COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Nourifard v. Emadzadeh,* 2024 BCCA 240

Date: 20240626
Docket: CA49462

Between:

Saeid Nourifard

Appellant
(Plaintiff)

And

Navid Emadzadeh and Novarc Technologies Inc.

Respondents
(Defendants)

Before: The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated November 3, 2023 (*Nourifard v. Emadzadeh*, 2023 BCSC 1940, Vancouver Docket S201132).

Counsel for the Appellant:	A. Soliman F. Mukasa, Articled Student
Counsel for the Respondent, N. Emadzadeh:	A.M. Beddoes
Counsel for the Respondent, Novarc Technologies Inc.:	K.A. Maw T. Latowsky
Place and Date of Hearing:	Vancouver, British Columbia May 24, 2024
Place and Date of Judgment:	Vancouver, British Columbia June 26, 2024

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

This is an appeal from the dismissal of the appellant's action pursuant to R. 9-6 of the Supreme Court Civil Rules on the basis that his claims were barred by the provisions of the Limitation Act. On appeal, the appellant raises numerous arguments, some of which are new. He contends, among other things, that it was not plain and obvious his claims were statute-barred given conflicts in the evidence and that, therefore, the chambers judge erred in dismissing his claims pursuant to R. 9-6. Held: Appeal allowed. There was a genuine issue bearing on the critical question to be answered. That issue could not be appropriately addressed on a R. 9-6 application as its resolution required a weighing of the evidence. In resolving the application, the chambers judge placed inappropriate weight on a passage inconsistent with this Court's R. 9-6 jurisprudence.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] On November 3, 2023, approximately three weeks before a five-day trial of his action was set to begin, the appellant, Saeid Nourifard, had his claims dismissed as statute-barred, for reasons indexed as 2023 BCSC 1940. The appellant says the question whether his claims were barred by the provisions of the *Limitation Act*, S.B.C. 2012, c. 13, could not be properly addressed on the merits without findings of fact on disputed and critical issues that could only be made on the evidence at trial. For that reason, he submits the chambers judge erred in dismissing his claims.

[2] The appellant alleges the individual respondent, Navid Emadzadeh, holds shares in the corporate respondent, Novarc Technologies Inc. ("Novarc"), in trust for him but has refused to transfer them to him in breach of an oral agreement to do so.

[3] The appellant's proceeding was commenced by a petition issued on February 3, 2020. After it was moved to the trial list, and a notice of civil claim replaced the petition, the action was held to be barred by a two-year limitation, resulting in the dismissal order which is the subject of this appeal. The limitation was held to have commenced when Emadzadeh first refused to transfer the shares to the appellant in response to a verbal demand to do so on November 21, 2017.

[4] The appellant says Emadzadeh answered that demand by asserting that a transfer could not be effected within five years of the issuance of the shares on December 8, 2016, because of restrictions on the transfer of Novarc's shares imposed by the *Small Business Venture Capital Act*, R.S.B.C. 1996, c. 429 [*SBVC Act*]. Further, he says Emadzadeh claimed to have suffered losses as a result of holding the shares in trust and sought to be indemnified before transferring the shares. While the fact Emadzadeh took that position caused the appellant to doubt his fidelity, he asserts there was no unequivocal refusal to transfer the shares. In the circumstances, he contends the running of the limitation period should have been held to commence on the date Emadzadeh first unequivocally denied that he held the shares in trust, between December 2019 and January 2020.

[5] In the alternative, he says Emadzadeh cannot rely on the limitation, because by representing that the share transfer could not occur prior to December 8, 2021, five years after the issuance of the shares, he wilfully misled him as to the appropriateness of a court proceeding, thus postponing the running of a limitation.

[6] Finally, he says that in a separate action commenced by Emadzadeh on January 16, 2020 (the "Emadzadeh Action"),[1] Emadzadeh confirmed he had assisted the appellant in purchasing Novarc shares. The appellant contends this assertion amounted to confirmation that the shares were held in trust for the appellant and a confirmation of a cause of action. In that action, Emadzadeh sought, among other relief, compensation for the losses he suffered (in the form of reduced or lost student benefits, child tax benefits and housing benefits) as a result of holding Novarc shares for Nourifard. Emadzadeh's notice of civil claim contains the following allegations:

> 9. … Due to Mr. Emadzadeh's financial status, Mr. Emadzadeh was eligible for student assistance, child tax benefits and rental subsidies from British Columbia Housing.
>
> 10. Mr. Nourifard told Mr. Emadzadeh that Mr. Nourifard wished to invest money in an entity known as Novarc Techologies Inc. [*sic*], a

[1] The Emadzadeh Action was commenced by the filing of a notice of civil claim in the Vancouver Registry of the Supreme Court of British Columbia. The proceeding is identified as British Columbia Supreme Court Action No. S200612.

> corporation under the laws of British Columbia, but wished the investment to take place under Mr. Emadzadeh's name for the benefit of Mr. Nourifard.
>
> 11. However, as an investor in the nature of what was discussed between Mr. Emadzadeh and Mr. Nourifard, Mr. Emadzadeh would no longer be eligible for the benefits. Mr. Nourifard told Mr. Emadzadeh that he did not need to worry about losing the benefits, as Mr. Nourifard would reimburse Mr. Emadzadeh for the loss of benefits suffered by Mr. Emadzadeh. Mr. Emadzadeh assisted Mr. Nourifard in making the investment as contemplated, and accordingly lost his eligibility for benefits and suffered damages thereby.
>
> [Emphasis added.]

Background

[7] The chambers judge cited the following "key pleaded facts" from the appellant's notice of civil claim:

> 9. In November 2016, [Emadzadeh] explained to the Plaintiff that, given the Plaintiff's status in Canada, the Plaintiff cannot own shares in a Canadian company and suggested that he holds the Plaintiff's shares in trust. Both the Plaintiff and [Emadzadeh] agreed to this arrangement.
>
> 10. On or about December 8, 2016, [Novarc] received $250,000 from [Emadzadeh] and the Plaintiff representing $225,000 for the Plaintiff's 90,000 shares (the "Shares") and $25,000 for [Emadzadeh's] shares.
>
> 11. On or about December 8, 2016, [Novarc] issued 100,000 Common shares to [Emadzadeh] with a share certificate number 22.
>
> 12. The price of each share was $2.50 CAD.
>
> 13. At all material times, [Novarc] knew that the Shares were held by [Emadzadeh] in trust for the Plaintiff.
>
> 14. Between December 2019 and January 2020 the Plaintiff demanded that [Emadzadeh] and [Novarc] transfer the Shares to the Plaintiff; however, [Novarc] and [Emadzadeh] refused. [Novarc] also demanded the consent of [Emadzadeh] and [Emadzadeh] withheld his consent.
>
> […]
>
> 17. The parties had an agreement that [Novarc] would sell 90,000 shares to the Plaintiff, [Emadzadeh] would hold these shares in trust for the Plaintiff, and that [Novarc] and [Emadzadeh] would transfer the Shares to [Emadzadeh] upon the Plaintiff's request. [Novarc] and [Emadzadeh] breached their agreement with the plaintiff [by] refusing to transfer the Shares to the Plaintiff.
>
> 18. By agreeing to hold the Shares in trust for the Plaintiff, [Emadzadeh] agreed to act as trustee and by refusing to transfer the Shares, [Emadzadeh] breached his trust obligations, including fiduciary duties and duty of loyalty, to the Plaintiff.

> 19. By marketing and selling the Shares to the Plaintiff, [Novarc] undertook fiduciary duties toward the Plaintiff as well as duty of loyalty. By refusing to transfer the Shares to the Plaintiff, [Novarc] breached its fiduciary duties to the Plaintiff.

[8] The judge placed some weight upon the following particulars of the allegation made in para. 17 of the notice of civil claim that the appellant provided to the respondents in response to a demand for particulars:

> The agreement was that [Emadzadeh] would hold the shares in his name until the Plaintiff came to Canada permanently, at which time, the shares would be placed in the Plaintiff['s] name. There is not [*sic*] written agreement. [Emadzadeh] told the Plaintiff that this was the best and easiest option for the Plaintiff since he was a non-resident of Canada and his visa may expire. [Emadzadeh] later informed the Plaintiff this also allowed for some sort of discount or credit, but the particulars of the credit were not fully understood by the Plaintiff. The agreement was with [Emadzadeh], for the benefit of [the Novarc], and it was known and understood by [Novarc].

[9] Neither the appellant's notice of civil claim nor his previously filed petition refer to the November 21, 2017 verbal demand, but the notice of civil claim alleges (in para. 14) that, between December 2019 and January 2020, Emadzadeh and Novarc refused to transfer the shares held by Emadzadeh in trust, and that Emadzadeh rejected Novarc's request that he consent to a transfer.

[10] The appellant was examined for discovery in July 2023. His critical evidence on examination, adduced by the respondents on their applications to dismiss his claims, includes the following:

> Q What was discussed?
>
> A On November 21st, 2017, I came back to Canada and I had the intention of staying here. So, I asked Navid [Emadzadeh] that he should transfer the shares in my name or register them in my name, and he said that he had an agreement with the Government of Canada that not allow him to transfer those funds for five years. And I was surprised to hear that.
>
> […]
>
> Q Was it before --
>
> A And he also told me another thing. He said that Hamid had told him that people who had invested in this start-up would have 30-percent tax return.
>
> THE INTERPRETER: Or he probably means tax credit.

> THE WITNESS: But at that time I did not know who would get this sum of money and who this sum of money belongs to and who can get it. But Novarc managers or officers knew -- and Navid -- knew all the rules in this regard and who would benefit -- the laws regarding these shares, but I did not have access to anything. I had asked Soroush [one of the Novarc principals] to send me the -- Novarc's information as he knew that I was the real -- information and news updates as he knew, that I was the real owner of the shares. But Soroush told me that, based on our internal regulations, I am not allowed to forward you -- to send you the emails, but you can ask Navid to forward the emails that he received to you. But Navid did not do that.

[11] He further testified that he was "naturally" concerned about Emadzadeh's response to the November 2017 demand. When asked whether he then asked Emadzadeh why he had not mentioned the "prohibition" on transferring shares in 2016, when they were purchased, the appellant testified that he did, and that Emadzadeh had:

> A … said that he had suffered a lot of losses in this process and that we needed to have a meeting and discuss it with each other and it -- and that's why I could not -- I cannot transfer the shares to you. It made me be very worried and at that point I lost my trust in him. He told me that his friends have told him that with what you have done for Saeid, you have to charge him a high percentage or a large sum of money, because you have done such a great job for him.
>
> [Emphasis added.]

[12] The appellant questioned Emadzadeh about the restriction on share transfers:

> A I asked him himself. He told me that because he had got 30-percent tax return.
>
> THE INTERPRETER: And I said, do you mean tax credit? And he says that there is another specific specialized term for that, maybe not even tax credit.
>
> THE WITNESS: So because he had got 30 percent --
>
> THE INTERPRETER: Whatever, that tax something is.
>
> THE WITNESS: -- that he could not transfer ownership of the shares to me unless he returned that money to the government. So, he's not allowed to sell the shares unless he gave the government the money back. And later I asked Soroush and I found out from Soroush and Reza [another of Novarc's principals] that that was true; that he could not transfer -- that Navid could not transfer the shares to me for five years unless he returned the money he had got from the government.

[13] In response to the question whether Emadzadeh told him, in November 2017, that he was not transferring shares because “he felt that he was entitled to funds from helping” him, the appellant testified that Emadzadeh said to him that his friends had told him (being Emadzadeh) “that he had any entitlement to the shares and he had believed them” (emphasis my own).

[14] It was the appellant’s evidence that, after the November 2017 meeting, Emadzadeh did not take his calls or answer his messages and so, about one and a half years later, he told Soroush and Reza (the principals of Novarc) about his problem and Reza said he would talk to Emadzadeh and convince him to return the shares to the appellant.

[15] In an affidavit dated October 10, 2023, and filed in response to the respondents’ applications to dismiss his claims, the appellant deposed that the only time he became aware that Emadzadeh was denying the “trust arrangement” was after Emadzadeh’s examination for discovery, which occurred on September 6, 2023. It was at this examination “where [Emadzadeh] changed his narrative and alleged that he received the funds for the purchase of the shares from a different source”. The appellant deposed that until that date he understood that Emadzadeh acknowledged the trust arrangement but was simply refusing to transfer the shares until he was reimbursed for the losses he incurred as a result of holding them and that Emadzadeh alleged an equitable lien on the shares in these proceedings.

[16] The chambers judge dealt with the respondents’ applications as applications for summary judgment made pursuant to R. 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009: see para. 15. Subrule 9-6(4) provides that, in an action, the answering party may apply under R. 9-6 for judgment dismissing all or part of a claim in the claiming party’s originating pleading. Subrule 9-6(5)(a) provides that on hearing such an application a judge, if satisfied that there is no genuine issue for trial with respect to a claim, must dismiss the claim.

[17] After referring to the evidentiary record before him, the judge held, at para. 27, that, by November 21, 2017, the appellant had come to Canada with the

intention to stay permanently; he had requested that the Novarc shares be transferred to him; he knew that Emadzadeh had refused to do so; and he knew that Emadzadeh claimed that he had an entitlement in relation to the shares. The judge found that "November 21, 2017 is an objective measure of the date of discovery": at para. 30. He held:

> [32] If one loses one's trust in his or her trustee, one does not accept what the trustee may say or wait for matters to unfold. I find the plaintiff's explanations in his October 10, 2023 affidavit filed in response to the current applications are not credible in the context of his July 24, 2023 examination for discovery.
>
> [33] I find that November 21, 2017 was the date of discovery for either a claim for a breach of contract or a breach of trust (or the doctrines of express trust, implied trust, resulting trust, and constructive trust listed under Part 3: Legal Basis in the notice of civil claim).
>
> [34] In sum, the date of discovery was November 21, 2017. The plaintiff commenced proceedings on February 3, 2020, which is more than two years after the date of discovery. Accordingly, the plaintiff's claims must be, and are, dismissed.
>
> [Emphasis added.]

[18] In response to the appellant's assertion that allegations made by Emadzadeh in the notice of civil claim in the Emadzadeh Action amounted to confirmation by Emadzadeh of the existence of a trust obligation, the chambers judge, without addressing whether anything in those pleadings amounted to an admission or had any probative value, held:

> [37] … I fail to see how at law an admission made after the expiration of a limitation period may breathe life into a dead claim. The legislative intent of ss. 6 and 12 of the *Limitation Act* is to ensure the timely resolution of disputes without some subsequent re-opening of matters.

Grounds of Appeal

[19] The appellant advances numerous arguments. He contends the judge:

a) misinterpreted and misapplied the provisions of the *Limitation Act*;

b) failed to address statutory obstacles to the commencement of litigation;

c) failed to consider the respondents' concealment of the breach of contract or trust;

d) failed to find that provisions of the *Limitation Act* meant that the Emadzadeh Action exempted his action from an applicable limitation period;

e) misapplied the burden of proof;

f) misapprehended the evidence; and

g) erred in concluding the case was suitable for summary adjudication.

[20] The respondents say the following are new arguments not made in chambers, and that the appellant has not met the burden he must discharge to obtain leave to advance arguments not made below. They say they will be prejudiced if the new issues are raised now, without the opportunity to tender additional evidence:

a) whether transfer restrictions under the *SBVC Act* postpone the running of the limitation;

b) whether the loss of trust occasioned by the refusal to transfer the shares in November 2017 was transient;

c) whether the agreement between the parties was that the transfer of the shares would occur after the appellant obtained permanent residency in Canada;

d) whether Novarc and Emadzadeh fraudulently concealed the *SBVC Act* restrictions;

e) whether s. 66 of the *Trustee Act*, R.S.B.C. 1996, c. 464, postpones the running of the limitation;

f) whether the Emadzadeh Action stood as a bar to the application of the *Limitation Act* in respect of the appellant's action; and

g) whether the limitation period was postponed by “mediation” efforts.

[21] There is some merit in the respondents’ objection to consideration of the new issues raised on appeal, particularly the fraudulent concealment argument and the claim that the running of the limitation was postponed by mediation efforts. Those arguments, in particular, require findings of fact and cannot be properly addressed in an evidentiary vacuum on appeal. In my view, however, many of the issues the respondents say arise for the first time on appeal were plainly before the chambers judge as evidentiary issues that had to be addressed in order to determine when the applicable limitation periods began to run. Principal among these was the question whether, in November 2017, Emadzadeh unequivocally denied the alleged trust agreement or whether he simply raised obstacles to the conveyance of the shares.

[22] There is no doubt that the appellant responded to the applications to dismiss his action by contesting the respondents’ assertion that Emadzadeh denied the appellant’s entitlement to the shares on November 21, 2017. The appellant deposed that had not occurred and that, rather, Emadzadeh had only raised the *SBVC Act* as an obstacle to a transfer of the shares at that time. In my view, it is open to the appellant to argue that the judge erred in law by weighing and rejecting that evidence, an exercise that cannot be engaged in on an application for summary judgment under R. 9-6.

[23] In order to appreciate the significance of the chambers judge’s findings of fact, it is necessary to describe in further detail the evidence that was before the judge in chambers. To properly understand that evidence, it is useful to review it in the context of the appellant’s arguments.

Application of the *Limitation Act*

[24] The material provisions of the *Limitation Act* for the purpose of this appeal are ss. 6, 8 and 12:

Basic limitation period

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

General discovery rules

> 8 … [A] claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
>
> (a) that injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the person against whom the claim is or may be made;
>
> (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.
>
> […]

Discovery rule for claims based on fraud or recovery of trust property

> 12 (1) In this section, "fraud or trust claim" means
>
> (a) a claim based on fraud, or fraudulent breach of trust, to which a trustee was a party or privy,
>
> (b) a claim to recover from a trustee trust property, or the proceeds from the trust property, if
>
> (i) that property is or those proceeds are in the possession of the trustee, or
>
> (ii) that property was or those proceeds were previously received by the trustee and converted to the trustee's own use, or
>
> (c) any other claim arising out of the fiduciary relationship between a trustee and a beneficiary if the trustee
>
> (i) wilfully conceals from the beneficiary the fact that
>
> (A) injury, loss or damage has occurred,
>
> (B) the injury, loss or damage was caused by or contributed to by an act or omission, or
>
> (C) the act or omission was that of the person against whom the claim is or may be made, or

> (ii) wilfully misleads the beneficiary as to the appropriateness of a court proceeding as a means of remedying the injury, loss or damage.
>
> (2) A fraud or trust claim is discovered when the beneficiary becomes fully aware
>
> (a) that injury, loss or damage had occurred,
>
> (b) that the injury, loss or damage was caused by or contributed to by the
>
> (i) fraud,
>
> (ii) fraudulent breach of trust,
>
> (iii) conversion, or
>
> (iv) other act or omission
>
> on which the claim is based,
>
> (c) that the fraud, fraudulent breach of trust, conversion or other act or omission was that of the person against whom the claim is or may be made, and
>
> (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.
>
> (3) For the purposes of subsection (2), the burden of proving that a fraud or trust claim has been discovered rests on the trustee.

[25] By operation of these provisions, the limitation period for contractual claims runs from the first day the plaintiff knows or reasonably ought to know the facts set out in s. 8(a)–(c) and knows or reasonably ought to know that, having regard to the nature of the injury, loss or damage, "a court proceeding would be an appropriate means" to seek to remedy the loss.

[26] The limitation period for breach of trust claims runs from when the beneficiary becomes "fully aware" of the facts set out in s. 12(2)(a)–(c) and, further, is fully aware that, having regard to the nature of the injury, loss or damage, "a court proceeding would be an appropriate means" to seek to remedy the loss.

[27] These are inherently factual analyses. For that reason, as the respondents submit, findings that the statutory test has been met are subject to review on a deferential standard. However, for the same reason, it may be a reviewable error to find that a claim was discovered on a certain date on an application under R. 9-6

where there is an evidentiary contest. Legitimate factual contests are usually "genuine issues for trial".

[28] The appellant says the judge misapprehended his evidence that he lost faith in Emadzadeh in November 2017. That misapprehension led the judge to conclude (at para. 32): "If one loses one's trust in his or her trustee, one does not accept what the trustee may say or wait for matters to unfold". He says that it was his evidence that upon learning what Emadzadeh said about restrictions on the transfer of Novarc shares was true—that he could only get the shares transferred after paying out the tax credit—he chose to wait for the five-year period to lapse. If this were a claim for compensation for the delay, the delay in commencing the action might stand as a bar. But that is not his claim. He asserts the judge erred by considering the temporary "loss of trust" in 2017 to start the running of the limitation period, ignoring the legal framework in ss. 8(b)–(d) and 12(2)(a)–(d) of the *Limitation Act*.

[29] He says his evidence was that, at the November 21, 2017 meeting, he lost trust in Emadzadeh when advised of the five-year transfer "prohibition" but that he then verified the truthfulness of the "prohibition" with Novarc's directors. His counsel argues:

> ... Upon learning it was true and that he could only get the shares transferred after paying out the tax credit, the Appellant chose to wait for the lapse of 5 years. Therefore, the 2017 loss of trust was momentary and arose because 2017 was the first time the legal prohibition was mentioned, …

[30] He further asserts:

> Regarding court action being the [appropriate] means to relief under Ss. 8 (d) and 12 (2) (d) of the BCLA, this case is identical to *Brooks v. Jackson*, in which the Appellant, having been advised that the injury was temporary and transient by nature and satisfied with such explanation, the Court of Appeal held that a reasonable person in the circumstances could not have been expected to seek legal advice whether there was a cause action, and as such limitation did not begin to run.

[31] He says there was no refusal on the part of Emadzadeh to acknowledge the trust, no unequivocal denial by Emadzadeh in November 2017 of the obligation to transfer the property, and no conduct inconsistent with his ownership interest.

[32] Further, he says the judge wrongly perceived his arrival in Canada, on November 21, 2017, as the date the share transfer ought to have occurred. The appellant arrived on that date and testified that it was his intention to stay permanently. However, he argues, a foreign national becomes a permanent resident of Canada only upon the acceptance of an application. From his perspective, the agreement contemplated a transfer when he became a "permanent resident" in the immigration law sense. The respondents say this argument was not advanced below. For reasons that follow, it is my opinion that I need not address this submission.

[33] The appellant relies upon *Gillham v. Lake of Bays (Township)*, 2018 ONCA 667, as authority for the proposition the discoverability analysis does not end with the plaintiff knowing that he has a cause of action, but requires the court to identify a date by which the plaintiff knew or should have known that a proceeding would be appropriate. Consideration of that factor is important to ensure that statutory limitations are applied in a manner that enables courts to function efficiently by deterring needless litigation. He notes that, in *Tapak v. Non-Marine Underwriters, Lloyd's of London*, 2018 ONCA 168 at para. 13, the Ontario Court of Appeal held that the "appropriate means" requirement "is intended to address the situation where there may be an "out-of-court avenue of relief that a party can use to remedy their 'injury, loss or damage'".

[34] It is the appellant's submission that the judge found the breach of contract and the trust claims to have been discovered in November 2017 based on presumptions and hypotheses of mistrust and suspicion. He is said to have failed to correctly employ the plausibility test described *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 at paras. 42–48. There, the Court held: "a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn". The plausible inference of liability requirement, the Court wrote, "ensures that the degree of knowledge needed to discover a claim is more than mere

suspicion or speculation". But, at the same time, requiring a plausible inference of liability "ensures the standard does not rise so high as to require certainty of liability".

[35] In addressing the trust claim, the appellant says the chambers judge failed to correctly interpret and apply the phrase "fully aware" in s. 12(2) of the *Limitation Act*. He says it was an error to find the limitation ran from, in his words, the moment he "should have become suspicious of Mr. Emadzadeh's future breach of trust".

[36] He further contends the judge incorrectly applied the common law discoverability rule referred to by this Court in *Aubichon v. Grafton*, 2022 BCCA 77, rather than the test codified in the *Limitation Act* and the Court's recent guidance in *Grant Thornton LLP.* The respondents, for their part, say the judge only relied on *Aubichon* for trite propositions concerning the irrelevance of a person's knowledge of the law. I agree with the respondents that there is no merit to this submission, the last of the appellant's arguments under this rubric.

[37] Dealing with the appellant's other arguments, Emadzadeh says the chambers judge correctly cited and relied upon the "governing statutory provisions" of the *Limitation Act*. With respect to s. 12, he argues that here, as in *Lennox v. Lennox*, 2019 BCSC 938, the running of the limitation was triggered when the plaintiff (in that case, the petitioner) became fully aware that the defendant (there, the respondent) denied existence of the trust and refused to transfer his interest in the property to him. He cites *Maussion v. Maussion*, 2021 BCSC 530, for the same proposition. He says the chambers judge made a specific finding that he (Emadzadeh) denied the appellant's entitlement to the shares, and claimed his own entitlement to them, on November 21, 2017. He contends the chambers judge was correct to conclude that by claiming he was entitled to the shares, Emadzadeh effectively denied the existence of a trust and that gave rise to a claim for breach of trust.

[38] Novarc similarly says the chambers judge correctly identified and applied the discoverability rules set out in s. 8 and s. 12 of the *Limitation Act*. It says the judge's findings underlying his conclusion that the limitation period began to run on

November 21, 2017 were based on a reasonable interpretation of the appellant's own evidence on his examination for discovery.

[39] The appellant says, as in *Brooks v. Jackson*, 2009 BCCA 150, he reasonably regarded the injury to be temporary (a delay in the share transfer) and could reasonably have awaited further developments before commencing litigation. Emadzadeh's counsel asserts this case may be distinguished from *Brooks* on the basis that the appellant did not simply become aware of a transient loss on November 21, 2017. He submits that "the nature of the damage allegedly suffered was, at the date of discovery, and remains, the loss of the Shares." He asserts that upon learning that his purported trustee disclaimed the trust by claiming entitlement to the alleged trust property, the appellant was fully aware that the alleged trust was breached. Where a claim is known, Emadzadeh argues, a plaintiff cannot rely on excuses regarding potential future negotiations or occurrences to say that the claim has not been discovered.

[40] That argument hinges upon acceptance of the finding that, on November 21, 2017, Emadzadeh refused to transfer the shares into the plaintiff's name because the appellant was not entitled to them.

Significance of the Statutory Obstacles

[41] The appellant says here, as in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, there were statutory bars to the commencement of litigation and, regardless of the state of his knowledge, the limitation period did not begin to run until those bars had been removed or expired. He contends there were two such bars:

1. the statutory obstacle to compliance with the agreement to transfer the shares posed by the *SBVC Act*; and

2. the bar on claims against trustees said to arise from the provisions of the *Trustee Act*.

[42] In *Peixeiro,* Major J. held:

> 44 Under s. 206(1) [of the *Highway Traffic Act*, R.S.O 1990, c. H.8], there is no cause of action until the injury meets the statutory exceptions to liability immunity in s. 266(1) of the [*Insurance Act*, R.S.O. 1990, c. I.8]. The discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue. Time under s. 206(1) does not begin to run until it is reasonably discoverable that the injury meets the threshold of s. 266(1). ...

[43] The appellant contends that the chambers judge found Emadzadeh subscribed for the shares in issue on December 8, 2016, pursuant to a share subscription agreement, but failed to consider the legal implications of that agreement or of ss. 28.6 and 28.92 of the *SBVC Act* which read, in part:

> 28.6 ...
>
> (5) An eligible business corporation must not register a transfer of a share or convertible right for which a tax credit has been issued under this Act if the transferor of the share or convertible right is
>
> (a) the original purchaser of the share or convertible right,
>
> …
>
> unless the transfer occurs
>
> (c) more than 5 years after the date of issue of the share or convertible right, or
>
> (d) in prescribed circumstances.
>
> […]
>
> 28.92 (1) If a person, within 5 years after the date of purchasing a share or convertible right for which a tax credit has been issued under this Part … disposes of a share or convertible right for which a tax credit was issued under this Part, then the person must pay to the Minister of Finance an amount equal to the tax credit allowed for the share or convertible right.
>
> [Emphasis added.]

[44] There appears to be no dispute between the parties that Novarc is an "eligible business corporation" under the *SBVC Act* and that Emadzadeh, as the subscriber for the shares in issue, received a tax credit pursuant to that statute.

[45] I need not interpret the provisions of the *SBVC Act* reproduced above nor make any definitive comment on their effect. I will say, however, that given those provisions, it would appear that Novarc was prohibited from registering any transfer

of the shares for five years from the date of their issuance (December 8, 2016) except for in certain prescribed circumstances, none of which appear to be applicable here. It would also appear that, if a person were to dispose of shares for which a tax credit was issued under the statute within five years of the date on which those shares were purchased, an obligation to "repay" the Minister of Finance an amount equal to the tax credit received would arise.

[46] The possible impact of these provisions was engaged by evidence which was before the chambers judge. The judge was aware of, and cited, the appellant's testimony that, in the November 2017 meeting, Emadzadeh had told the appellant that he (Emadzadeh) "could not" transfer the shares due to a five-year restriction, unless money was returned to the government.

[47] The appellant asserts that Emadzadeh's response to his 2017 demand that shares be transferred was not a denial of the trust or a definitive statement the shares would not be transferred but, rather, an assertion that they could not be transferred for five years. His evidence was that, after learning about the five-year legal "prohibition" (and being unwilling to repay the tax credit afforded to the purchaser of shares under the *SBVC Act*), he chose to wait out the five years. He contends the judge ignored the effect of the restrictions on share transfers. He asserts the decision to wait until the shares became transferable was a reasonable course of action and the limitation should not run during a period within which he believed he could not compel Emadzadeh to transfer the shares held in trust (without repayment of the tax credit).

[48] In my view, there is some merit to the respondents' submission that the *SBVC Act* did not "prohibit" the transfer or sale of the shares but, rather, imposed a financial obligation as a consequence of any transfer which occurred within five years of the date of issuance. As I have indicated, however, the specific or precise effect of the provisions of the *SBVC Act* need not be decided. The question that properly arises from the *SBVC Act*, in my view, is not whether it postponed the running of the limitation period but whether reference to it on November 21, 2017,

was most consistent with Emadzadeh having an obligation to hold shares in trust for the appellant and inconsistent with his current position.

[49] While the *SBVC Act* thus has some significance in the analysis, I see no significance in the provisions of the *Trustee Act* that are raised for the first time on appeal. The appellant says a beneficiary can only commence an action to compel a trustee to transfer shares if the trustee fails to do so within 28 days of a demand in writing. Section 66 of the *Trustee Act* provides:

> 66 If a sole trustee of a stock … neglects or refuses to transfer the stock, … according to the direction of the person absolutely entitled to it, for 28 days next after a request in writing for that purpose has been made to the trustee by the person absolutely entitled to it, the court may make an order vesting the sole right to transfer the stock … in the persons as the court appoints.

[50] The appellant suggests that, therefore, the limitation period for a claim against a trustee begins to run 28 days after the beneficiary's written demand to have shares transferred, in this case 28 days after December 15, 2019. The respondents say s. 66 merely prescribes the circumstance in which the court may make an order vesting certain rights in a claimant. It does not establish a precondition to any breach of trust claim. I agree with the respondents that this provision does not postpone the running of a limitation period. Further, it cannot be argued that the existence of this provision justified any delay in commencing the litigation. The appellant does not suggest that he was aware of or relied upon this provision as an obstacle to bringing a proceeding.

Significance of the Emadzadeh Action

[51] The appellant submits the chambers judge erred "by not finding that the [Emadzadeh Action] acted to exempt [his] action from time limitation". Contending that his action and the Emadzadeh Action are "very related", he relies upon ss. 22(1) and 22(5) of the *Limitation Act* in support of a submission that the chambers judge should have made an order adding Novarc as a party to the Emadzadeh Action and permitting the pleadings in that action to be amended so as to enable the appellant to raise new claims, as opposed to simply striking out the appellant's action. This

argument was not made below and there was no application for such relief before the chambers judge.

[52] Emadzadeh says this argument reflects a misunderstanding of s. 22(1). In suggesting that the invocation of s. 22 to grant such relief would not be appropriate, he says the appellant's action is not a secondary claim to the Emadzadeh Action as it was commenced as a separate proceeding, and that the Emadzadeh Action was commenced on January 16, 2020, outside the limitation period for the appellant's claims, which expired on November 21, 2019.

[53] Emadzadeh adds that this submission is in "direct conflict" with the position taken by the appellant earlier in these proceedings: that "there was no commonality of claims, disputes and relationships between the parties to justify the consolidation of the [appellant's action and the Emadzadeh Action]."

[54] I need not decide whether the appellant's submission is legally tenable or whether, as is suggested, it is premised on a misguided understanding of s. 22 of the *Limitation Act*. In my view, the argument may be disposed of on the basis that there is no merit to the suggestion that the chambers judge should have considered an option so clearly dismissed by the appellant himself.

[55] However, the pleadings in the Emadzadeh Action do have significance. Emadzadeh, relying on *Ledinski v. Chestnut*, 2015 BCSC 373, says a statement in a pleading cannot be relied upon as an admission unless it is a deliberate and clear concession made by a party for the benefit of the other party. He says the pleadings in the Emadzadeh Action do not constitute admissions in this action as they are not deliberate concessions made for the benefit of the appellant. In my view, whether or not they are admissions *per se*, they may properly be considered as evidence of *the position taken* by Emadzadeh when the notice of civil claim was filed in the Emadzadeh Action in January 2020.

[56] The appellant says that, until September 6, 2023 (the date Emadzadeh was examined), Emadzadeh did not deny the existence of the trust, refuse to transfer the

shares, or indicate an intention to convert them. To the contrary, the appellant argues, he admitted the trust in his notice of civil claim in the Emadzadeh Action and in an affidavit filed on February 25, 2020, in these proceedings, where he deposed:

> … Mr. Nourifard assured me that any expenses or loss I suffered on his account would be paid for by the increased value of the shares.

Suitability for Summary Judgment

[57] The appellant says there is an issue with respect to when Emadzadeh unequivocally refused to transfer the shares, and that there is conflicting evidence. He says much evidence supported the conclusion that the first clear refusal to transfer shares was Emadzadeh's response to his counsel's demand letter of December 15, 2019.

[58] The respondents assert that the only evidentiary inconsistency was within the appellant's own evidence: between his examination for discovery testimony and his affidavit of October 10, 2023, filed in response to the respondents' applications.

[59] However, the appellant argues that, in an affidavit filed in support of his application for summary judgment, Emadzadeh alleged that, in November 2017, the appellant asked to buy his shares, and he refused. The evidence the appellant refers to in this regard appears to be the following passage from Emadzadeh's affidavit of October 3, 2023:

> **Mr. Nourifard demands that I sell him the Shares**
>
> …
>
> … in November 2017, he demanded that I transfer to him shares that I own in Novarc. He insisted we had an agreement that I would do so, and I disagreed. I refused to transfer any of my shares to him.

[60] The appellant says there was an evident conflict between that evidence, on one hand, and the notice of civil claim in the Emadzadeh Action and Emadzadeh's February 25, 2020 affidavit, on the other, that was not addressed or resolved by the chambers judge.

[61] The respondents contend it was reasonable for the chambers judge to find that the appellant's "explanations in his October 10, 2023 affidavit filed in response to the current applications are not credible in the context of his July 24, 2023 examination for discovery". They submit the judge properly canvassed the relevant case law with respect to a judge's role on a R. 9-6 application, including *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCSC 348. In that case Hinkson C.J. held:

> [65] I am unable to agree with the Attorney General that if any recourse to weighing the evidence is required, summary judgment cannot be granted. In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, Chief Justice McEachern held that the predecessor to Rule 9-6 was designed for the express purpose of permitting summary judgment even though there was conflicting affidavit evidence.

Discussion

[62] In support of its application to dismiss the appellant's claim as statute-barred, Novarc, relying on the appellant's discovery evidence, submitted that, on November 21, 2017, the appellant met with Emadzadeh and demanded that the shares be transferred into his name. Emadzadeh said that he would not transfer ownership of the shares to the appellant because:

a) pursuant to an agreement with the Government of Canada, he could not transfer the shares for five years; and

b) the appellant was not entitled to the shares.

[63] It was on that basis that Novarc argued that there was no "*bona fide* triable issue" and that the plaintiff (i.e., the appellant) was "bound to lose".

[64] In support of his application to dismiss the claim as statute-barred, Emadzadeh relied on the same discovery evidence: that, according to the appellant,

Emadzadeh had refused to transfer the shares into the appellant's name on November 21, 2017, because:

a) pursuant to an agreement with the Government of Canada, he could not transfer the shares for five years; and

b) the appellant was not entitled to the shares.

[65] In his response to the respondents' applications, the appellant claimed that, at the November 21, 2017 meeting, Emadzadeh did not dispute his entitlement to the shares. He asserted that Emadzadeh said the shares had to remain under his name for the duration of that tax credit arrangement. He said Emadzadeh offered to transfer the shares to him, but that if he did the appellant would need to repay the tax credit.

[66] The appellant deposed that, after confirming what Emadzadeh told him about the tax credit was true, he decided to wait and did not demand that Emadzadeh return the shares to him in November 2017. The first demand was made on December 15, 2019, after he consulted counsel.

[67] The appellant argued, in his application responses, that it thus was not plain and obvious that his claims were statute-barred, and that the issue with respect to the running of the limitation was not suitable for summary determination.

[68] In my view, and leaving aside the issue discussed above regarding any possible statutory postponement of the running of a limitation, there was a real issue before the chambers judge on the evidence and the pleadings: whether, as the respondents both asserted, Emadzadeh told the appellant on November 21, 2017, that he would not transfer ownership of the shares to him because the appellant was not entitled to the shares.

[69] On this question, there was only the sworn evidence of the appellant that his entitlement was not questioned in November 2017, and his evidence on examination for discovery that Emadzadeh had said his friends told him he had to charge the

appellant a high percentage or a large sum of money, because he had done such a great job for him (presumably by holding shares as his trustee), and that his friends had told him "that he had any entitlement to the shares and he had believed them".

[70] As I have noted, some weight is leant to the appellant's submission that Emadzadeh held the shares as trustee by Emadzadeh's claim to compensation for acting as a trustee in the Emadzadeh Action and his assertion of an equitable lien against the shares in these proceedings.

[71] There is evidence that the parties regarded the restrictions on transfer in the *SBVC Act* to be an obstacle to the transfer of the shares. I cannot see why that obstacle would have been mentioned or relied upon by Emadzadeh if, as he now asserts, he had repaid the appellant and obtained funding elsewhere to buy the Novarc shares now registered in his name.

[72] Those were the pleadings and evidence that confronted the chambers judge. He dealt with it summarily, stating: "I find the plaintiff's explanations in his October 10, 2023 affidavit filed in response to the current applications are not credible in the context of his July 24, 2023 examination for discovery": at para. 32.

[73] In my respectful opinion, it was not open to the chambers judge to reject the sworn evidence of the appellant on a critical question on an application under R. 9-6. In this regard, he placed inappropriate weight upon the passage he cited from para. 65 of *Trial Lawyers Association of British Columbia*.

[74] That passage has been referred to in the commentary as "unclear" and "inconsistent with … Court of Appeal decisions", particularly *Skybridge Investments Ltd. v. Metro Motors Ltd*., 2006 BCCA 500 at para. 12; *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48; *Tran v. Le*, 2017 BCCA 222 at paras. 7–9; *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149 at para. 14; and *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at paras. 32–46: see John Fiddick and Cameron Wardell, *The CanLII Manual to British Columbia Civil Litigation*, 2020 CanLII Docs 630 at R. 9-6.

[75] In *Skybridge*, considering the predecessor to R. 9-6, Thackray J.A., for the Court, wrote:

> [12] If *sufficient* material facts have been pleaded to support every element of a cause of action, but one or more of those pleaded material facts are contested, then the judge ruling on a Rule 18(6) application is not to weigh the evidence to determine the issue of fact for the purpose of the application. The judge's function is limited to a determination as to whether a *bona fide* triable issue arises on the material before the court in the context of the applicable law. If a judge ruling on a Rule 18(6) application must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met.
>
> [Emphasis by underlining added.]

[76] The current iteration of R. 9-6 was considered in *Beach Estate*. There, Bauman C.J.B.C., writing for the Court, observed:

> [48] … Rule 9-6 is a challenge on a limited review of evidence. A defendant can succeed on a Rule 9-6 application by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case: *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 at para. 46, quoting *Progressive Construction Ltd. v. Newton* (1981), 25 B.C.L.R. 330 at 335; *International Taoist Church of Canada v. Ching Chong Taoist Association of Hong Kong Ltd.*, 2011 BCCA 149 at para. 14. Such evidence generally is adduced in the form of an affidavit. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed on the Rule 9-6 application: *Canada v. Lameman*, 2008 SCC 14 at paras. 10–11. Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect or if the defendant's evidence in support of the Rule 9-6 application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed: *B & L Holdings Inc.* at para. 46, quoting *Progressive Construction Ltd.* at 335.
>
> [49] Although an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial: *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 32. The judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is incontrovertible: any further weighing may only be done in a trial: *Tran v. Le*, 2017 BCCA 222; *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 8-12.
>
> [Emphasis added.]

[77] In my view, it is clear that the learned chambers judge was required to consider evidence before addressing the limitation defence. It was not plain and obvious that, on November 21, 2017, Emadzadeh refused to transfer the shares into

the appellant's name because the appellant was not entitled to those shares. In respect of the pleaded contractual claims, it was therefore not plain and obvious that the appellant then knew or reasonably ought to have known the facts set out in s. 8(a)–(c) of the *Limitation Act*. It is not plain and obvious that, on that date, he knew or ought to have known that a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage. In respect of the pleaded breach of trust claim, it was not plain and obvious that the appellant was then "fully aware" of the facts set out in s. 12(2)(a)–(c) or that he then knew that "a court proceeding would be an appropriate means" to seek to remedy the loss.

[78] None of these questions could be appropriately addressed on a R. 9-6 application. Their resolution required a deeper appreciation of what transpired on November 21, 2017. That required a weighing of the evidence.

[79] The respondent Emadzadeh says, in the alternative, that it would have been reasonable for the chambers judge to determine the matter under R. 9-7 and that the judge would have come to the same conclusion. If this Court finds that the chambers judge erred by determining the limitations issue under R. 9-6, he submits, the appeal should still be dismissed as time-barred under R. 9-7. He invites this Court to conduct "a fresh assessment of the evidence" because it is feasible and in the interests of justice to do so. I would not accede to that request precisely because, for reasons I have expressed, the record is insufficient to resolve the conflicts in the evidence with respect to the key issue.

Conclusion and Disposition

[80] I would allow the appeal and set aside the order dismissing the appellant's action.

[81] In doing so, I should note that I have not weighed the merits of the appellant's claims and, in particular, I have not addressed the apparent deficiencies in the pleadings against the respondent Novarc.

[82] Novarc's position, as expressed in the correspondence in the record, is that if it is presented with a properly authorized and executed instruction to transfer shares to the appellant, it will comply, provided that it is comfortable that there is an appropriate exemption from prospectus requirements to issue the shares to the appellant, as transferee. It says that, in the absence of such documentation and an available prospectus exemption, it is unable to alter the Register of Shareholders on the basis of a third-party demand. To the extent the appellant asserts that Emadzadeh holds his shares pursuant to a trust agreement for the benefit of the appellant, Novarc says that is an issue that does not involve Novarc. For the purposes of this appeal, I have not distinguished the limitation applicable to claims against Novarc from the limitation of claims against Emadzadeh. The parties have not identified any distinction and, for that reason, I have not attempted to define the cause of action advanced against Novarc nor determined when it may have begun to run. Doing so is not necessary, in my view, in order to deal with the point before us on this appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Abrioux"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"