Justice Greyell's decision nor the mutuality requirement of issue estoppel are in dispute in this case, rather the submissions centered on the first precondition, i.e. whether or not the issue of the expiration of the limitation period was "necessarily bound up with the determination" of the Joinder Application (*Danyluk*, at para. 54). The Court in *Danyluk* said the following in relation to what can be considered a "fundamental" issue for the purpose of issue estoppel (at para. 24):

> Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

[32] Whether or not the plaintiff conceded that the limitation period had expired is ultimately irrelevant to an assessment of issue estoppel, as it is clear that, regardless of the plaintiff's intention, Mr. Justice Greyell accepted that the plaintiff admitted the limitation period had expired and therefore the relevant inquiry for the purpose of issue estoppel is limited to the effect this finding had on his ultimate decision to refuse to join the defendants.

[33] In order to satisfy the first precondition to issue estoppel, the defendants must prove that expiry of the limitation period was necessarily bound up with or fundamental to Mr. Justice Greyell's decision to dismiss the Joinder Application. Though it is clear that the expiration of the limitation period informed the context of Mr. Justice Greyell's decision, I cannot conclude that it was fundamental to his ultimate determination that the plaintiff failed to meet the first branch of the joinder test, i.e. that they failed to raise an issue between the plaintiff and the defendants that related to the relief, remedy, or subject matter of the proceeding. Though he went on to consider the second part of the joinder test and took into account, *inter alia*, the prejudice to the defendants of being deprived of a limitation defence, ultimately he determined that the claim against the defendants unnecessarily broadened the scope of the original litigation and therefore the plaintiff failed to prove that joinder was just and convenient in all the circumstances (at paras. 37 & 40). Though limitation periods have been said to be relevant to the issue of whether or not joinder is appropriate, courts have clearly said that this issue is not determinative (*The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329, (*sub nom. Strata Plan VIS3578 v. Canan Investment Group Ltd.*) [2010] B.C.J. No. 1280, at para. 47 [*John A. Neilson Architects]*). It is clear from Justice Greyell's discussion at para. 40 of his reasons that, though the loss of a limitation defence was relevant in the circumstances, it was not determinative and therefore was not a finding that was fundamental to his decision.

[34] I note also, that though persuasive, the case of *Global Aerospace* is not binding on this court, and further is premised on statutory language that is not applicable in this case. Importantly, the language of s. 20 of *The Limitations Act* of

Saskatchewan begins, "Notwithstanding the expiry of a limitation period after the commencement of a proceeding", whereas s. 4(1)(d) of the *Limitation Act* provides that, "If an action to which this or any other Act applies has been commenced, the lapse of time for bringing an action is no bar…". Unlike s. 20 of the Saskatchewan *Act*, s. 4(1)(d) of our *Limitation Act* is not dependant on a finding that the applicable limitation period has expired. Therefore I cannot conclude, on the arguments advanced by the defendants and supported by *Global Aerospace,* that s. 4(1)(d) also contains an implicit admission that a limitation period has expired, but rather prefer the submission of the plaintiff that it applies where there is a possibility that the limitation period has expired, but does not require that this issue be determinatively settled before it can be applied to specific proceedings.

[35] Despite my finding that the issue of the expired limitation period fell short of being fundamental to the decision of Mr. Justice Greyell, thus precluding the application of issue estoppel, it does not preclude the application of the doctrine of abuse of process (*Global Aerospace* at para. 94).

Abuse of Process

[36] The case of *C.U.P.E., Local 79* is cited by the parties as the leading case on the doctrine of abuse of process and it establishes that abuse of process can preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing the litigation to proceed would violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice (para. 37). It has also been held by this court that abuse of process may be found in the context of "multiple or successive proceedings which cause or are likely to cause vexation or oppression" (*Babavic v. Babowech*, [1993] B.C.J. No. 1802 at para. 18). However, the law is clear that bringing a new action after a failed joinder application is not in and of itself an abuse of process, and is in fact endorsed by the courts where appropriate (*John A. Neilson Architects* at para. 29, *Owners, Strata Plan LMS 343 v. Haseman Canada Corporation*, 2007 BCCA 301 at paras. 22-23).

[37] The reasons of Mr. Justice Greyell are clear; he not only proceeded on the basis that the limitation period had expired, he further found that the plaintiff had acknowledged this fact (see in particular paras. 11, 18, 19, and 40, of his Reasons for Judgment). The plaintiff now submits that this was never the position of plaintiff's counsel at the Joinder Application, submitting in support the transcripts from the proceeding. However, it must be noted that the plaintiff made no attempt to appeal the decision of Mr. Justice Greyell. In *C.U.P.E., Local 79*, the majority said the following in reference to impeaching judicial findings (at para. 46):

> A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

[38] The plaintiff submits that only final orders can be appealed, and therefore they had no mechanism to appeal a mere finding of fact. This, however, presents too narrow a description of the function of appellate review on the basis of misapprehension of facts. It was open to the plaintiff to appeal the dismissal of the Joinder Application on the basis that Mr. Justice Greyell misapprehended the plaintiff's position in relation to the limitation period, and therefor incorrectly dismissed their application. It is improper to now attack Mr. Justice Greyell's findings of fact on the basis of the underlying record, outside of an appeal of the merits of that decision. As suggested by Ramsay Warden, this smacks of an impermissible collateral attack, or "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment" (*C.U.P.E., Local 79* at para. 33).

[39] The plaintiff contends that given the dispute between the parties relating to the limitation period, for the purpose of the Joinder Application alone, the correct legal position for the plaintiff to take was to assume the limitation period had expired, and cite in particular the authority of *Brito (Guardian ad litem) v. Wooley*, [1997] B.C.J. No. 2487 and *Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611,

for this proposition. However, this submission oversimplifies the law in this area, and is procedurally incorrect. In *John A. Neilson Architects* the Court of Appeal made it clear that "[t]he 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" (at 47). As such, the court held that there are 4 options available to a judge presiding over a joinder application in relation to accrued limitation periods:

> [47] …
>
> > 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.
>
> [Emphasis added.]

[40] It is clear from the above that it is open to a judge sitting on a joinder application to determine the issue of the existence of a limitation defence, provided the requisite factual matrix exists to fairly determine the issue, particularly where postponement is plead (*Star Masonry* at para. 22). Further, the underlined portion of the above quote clearly shows that it is only after the court decides that the limitation

issue cannot be determined on the joinder application that it becomes necessary to assume, for the purpose of the application, that the limitation period has expired. The above also clearly identifies that it is not for counsel to assume, for the purpose of a joinder application, that the limitation period has expired, but rather it is up to the discretion of the sitting judge. By presenting their submissions from the assumption that the limitation period had expired without making this assumption clear to Mr. Justice Greyell, plaintiff's counsel effectively removed any discretion Mr. Justice Greyell would have had to (i) invite argument relating to the existence of the limitation defence at the Joinder Application, (ii) proceed under the fourth option and join the defendants while preserving their right to argue a limitation defence, or (iii) refuse to join the defendants but leave the issue of postponement to be decided on a subsequent application.

[41] Though initiating a new claim after a failed joinder application is not itself an abuse of process, this procedure is permissible only when the question of the existence of a limitation defence is not expressly determined at the joinder application (see *Haseman* at para. 12, and *John A. Neilson Architects* at para. 79). As such, the plaintiff's choice to proceed on the unstated assumption that the limitation period had expired was not required by the case law nor was it consistent with the procedure identified above. Further, regardless of the position the plaintiff *intended* to take at the Joinder Application, it is clear that Mr. Justice Greyell understood they were taking the position that the limitation period had expired, and the plaintiff cannot now advance an irreconcilable position not articulated as alternative claims that should have been advanced at the Joinder Application (*First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5 at para. 25). Thus, "as a matter of protecting the integrity of the court's process" the claims against the defendants asserting postponement of the limitation period cannot be permitted to proceed and must be struck (*Pepper's Produce Ltd. v. Medallion Realty Ltd.*, 2012 BCCA 247).

[42] I echo the remarks of our Court of Appeal in the case of *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at 40:

> If counsel at the first hearing intended the Court to deal with only one of many issues, they should have made that clear to the other parties and to the Court, which may have had an opinion on the subject. … If nothing else, this case is a cautionary tale for practitioners … about the importance of clearly informing the Court as to the issues being raised, and properly stating in the Court's order exactly what was determined and what was not.

Limitation Period

[43] In light of the above conclusion on the issue of abuse of process, it is unnecessary for me to comment on the status of the limitation period in this case. However, in light of the arguments raised on this issue, I wish to make the following remarks.

[44] The plaintiff relies on a line of Ontario cases that hold, *inter alia*, that the appointment of a litigation guardian does not crystallize the discoverability of a claim nor cause the limitation period to commence, as rules of procedure and the protection mechanisms found therein cannot overcome the absolute protections given to persons under a legal disability under the Ontario *Limitation Act*, S.O. 2002, c. 24, Schedule B (see, for example, *St. Jean v. Cheung*, 2008 ONCA 815; *Lawson v. Hospital for Sick Children*, [1990] O.J. No. 1165).

[45] However, as Ontario cases are not binding on this court, and this is a novel question on the interpretation of a specific provision of the B.C. *Limitation Act*, this question requires a textual analysis of the actual provisions in question and resort to long-standing principles of statutory interpretation. One of the leading cases on statutory interpretation is *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, which affirmed that there is one modern approach to statutory interpretation, namely that the words of an Act are read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act and the intention of Parliament (at para. 21). Recently, in *Halvorson v. Medical Services Commission of British Columbia*, 2014 BCSC 448, Madam Justice Adair succinctly described the exercise of statutory interpretation as follows:

> [64] Thus, the interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the legislation as a whole. When the words of a provision

> are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. See ***Canada Trustco Mortgage Co. v. Canada***, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10.

[46] Taking the above into consideration, any interpretation of s. 7 of the *Limitation Act* must balance the purpose of the provision "to prevent unfairness which may result from the application of a limitation period when a person is under a disability" (*Eaton v. Herman*, 1987 CarswellBC 2889 at para. 9), with the general purpose of limitation legislation to protect the interests of defendants against stale claims brought by plaintiffs who "sleep on their right", to preserve relevant evidence, and to treat plaintiffs fairly in regards to their specific circumstances (*Novak v. Bond*, [1999] 1 S.C.R. 808 at paras. 64-67).

[47] A plain reading of s. 7(2) clearly states that the limitation period set under the *Act* is postponed "so long as that person is under a disability", defined in s. 7(1)(a)(ii) as a person who is "in fact incapable of or substantially impeded in managing his or her affairs". Nowhere in the definition of disability, or elsewhere in the *Limitation Act,* is the inability to manage one's affairs resolved by the appointment of a litigation guardian or other representative. Section 7(6) provides a mechanism to trigger the commencement of a limitation period by service of a notice to proceed on a person's "guardian". Section 7(1)(b) defines "guardian" as including "a committee appointed under the *Patients Property Act*", R.S.B.C. 1996 c. 349, who stands in the place of a patient, as that term is defined in the *Patients Property Act*, for the purpose of advancing or defending any claim against a patient. Thus, a committee fulfills effectively the same role as a litigation guardian appointed under the *Supreme Court Civil Rules*, or as a representative appointed under the *Representation Agreement Act* in the sense that they attempt to manage the affairs of a person who is incapable of managing their own affairs. Reading s. 7 as a whole reveals that the triggering mechanism found in s. 7(6) is premised, in part, on the prior appointment of a "guardian", or someone who could generally stand in the place of a person under a

disability to manage their affairs. It is therefore inconsistent with a plain reading of the provision to hold that the appointment of someone charged with managing the affairs of a person who is under a disability, in and of itself, triggers the running of a limitation period. As such, the arguments of Thomas Leung and ELUDA in relation to the commencement of the limitation period must fail.

[48] In contrast, Polygon argues that s. 7 should be interpreted as being concerned only with the expiration of the limitation period for persons under a disability who have not yet acted in pursuit of their claim, and therefore does not apply to a plaintiff who has already acted in pursuit of their claim. Polygon submits that a "disabled plaintiff who actually does advance a claim but has not received a notice to proceed has no time limit to advance any claim unless and until a notice to proceed is delivered", a result which they submit creates an unfair situation for defendants, who upon receipt of a notice of claim from a person under a disability, would have to immediately file a notice to proceed to invoke a limitation period for the plaintiff's claim. This position ignores rules of procedure that govern initiated claims and the following statement of Mr. Justice Tysoe, as he then was, in *The Owners, Strata Plan LMS 343 v. Haseman Canada Corp.*, 2006 BCSC 1457, at para. 33 is apposite:

> In addition to the *Limitation Act,* the *Rules of Court* address the effects of delay by a plaintiff after an action has been commenced. For example, the *Rules* enable a defendant to apply to have an action dismissed for want of prosecution and prejudice caused by the plaintiff's delay is one of the factors considered by the courts on such an application.

[49] Further, though the purpose of this provision is clearly to ensure fairness towards persons under a disability, it also incorporates a protection mechanism for potential defendants. A notice to proceed served pursuant to s. 7(6) is the mechanism by which defendants can limit the period of their potential liability and ensure that claims are brought against them in a timely manner. Thus, s. 7(6) balances the competing interests identified by the Supreme Court of Canada in *Novak*, between the defendant's need for certainty and the plaintiff's need for

fairness, and is thus consistent with the purpose of the provision as a whole and the scheme of the *Act*.

[50] Further, the interpretation suggested by Polygon is not consistent with the words of the provision, the purpose of the provision, nor the scheme of the *Act*. Outside of the exceptional factual matrix of this case, a plain reading of this section does not lend itself to an interpretation that a limitation period is triggered when an action is commenced by a plaintiff. Nothing in the words of the provision suggest that it does not apply to a person under a disability who has already initiated a claim, nor is this interpretation supported by the purpose of the provision or the scheme of the *Act* as a whole given the balancing of interests found in s. 7 itself. The starting point for any question relating to the limitation period for a person under a disability is s. 7(2), which states unequivocally that any limitation period is postponed until that person is no longer under a disability. Notwithstanding this immunity provision, two other instances are identified in the *Act* where a limitation period will be imposed upon a person under a disability: where a notice to proceed is properly served under s. 7(6) and where the ultimate limitation period of 30 years has been reached (s. 8(1)(c)). Polygon has not succeeded in persuading me that any further limits could or should be read into s. 7 such that it would not apply to a plaintiff under a disability who has initiated an action, nor, do I think such an interpretation is warranted based the scheme and purpose of the *Act* as a whole.

Conclusion

[51] Accordingly, the application to strike defendants, aside from Alma Mater Society, from this action is granted with costs.

"Wong J."