

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sabaghchian v. Taghiakbari*,
2024 BCSC 327

Date: 20240202
Docket: S219236
Registry: Vancouver

Between:

Dr. Aliakbar Sabaghchian

Plaintiff
(Defendant by Counterclaim)

And:

Amir Taghiakbari

Defendant
(Plaintiff by Counterclaim)

Before: The Honourable Justice MacDonald

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

E. Dishart

Counsel for the Defendant:

N. Lidder
J. Tam

Place and Date of Hearing:

Vancouver, B.C.
January 26, 2024

Place and Date of Judgment:

Vancouver, B.C.
February 2, 2024

Overview¹

[1] In this application, the defendant in the main action and potential plaintiff by counterclaim seeks leave to file a counterclaim pursuant to r. 22-4(2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. The plaintiff, the respondent to the application and potential defendant in the counterclaim, opposes the application. For clarity, I refer to the plaintiff and the defendant in accordance with their roles in the main action.

[2] The notice of civil claim was filed on October 4, 2021, alleging that the defendant made defamatory statements about the plaintiff regarding a business relationship between the parties. The relationship related to the construction and renovation of the plaintiff's projects. The plaintiff states that, in 2014, he retained the defendant in respect of this relationship, and the defendant alleges two oral contracts between the two were made in or around September 2014.

[3] The relationship ended approximately two years later, in 2016.

[4] The parties agreed the defendant could file his response to the notice of civil claim on December 3, 2021. This was done. The defendant proceeded to file a proposed counterclaim on May 5, 2022, and served it on the plaintiff on May 9, 2022. By this point, the defendant was outside the timelines provided for in r. 3-4(4), and he did not seek leave to file his counterclaim as required by r. 3-2.

[5] The plaintiff filed a response to counterclaim on May 31, 2022, denying all of the relief sought by the defendant. This response to counterclaim was served on the defendant on June 22, 2022. In his response, the plaintiff did not object to the timing of the counterclaim but indicated it was statute barred by the operation of the *Limitation Act*, S.B.C. 2012, c. 13.

¹ At the outset, the Court stated: "I thank the parties for making themselves available this morning. Given that these are oral reasons, I reserve the right to edit the judgment, but such editing will not change the substance of the decision."

[6] In the counterclaim, the defendant alleges that the plaintiff unilaterally and without cause terminated two oral contracts with the defendant in April 2016 and that no payments under either contract had been made to him. The defendant also alleges the plaintiff made defamatory and slanderous comments against him, amongst their friends, and more broadly within the Persian community on the North Shore.

[7] On November 22, 2023, the plaintiff filed an application seeking to strike the counterclaim as well as an order for document production. On January 15, 2024, the defendant filed his application seeking leave pursuant to r. 22-4(2) to file the counterclaim. The two applications came before me on January 26, 2024 with a time estimate of 90 minutes. This decision only addresses the application seeking leave to file the counterclaim. The application to strike was adjourned because there was not enough time to address it. The plaintiff did not pursue the document-production application before me.

[8] At the date of application, discoveries had not been conducted by either party.

The Parties' Positions

[9] The defendant argues that I should exercise my discretion and grant leave to extend the time to file his counterclaim. The defendant contends that due to serious health issues, he did not retain and instruct counsel to file a counterclaim within the timelines provided in r. 3-4(4). He also claims to have been experiencing financial difficulties due to the dispute between the parties.

[10] Central to the defendant's position is his contention that there is a substantial connection between the counterclaim and the plaintiff's notice of civil claim insofar as the plaintiff's claim in defamation is based on the contractual claims between the parties. More broadly, the defendant relies on r. 1-3(1) for the principle that the object of the *Rules* is to ensure the determination of every proceeding on its merits in an expedient manner.

[11] The plaintiff says that the filing of the counterclaim was outside the time provided for in the *Rules*. The plaintiff relies on the *Limitation Act*, however, as a primary reason I should not provide leave to late file the counterclaim. To the extent that the contracts ended in or around April 2016, the plaintiff says the latest the defendant could file his claims would be early 2019.

[12] In support of his position, the plaintiff argues there is not a sufficient connection between the notice of civil claim and the counterclaim to justify granting leave. He says the counterclaim raises contractual issues that are not connected to the defamation claims in the notice of civil claim. The plaintiff further argues that there is no proper explanation for the defendant's delay. He suggests that the defendant's medical issues were not serious and that they did not occur within the proper timeframe to cause the delay.

[13] The plaintiff states that refusing leave will not prevent the defendant from making full answer and defence to the claim brought against him.

[14] The defendant emphasizes the plaintiff did not raise an issue regarding the timing of the service of the counterclaim. The defendant concedes the plaintiff raised *Limitation Act* issues regarding the claim for breach of contract in its response to counterclaim.

Issue

[15] The issue before me is whether I should exercise my discretion and grant leave to the defendant to file and serve his counterclaim late.

Legal Principles

[16] The jurisdiction to extend the time to file is found in r. 22-4, which grants the court discretion to extend any period of time provided for within the *Rules*. Rule 22-4(2) provides that this Court may extend the time provided for in the *Rules* even if the application is made after the date for filing has expired.

[17] The applicable factors to consider were set out in *Mathias v. Canadian Pacific Ltd.*, 1998 CanLII 3909 (BC SC), [1998] BCJ No 1726 [*Squamish*]. They are summarized as follows:

- a) the length of the delay between receiving the notice of civil claim and filing the counterclaim;
- b) the reasons for the delay;
- c) whether the counterclaim would be barred but for s. 22 of the *Limitation Act*;
- d) the connection between the counterclaim and the notice of civil claim;
- e) prejudice to the defendant such as preventing him from making full answer and defence to the claim brought against him; and
- f) whether there will be prejudice to the plaintiff.

[18] The considerations from *Squamish* is also set out in *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2014 BCSC 1049 at para. 24 [*Arbutus Bay Estates*] and *Syukur v. Yeh*, 2018 BCSC 1826.

[19] Subsequent jurisprudence has indicated that the degree of connection between the factors described in the *Squamish* need not be high, although the connection should not be low: *Kasian Estate v. Kasian*, 2021 BCSC 538 at para. 58. A proposed counterclaim may raise additional legal issues pursuant to different law than the main claim: *Kasian* at para. 57.

[20] In *Boutsakis v. Kakavelakis*, 2008 BCCA 13 [*Boutsakis*], Justice Newbury, for the Court of Appeal, explained a *Limitation Act* defence in the context of a counterclaim:

[42] ... where a counterclaim is involved, it is s. 4(1) of the ***Limitation Act*** that applies, rather than s. 4(4) [now s. 22(1)(a)]. Section 4(1) states that if an action has been commenced, the lapse of time limited for bringing an action is no bar to proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim, with respect to any claims relating to or connected with the subject matter of the original action. ...

[21] Put simply, s. 22(1)(a) of the *Limitation Act* provides that if an action has been commenced, the lapse of a time limit for bringing an action is no bar to proceeding by counterclaim, including the addition of a new party as a defendant by counterclaim, with respect to any claims that are related or connected with the subject matter of the original action.

[22] Justice Newbury relied on *Lui v. West Granville Manor Ltd.*, 1987 CanLII 164 (BC CA), 11 B.C.L.R. (2d) 273 [*Lui*], where Justice Lambert stated at 18:

The legislative purpose must surely have been to permit those proceedings which are brought within the applicable limitation period to go ahead, and to permit all subordinate proceedings which are dependent on the main proceedings to go ahead with them, but to prevent any proceedings which are truly independent from using bogus subordinate status to avoid a limitation period which would otherwise be applicable.

[23] In *Boutsakis*, Justice Newbury pointed out that this statement from *Lui* was made in the context of third-party proceedings but that similar considerations applied to counterclaims: at para. 43.

[24] This court stated in *Shoolestani v. Ichikawa*, 2017 BCSC 1589, aff'd 2018 BCCA 11 that “[a]mong the factors to consider are the facts that give rise to the claims, the causes of action and the possible connection between the relief sought by the parties”: at para. 35.

[25] If the counterclaim is properly within the ambit of s. 22(1)(a) of the *Limitation Act*, the court has the discretion to extend the time period for a counterclaim to be filed if it is just and convenient to do so. In *Lui*, the Court of Appeal held that the applicable inquiry is fact specific.

[26] Consequently, whether the claims in the proposed counterclaim are related to or connected with the subject matter of the plaintiff's claim is an important factor to consider.

Analysis

[27] I have reviewed the case law and statutory authorities to which the parties directed me. Although I do not recite them all, I have considered them in rendering this decision.

[28] Pursuant to section r. 3-4(4), the counterclaim should have been filed within 21 days of the defendant being served with the notice of civil claim. To late file, the defendant was required to apply for leave: r. 3-2; *Genaille v. Webb*, 2021 BCSC 2284 at para. 42. The defendant did not do so.

[29] As the defendant points out, pursuant to r. 22-4(2), I have the authority to exercise my discretion to grant leave to extend the time for filing the counterclaim. The plaintiff emphasizes that, pursuant to r. 22-7(2), I may also set aside a proceeding for a failure to comply with the *Rules*.

[30] I will consider the factors set out in *Squamish* to determine if I should exercise my discretion to grant leave as sought by the defendant, albeit in a different order from that case.

Would the Counterclaim be Barred but for s. 22 of the *Limitation Act*?

[31] The plaintiff argues that in addition to the timelines in the *Rules*, the counterclaim is barred by the *Limitation Act*. He states that the two-year limitation period has lapsed with respect to the contractual claims. The plaintiff relies upon *Squamish* where it was stated that “[i]n the event the *Limitation Act* precludes the claim, the time for filing the counterclaim will not be extended under Rule 3(2)”: at para. 37.

[32] The basic limitation period is two years running from the time the cause of action was discoverable: *Limitation Act*, s. 6(1). Due to the principle of discovery, I do not have enough information before me to determine if parts of the defendant's counterclaim that relate to the contractual issues would be barred by the *Limitation Act*. While I am aware the alleged contract ended in or around April 2016, I am not

aware of the existence, or lack thereof, of circumstances that might impact this analysis.

[33] The defendant, for example, states in his materials that the “plaintiff continuously promised the defendant that he would pay the defendant the amounts owed” under the two contracts. Whether this is correct and if so, on what dates these promises were made are relevant. I note in addition to the two alleged oral contracts, there was also a written agreement, dated May 1, 2015, attached as an exhibit to an affidavit between the plaintiff and the defendant's company, ATACT Construction.

[34] If the *Limitation Act* applies, there is an exception to its application as set out in s. 22. The Court of Appeal in *Lui* held the exception applies if there is a “real and substantive connection” between the original action and the counterclaim. This point was also made in *Boutsakis* at para. 44.

[35] On the materials and submissions before me I am unable to determine whether the limitation period in respect of the defendant's contractual claims have or have not elapsed. I am unable to determine whether the contractual claims would be barred by the *Limitation Act* and, if so, whether they would fall within the ambit of the exception in s. 22.

[36] While the *Limitation Act* defence is an important factor to consider in these types of applications, I am not persuaded that my being unable to decide the limitation issue is the end of the matter. As Justice Donegan stated in *Raven v. A&W Ranching Limited*, 2014 BCSC 1359 [*A&W Ranching*]:

[40] Given the insignificant length of the delay, the legitimate reasons for the delay, the very close connection between the claim and the counterclaim, and the balancing of any potential prejudices to either party, I find it is just and convenient to extend the time for filing the counterclaim. Any potential limitation issues, as alleged by both parties, can be dealt with by the trial judge.

[37] In *Squamish*, the case the plaintiff relied on for his limitation defence, this court relied on *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*, 1996 CanLII 3033 (BC CA), 19 B.C.L.R. (3d) 282. In *Teal Cedar*, Justice Finch articulated

these principles that would later be set out in *A&W Ranching*. In *Teal Cedar*, he held that, in exercising the discretion under the *Rules*, the test to apply is whether it is just and convenient to permit the amendment, a decision which requires consideration of the length of delay, the reasons for the delay, the expiration of the limitation period, any prejudice arising from the amendment, and the connection of the amendment to the existing action. He further stated at that “... no one factor should be accorded overriding importance, in the absence of a clear evidentiary basis for doing so”: *Teal Cedar* at para. 45.

[38] It would be best if I could address these matters together, but I do not read the thrust of the authorities to say that the *Limitation Act* issue is the determining or only factor to consider. As a result, despite being unable to address the limitation issue, I continue to analysis the facts in the context of the six-part *Squamish* test.

Delay (Length and Reasons)

[39] The defendant argues he was not well enough to retain and instruct counsel to file the counterclaim within the applicable timeline. His application also relies on financial difficulties. The defendant provided evidence of his medical issues but, apart from the allegation of mental-health issues, they were not concentrated at the time during which he delayed filing his counterclaim. I find the defendant's health issues are related to the delay but are unlikely the sole reason.

[40] The defendant further argues that the plaintiff continually reassured him that he would be paid for the work he provided pursuant to the two alleged oral contracts. This is a factual dispute that I am unable to resolve on the basis of this application, but if true, it would help to explain the delay. I note at the relevant time the defendant had already retained counsel for his response to the notice of civil claim. The defendant advises, however, that he was not made aware of the timeframe in which to bring a counterclaim.

[41] I am mindful that the object of the *Rules* includes determining every case in a just fashion on its merits. Here the delay was not “inordinate,” a term used in a number of authorities. It was months late, not years. The length and reasons for the

delay are not enough alone to persuade me to set aside the counterclaim for a failure to comply with the *Rules*. Ultimately, this factor militates toward exercising my discretion to grant leave to file the counterclaim.

Connection Between the Notice of Civil Claim and Counterclaim

[42] A complex factor to be considered in this application is whether the proposed counterclaim, or aspects of it, are related to or connected with the subject matter of the plaintiff's claim. In the counterclaim, the defendant alleges that the plaintiff unilaterally and without cause terminated two oral contracts with the defendant in April 2016. The defendant further alleges that no payments under either contract had been made to him but that the plaintiff had given him assurances he would be paid. The plaintiff argues that the defendant raises new issues in the counterclaim, including breach of contract and moneys owed to the alleged breach.

[43] The defendant argues there is a strong connection between the vast majority of the plaintiff's claims and the counterclaim. He says the alleged statements made by the defendant regarding the plaintiff's breach of the two contracts as well as the outstanding amounts owed to the defendant under the contracts.

[44] On its face, the contractual claim is separate from the defamation claim, and it is apposite to observe that it could have been pursued as such.

[45] To the extent I am able to ascertain at this stage of the proceedings and with the material available to me, all of the claims in this matter appear to be rooted in the business relationship that was initiated at some point in 2014 and that concluded at some point in 2016.

[46] Having considered the applicable authorities, I accept there is sufficient connection between the defamation claims in the notice of civil claim and the defamatory claims in the counterclaim because:

- i. the identities of the parties are the same;
- ii. the action and counterclaim arise originally from the same facts;

- iii. the causes of actions are the same;
- iv. the nature of the alleged damages is similar; and
- v. the periods of time in which the alleged causes of actions arose are similar.

[47] With respect to the contractual claims, the facts are more nuanced and it is important to note that the notice of civil claim sounded strictly in the law of defamation. I find, however, that the defendant's contractual claims are related to the plaintiff's defamation claims. In the notice of civil claim, the plaintiff alleges, *inter alia*, that the defendant had defamed him by advising certain individuals that the plaintiff:

- i. had breached a contract with the defendant; and
- ii. owed the defendant money from the business relationship.

[48] These allegations of the plaintiff flow quite clearly from the breaches of contract alleged by the defendant. The identities of the party are the same and the action and counterclaim arose, originally, from the same facts. Moreover, the contractual claims may speak to the core question of whether the statements were defamatory.

[49] I am satisfied that the degree of connection militates toward the justice and convenience in hearing all of the applicable claims together.

Prejudice to the Plaintiff and Defendant

[50] Cases should be decided on their merits unless doing so would invite significant prejudice on one party. The plaintiff did not argue prejudice with any vigour; he baldly stated there would be prejudice to him if the defendant is permitted to make a separate claim in breach of contract against a different party, ATACO Construction Company. He emphasized that the defendant would be able to make full answer and defence to the notice of civil claim without the need for a counterclaim.

[51] In my view, no significant prejudice would be invited on the plaintiff by my allowing this application, apart from the general prejudice in delaying the adjudication of claims. Memories may fade, for example, through the passage of time: *0803589 B.C. Ltd. (Formerly Ralph's Auto Supply (B.C.) Ltd.) v. Ken Ransford Holding Ltd.*, 2015 BCSC 1428 at para. 42. When the delay has not been inordinate, which would more likely result in fading memories, and there is no other obvious prejudice, a claim should proceed on its merits.

[52] In balancing the potential prejudices, I find there would be more prejudice to the defendant if he were unable to pursue his claims than there would be to the plaintiff if I grant leave for the defendant to file his counterclaim. As this court stated in *Arbutus Bay Estates*:

[37] There are many authorities discouraging a multiplicity of proceedings when the issues affecting all parties can be dealt with in one proceeding. The cost to both parties of having two separate proceedings for which virtually identical evidence is needed would be great. I am satisfied that the defendant may suffer some prejudice in making a full answer [and] defence if its claim were denied as the full picture would not be before the court for resolution.

[53] Based on prejudice to the defendant, I find this factor militates toward allowing the counterclaim to be heard on its merits with the full factual context before the Court.

Conclusion on Counterclaim

[54] Based on the above reasons, I am exercising my discretion to extend the time period under the *Rules*. I find it is just and convenient to grant leave to the defendant to late file his counterclaim: see *Smith v. British Columbia*, 2010 BCSC 928 at para. 34.

Naming Issue

[55] A further issue was raised concerning the fact that in his counterclaim, the defendant named himself individually rather than naming his company, ATACO Construction Company. This issue arose because the notice of civil claim was a defamation claim against the defendant. In his counterclaim, the defendant pleaded

defamation but also raised a contractual relationship not pleaded in the notice of civil claim.

[56] Using the May 2015 written contract, the plaintiff demonstrated that the applicable contractual relationship was, at least partly, between the plaintiff and the defendant's company, ATACO Construction Company. The plaintiff argues that allowing a separate claim against a different party will be prejudicial to him.

[57] The defendant counters that the oral contracts were between the plaintiff and the defendant in his personal capacity. In any event, this is a matter that can be easily addressed through a simple amendment to the pleading. I do see this as a reason not to grant leave to the defendant in respect of the counterclaim.

Plaintiff's Application to Strike the Counterclaim

[58] The plaintiff's application to strike the counterclaim was adjourned due to a lack of time. In this application, I was unable to address the issue of whether aspects of the counterclaim would be statute barred. In addition, there may be factual disputes in the affidavit evidence.

[59] Since I was unable to determine if the contractual claims would be statute barred, I could not go on to answer the subsequent question of whether the contractual claims fit within the s. 22 exception in the *Limitation Act*. Nevertheless, based on the test in *Kasian* and in other authorities, I found there was a sufficient connection between the notice of civil claim and the counterclaim for me to exercise my discretion and provide leave to late file the counterclaim. This was in the context of late filing under the *Rules*, not in the context of the *Limitation Act*.

[60] As I read the authorities, when determining whether a claim falls within the exception in the *Limitation Act*, there must be a “real and substantive connection” between the original action and the counterclaim: *Lui and Boutsakis* at para. 44. This is a higher threshold than that provided for in *Kasian*. In *Kasian*, the court found the contract claims were out of time under the *Rules* and the *Limitation Act*. This factor weighed against an “easy extension of time to file a counterclaim”: *Kasian* at para.

55. Associate Justice Elwood (as he then was), held that the degree of connection required to determine if a counterclaim could be late filed was not high, although it was also not low: at para. 58.

[61] Unfortunately, in the instant matter, we did not have time on January 26, 2024 to address the applicable limitation issues. In these circumstances, I find it is not just and convenient to dismiss the plaintiff's *Limitation Act* defence through this application. This issue is preserved and can be addressed in the adjourned application to strike the counterclaim or at trial.

[62] In coming to this conclusion, I rely on *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329, wherein the approach from *Lui* was adopted:

[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 CanLII 164 (BC CA), [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.

[63] I leave it to the judge who hears the limitation issue to determine whether aspects of the counterclaim are out of time under the *Limitation Act* and if so, whether those aspects of the counterclaim fall within the ambit of the *Limitation Act* exception in s. 22.

Disposition

[64] Pursuant to r. 22-4(2), leave is granted for the defendant to file his counterclaim late.

[65] The plaintiff's application to strike the counterclaim is adjourned generally.

[66] The *Limitation Act* defence is preserved and can be addressed through the plaintiff's application to strike the counterclaim or at trial.

“D. MacDonald J.”