COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *JM Food Services Ltd. v. Waheed,*
2024 BCCA 381

Date: 20241118
Docket: CA49562

Between:

JM Food Services Ltd., Freshslice Holdings Ltd., RFSP Equipment & Operating Inc., A&M Enterprise Ltd., 1015214 B.C. Ltd., RF Franchising Inc., and The Trustees of the Freshslice Family Trust

Appellants
(Defendants)

And

Tariq Waheed and 0923063 B.C. Ltd.

Respondents
(Plaintiffs)

Before: The Honourable Mr. Justice Abrioux
The Honourable Madam Justice Horsman
The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated December 1, 2023 (*Waheed v. JM Food Services Ltd.*, 2023 BCSC 2113, Vancouver Docket S2011355).

Counsel for the Appellants:	V. Li
Counsel for the Respondents:	D. Grunder
Place and Date of Hearing:	Vancouver, British Columbia September 5, 2024
Written Submissions Received:	October 2 and 15, 2024
Place and Date of Judgment:	Vancouver, British Columbia November 18, 2024

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Justice Iyer

Summary:

The underlying action relates to allegations that the appellants engaged in fraudulent conveyances to avoid complying with a court-ordered judgment for damages. At the time the respondents filed the action, the corporate respondent was dissolved. Close to two years after filing the action and prior to trial, the company was restored. The appellants sought to have the company's claim dismissed on the basis that the limitation period expired prior to its restoration. The trial judge held that the intervening expiry of a limitation period did not bar a restored company's claim under the relevant provisions of the Business Corporations Act.

Held: Appeal allowed. The judge erred in her analysis of the relevant provisions of the Business Corporations Act. The company's restoration was without prejudice to the appellants' intervening acquired rights, which included the right to have the action dismissed if the limitation period has expired. The issue of whether the limitation period had, in fact, expired is remitted for trial in the Supreme Court. The trial judge made no findings on this issue, and the record before the court is insufficient to determine the issue.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Introduction

[1] The discrete issue raised on this appeal is how to reconcile provisions of the *Business Corporations Act,* S.B.C. 2002, c. 57 [*BCA*] that govern the dissolution and restoration of a company. Specifically, where a company is dissolved at the time it files a notice of civil claim, is the claim statute-barred if the limitation period expires before the company is restored?

[2] This issue arises in the context of an action brought by the respondents Tariq Waheed and his company 0923063 B.C. Ltd. ("092"), which alleged that the appellants engaged in fraudulent conveyances to avoid complying with a court-ordered judgment for damages. At the time the action was filed in November 2020, 092 was dissolved, meaning the claim was a nullity. The appellants argued that by the time 092 was restored in September 2022, and the claim was revived, the limitation period had expired. They took the position that 092's action against them should be dismissed on this basis.

[3] The trial judge concluded that the action against 092 was not statute-barred. She relied on s. 364(4) of the *BCA*, which provides that a restored company is

deemed to have continued in existence as if it had not been dissolved. The judge reasoned that s. 364(4) meant that any expiry of a limitation period prior to a company's restoration did not operate to bar its claim. The judge did not address the question of whether the action against 092 would have been statute-barred if, as the appellants argued, s. 364(4) did not override an expired limitation period.

[4] On appeal, the appellants argue that the judge erred in failing to give effect to s. 358(2) of the *BCA*, which provides that the restoration of a company is "without prejudice to the rights acquired by persons before the restoration". They say that prior to the restoration of 092, they acquired the right to have 092's claim against them dismissed on the basis that the limitation period had expired. They seek an order dismissing 092's claim.

[5] For the reasons that follow, I would allow the appeal and remit the matter to the trial court to address the question of whether the limitation period had expired prior to 092's restoration. I agree with the appellants that the judge erred in her analysis of the legislation by overlooking the effect of s. 358(2) of the *BCA* when interpreting s. 364(4). An expired limitation period is a pre-restoration acquired right within the meaning of s. 358(2). However, the record before this Court is insufficient to allow the resolution of the question of whether the limitation period for 092's claim had, in fact, expired. The question was not addressed in the trial judgment and should be resolved fairly on a proper record in the trial court.

Background

[6] The facts relevant to this appeal are not contentious.

The first proceeding

[7] On April 20, 2015, Mr. Waheed and 092 commenced an action against the appellants alleging breach of a franchise agreement between 092 and the appellant JM Food Services Ltd. ("JM Food"). Under the agreement, 092 became a franchisee to sell Freshslice pizza at a location in Richmond. At some point after June 21, 2013, JM Food stopped providing food supplies to 092, and the company was forced to

close the franchise. In the action, 092 sought damages for breach of contract as well as punitive damages. Mr. Waheed, the owner of 092, sought damages for conversion in relation to a $25,000 advance he made to JM Food, which he alleged was wrongfully retained.

[8] On April 4, 2017, after the breach of contract action was commenced but before judgment was issued, 092 was dissolved.

[9] This first proceeding was tried over two weeks in December 2018 and March 2019. The trial judge, Justice Macintosh, released reasons for judgment on April 11, 2019 (“Macintosh Judgment”, indexed as 2019 BCSC 553). It appears from the entered order that he also released supplementary reasons on November 18, 2019, although those reasons are not before us on this appeal. Justice Macintosh found that JM Food was liable to 092 for breach of the contractual duty of good faith and for punitive damages. The damage award to 092 totalled approximately $324,000, plus prejudgment interest. Justice Macintosh further held that JM Food was liable to pay Mr. Waheed damages for conversion in the amount of $25,000, plus prejudgment interest. Finally, Justice Macintosh ordered JM Food pay 092 its reasonable legal fees and costs of the action, pursuant to a term in the franchise agreement.

The fraudulent conveyance proceeding

[10] Following the Macintosh Judgment, the respondents had no success in collecting the damage award, beyond the $6,000 the appellants paid as security for costs of an appeal that was later dismissed as abandoned. On November 6, 2020, the respondents filed a notice of civil claim seeking relief under the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 and the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164. The notice of civil claim alleged:

> 11. On some date after June 21, 2013, but before the date of the [Macintosh Judgment], the Defendant, JM Food Services Ltd. transferred some or all of its assets ("Property") to one or more of the remaining Defendants ("Transferees") with only nominal consideration or without adequate consideration, with the intent to delay, hinder or defraud the Plaintiffs of the just and lawful remedies of the Plaintiffs.
>
> [Emphasis added.]

[11] On December 10, 2020, the appellants filed a response to civil claim, denying that they had transferred assets with the intent to delay, hinder or defraud the respondents.

[12] At the time the notice of civil claim was filed, 092 was still dissolved. As such, pursuant to s. 344 of the *BCA* the dissolved company had ceased to exist for any purpose. 092's dissolution was not apparent on the pleadings. In fact, the notice of civil claim pleaded that 092 "is a corporation incorporated under the laws of British Columbia", with a registered address and address for delivery. While the details are not before this Court on appeal, it appears that the dissolution of 092 was inadvertent, and only belatedly discovered shortly before the trial date.

[13] The trial was scheduled to commence on September 6, 2022. On the first day of trial, the respondents asked for, and were granted, an adjournment in order to apply to have 092 restored. The adjournment was conditioned on the respondents paying the appellants' costs thrown away and the posting of security for costs.

[14] On September 9, 2022, 092 was restored by the Registrar of Companies pursuant to the *BCA*.

[15] The rescheduled trial proceeded in September 2023 on the original pleadings. Neither party amended their pleadings to reflect the events around 092's dissolution and restoration. However, the limitation issue was clearly framed as an issue for trial. In their trial brief filed in July 2023, the appellants' list of issues in dispute included the following:

> 4. If a dissolved company files an action and the limitation period lapses during the period between the dissolution and the revival of that company, do the purported defendants acquire "a post-dissolution legal right" that they are

> entitled to rely upon to assert that the action is statute barred, regardless of the retroactive effect of the company's revival?

[16] All parties made submissions on this issue at trial, provided relevant case law, and the trial judge was invited to resolve the issue. The respondents did not take the position at trial that the limitation issue could not be raised in the absence of a pleaded limitation defence.

The trial judgment (2023 BCSC 2113)

[17] In the opening paragraphs of her judgment, the judge set out an overview of the issues at trial. As to the fraudulent conveyance claim, the respondents alleged that at some point after June 21, 2013, all of the assets of JM Food were transferred to the other appellants in order to defeat the respondents' ability to secure a monetary remedy. The appellants denied this, and stated that any corporate reorganization was necessary to address financial difficulties and ensure the future viability of the company. The judge set out the limitation issue as follows:

> [6] Furthermore, the defendants submit that they acquired a "post dissolution legal right" when, in 2017, 092 lost its corporate status. On this basis, the defendants submit that the action by 092 is statute-barred regardless of the retroactive effect of the company's revival.

[18] On the fraudulent conveyance claims, the judge found that: there was a transfer of corporate assets between the appellants after June 21, 2013 for no consideration; the appellants' intent was to hinder or delay creditors; and the appellants did not establish a satisfactory explanation for the impugned transactions. Accordingly, the judge concluded that the transfer of the assets constituted a fraudulent conveyance and a fraudulent preference. These findings are not challenged on appeal.

[19] The judge then turned to the limitation defence. She described the appellants' position in these terms:

> [156] The defendants assert that when a company is dissolved, it ceases to exist for any purpose and has no legal status or capacity to bring or retain an action as against a defendant. As a result, submits the defendants, a claim commenced by a dissolved company is a nullity and the claim cannot be

> effective until after the corporation is revived: *DeBoer v. Fletcher*, 2013 BCSC 143 at para. 4; *BCA*, s. 344(1).
>
> [157] The defendants submit that if a dissolved company files an action and the limitation period lapses during the period between the dissolution and the revival of that company, the purported defendant acquires "a post-dissolution legal right" that it is entitled to rely upon to assert that the action is statute-barred, regardless of the retroactive effect of the company's revival. They rely on *Boake v. Blair*, 2019 BCSC 830 in taking the position that limitation periods that expire after a company is dissolved continue to run during any period of dissolution: at para. 85.

[20] The judge then quoted ss. 358(2) and 364(4) of the *BCA*. She cited case law standing for the proposition that the retroactive effect of the restoration of a dissolved company serves important policy objectives in regularizing transactions entered into between corporations and third parties during the period of dissolution. Applying these principles to the facts, the judge reasoned:

> [161] I find that, to the extent a company is deemed to have continued in existence as though it had never been dissolved by operation of s. 364(4) of the *BCA*, it would be true (if that company had initiated an action while dissolved) so long as that action was initiated in accordance with any applicable limitation period, the limitation period should not be deemed to have elapsed just because the restoration of the company occurs after the limitation might have otherwise elapsed.
>
> [162] On this basis, I agree with the plaintiffs' submissions that the recent authority interpreting the *BCA* and the interaction between the limitation of liability sections of the *BCA* and the restoration provisions answer the defendants' submission. The time that has elapsed since 092's dissolution and its restoration is not a bar to the plaintiffs claim because, according to the statute, 092 is deemed to have never been dissolved.
>
> [Emphasis added.]

[21] Accordingly, the judge granted declarations that any transfer of property by JM Food to any of the other appellants was a fraudulent conveyance and a fraudulent preference, and was of no force and effect insofar as it affected the rights of 092 and Mr. Waheed as judgment creditors. She further ordered that both respondents were entitled to pursue their remedies as judgment creditors against JM Food as if it were still legal and beneficial owner of the transferred property.

Issues on appeal

[22] While stated various ways in the appellants' factum, this appeal raises a single ground of appeal: the trial judge erred in failing to give effect to s. 358(2) of the *BCA*, which protects rights acquired prior to a company's restoration.

[23] The parties agree that this ground of appeal raises an issue of pure law, and therefore the applicable standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[24] The respondents also raise a preliminary issue of whether the appellants can rely on the alleged expiry of a limitation period if they did not plead a limitation defence in their responses to civil claim.

The law

Restoration under the *BCA* and the former *Company Act*

[25] When a company is dissolved under the *BCA*, subject to limited exceptions that are not relevant here, it "ceases to exist for any purpose": *BCA*, s. 344(1). It is not disputed that the notice of civil claim that initiated the present proceeding was, as it related to the claim of 092, a nullity at the time it was filed because 092 had no legal existence. The difficult question is how to resolve the apparent tension between the provisions of the *BCA* that are the focus of this appeal: s. 364(4), which deems a restored company to have continued in existence as if it had not been dissolved, and s. 358(2), which provides that the restoration is "without prejudice" to the rights of a person acquired before the restoration.

[26] A helpful starting point in interpreting the interplay between ss. 364(4) and s. 358(2) of the *BCA* is the analogous provisions in the former *Company Act*, R.S.B.C. 1996, c. 62 [1996 *Company Act*]. Prior to the enactment of the *BCA* in 2002, and consequent repeal of the 1996 *Company Act*, ss. 262(2) and 263 of the 1996 *Company Act* provided as follows:

> **Restoration to register**
>
> **262** […]
>
> (2) If a company or an extraprovincial company is restored to the register under subsection (1), the company is deemed to have continued in existence, or the registration of the extraprovincial company is deemed not to have been cancelled, and proceedings may be taken as might have been taken if the company had not been dissolved, or the registration of the extraprovincial company had not been cancelled.
>
> […]
>
> **Power of court**
>
> **263** In an order made under section 262, the court may give directions and make provisions it considers appropriate for placing the company or extraprovincial company and every other person in the same position, as nearly as may be, as if the company had not been dissolved or the registration of the extraprovincial company cancelled, but, unless the court otherwise orders, the order is without prejudice to the rights of parties acquired before the date on which the company or extraprovincial company is restored to the register.

[27] In *Natural Nectar Products Canada Ltd. v. Theodor*, 46 B.C.L.R. (2d) 394, 1990 CanLII 834 (C.A.) [*Natural Nectar*], this Court held that the language in what was then s. 286(2) [later s. 262(2)] of the *Company Act*, R.S.B.C. 1979, c. 59 [1979 *Company Act*] did not validate a writ of summons filed when the plaintiff company was dissolved. The Court accepted that the purpose of the deeming provision in s. 286 was to avoid the difficulties that might otherwise arise when a struck company is restored to the register. However, the Court held that such difficulties were properly addressed through the power of the court to make directions under s. 287 [later s. 263] of the 1979 *Company Act*. As explained by the Court at 400:

> Upon the basis of that reasoning, however, I do not conclude that s. 286 should be given retrospective operation. Rather, such an effect can be given to the order restoring the company to the register if the court gives appropriate directions under s. 287 for placing the company "in the same position, as nearly as may be, as if the company had not been dissolved…".
>
> In my opinion, that would have been the effect of the order restoring the company to the register if the words "as if its name had never been struck off" had been contained in the order.

[28] Since the order at issue in *Natural Nectar* did not contain such a term, the Court held that restoration of the company to the Register did not validate the writ of summons, and accordingly the action was dismissed.

[29] The current restoration provisions in the *BCA* are substantively different from ss. 262(2) and 263 of the 1996 *Company Act*. In relevant respects, they provide:

> **Registrar must restore**
>
> **358** (1) Subject to section 363, unless the court orders otherwise in an entered order of which a copy has been filed with the registrar, after a restoration application under section 356 is filed with the registrar, the registrar must, on any terms and conditions the registrar considers appropriate, restore the company.
>
> (2) Subject to section 368, unless the court orders otherwise, a restoration under subsection (1) of this section is without prejudice to the rights acquired by persons before the restoration.
>
> …
>
> **Effect of restoration of company**
>
> **364** […]
>
> (4) A company that is restored is deemed to have continued in existence as if it had not been dissolved, and proceedings may be taken as might have been taken if the company had not been dissolved.
>
> [Emphasis added.]

[30] Unlike s. 262(2) of the 1996 *Company Act*, s. 364(4) of the *BCA* expressly provides that a restored company is deemed to have continued in existence as if it had not been dissolved. Thus, the *BCA* now provides for the retroactive effect of restoration and removes the need to add such terms to the restoration order: *British Columbia Corporations Law Guide* (LexisNexis) at ¶48,620.

[31] The appellants in this case do not dispute that as a result of the retroactive effect of s. 364(4), 092 could continue the action as if it had never been dissolved despite the fact that the notice of civil claim was filed when 092 was dissolved. However, the appellants say that as a result of s. 358(2) of the *BCA*, this was subject to the important qualification that the retroactive effect of restoration could not prejudice the rights acquired by a person in the intervening period. They say this includes their acquired right to have 092's claim dismissed on the basis of an

expired limitation period. The question, then, is how the limitation period operates within this statutory context. While the parties were unable to refer the Court to any British Columbia authorities directly on point, there are helpful precedents from appellate courts in Ontario and Manitoba, to which I will now turn.

Shell Canada* and *Munday

[32] The decisions of the Ontario Court of Appeal in *602533 Ontario Inc. v. Shell Canada Ltd.*, 155 D.L.R. (4th) 562, 1998 CanLII 1775 [*Shell Canada*], and of the Manitoba Court of Appeal in *Munday (E.C.) Ltd. v. Canada Safeway Ltd.*, 2004 MBCA 143 [*Munday*], provide direct assistance on the interplay of the comparable versions of ss. 358(2) and 364(4) of the *BCA* in those provinces.

[33] In *Shell Canada*, the plaintiff corporation commenced an action at a time when, unknown to everyone concerned, it had been dissolved. Once this was discovered many years later, the corporation was restored, but the limitation period had expired in the meantime. The issue on appeal was framed by the Ontario Court of Appeal in these terms at 564:

> The primary issue in this appeal is whether the expiry of a statutory limitation period between the issuance of 602533's claim, when it was a dissolved corporation, and its subsequent revival under s. 241(5) of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 (the "Act"), created a post-dissolution right in Shell to which 602533 was subject and upon which Shell could rely to defeat 602533's claim as statute-barred.

[34] This issue turned on the language of s. 241(5) of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B. 16, which provided as follows at the time of the appeal:

> **241(5)** Where a corporation is dissolved under subsection (4) or any predecessor thereof, the Director on the application of any interested person immediately before the dissolution may, in his or her discretion, on such terms and conditions as the Director seeks fit to impose, revive the corporation and thereupon the corporation, *subject* to the terms and conditions imposed by the Director *and to any rights acquired by any person after its dissolution*, is restored to its legal position, including all its property, rights and privileges and franchises, and is subject to all its liabilities, contracts, disabilities and debts, as of the date of its dissolution, in the same manner and to the same extent as if it had not been dissolved.

> [Italic emphasis in the original, underline emphasis added.]

[35] The Ontario Court of Appeal reasoned from the statutory language that: (1) upon its dissolution, 602533 ceased to exist as a legal entity; (2) as such, the company had no status to commence legal proceedings, and therefore the claim was a nullity at the time it was filed; (3) upon the company's revival, that impediment was cured and 602533 was entitled to pursue its claim; and (4) this was subject to any post-dissolution rights acquired by the defendant: *Shell Canada* at 566.

[36] Justice Moldaver (as he then was), writing for the Court in *Shell Canada*, expressed some hesitation in accepting the proposition, on the facts of the case, that the expiry of a limitation period was a post-dissolution acquired right. He noted that it was difficult to accept that the defendant Shell should be able to take advantage of the limitation period and escape liability when, at all material times, it was fully aware of, and had responded to, the claim against it. In such circumstances, as Moldaver J.A. observed, "the policy considerations that inform the purpose of the limitation defences would seem not to apply": at 568. Nevertheless, he noted that it is well-established that the passage of a limitation period confers an accrued legal right on a defendant, regardless of whether they can show actual prejudice: at 569, citing *Martin v. Perrie*, [1986] 1 S.C.R. 41, 1986 CanLII 73. It followed that:

> …between the time of 602533's dissolution in 1988 and its revival in 1996, Shell acquired a post-dissolution legal right by virtue of the lapse of the limitation period and it was entitled to rely upon that right to defeat 602533's claim.

Shell Canada at 570.

[37] Accordingly, 602533's claim stood dismissed.

[38] In *Munday*, the Manitoba Court of Appeal considered the effect of the revival of a company on a statement of claim that had been filed at a time the company was dissolved. The appeal concerned two issues: (1) whether the revival of a corporation under *The Corporations Act*, C.C.S.M. c. C225, operated retroactively so as to validate the statement of claim, and (2) if so, whether the defendant had acknowledged the debt in issue in the action so as to extend the limitation period.

[39] Unlike the parallel legislation in Ontario and British Columbia, Manitoba's *The Corporations Act* did not provide that a revived company was restored to its previous position as if the company had never been dissolved. Instead, s. 202(2) read as follows:

> **202(2)** A corporation is revived as a corporation under this Act on the date shown on the certificate of revival, and thereafter the corporation, subject to such reasonable terms as may be imposed by the court or the Director and to the rights acquired by any person after its dissolution, has all the rights and privileges and is liable for the obligations that it would have had if it had not been dissolved.
>
> [Emphasis added.]

[40] This language gave rise to the first issue before the Court in *Munday*: whether s. 202(2) should be interpreted as operating retroactively so as to validate the statement of claim. This issue does not arise in the present case because the parties agree that s. 364(4) of the *BCA* has retroactive effect. As such, it is unnecessary to review the Manitoba Court of Appeal's lengthy analysis of the wording in s. 202(2) of *The Corporations Act*. The relevant point for present purposes is that the Court in *Munday* ultimately concluded that s. 202(2) operated retroactively to validate the statement of claim. Thus, it was necessary for the Court to proceed to address the second issue concerning the alleged expiry of the limitation period.

[41] The starting point for the Court's consideration of the limitation period issue in *Munday* was the corporate plaintiff's acknowledgment that, if the limitation period had expired prior to its revival, the claim must be dismissed. This acknowledgment was based on the protection of "the rights acquired by any person after its dissolution" in s. 202(2) of *The Corporations Act*, and the judgment in *Shell Canada*. The only question was whether the defendant had, in correspondence, acknowledged a debt so as to extend the limitation period under Manitoba's limitations legislation. The Court of Appeal found that there had been no such acknowledgement. Therefore, the claim was dismissed on the basis that that the limitation period had expired prior to the corporate plaintiff's revival. The Court treated the date of revival as the effective filing date of the statement of claim for the

purpose of determining whether the limitation period has expired: *Munday* at para. 66.

Analysis

Preliminary issue: Did the appellants have to plead the limitation defence?

[42] The respondents' primary argument on appeal is that the expiry of a limitation period is not an acquired right unless it has been expressly pleaded. In this case, the appellants did not amend their responses to civil claim to plead a limitation defence despite knowing no later than September 6, 2022 that 092 had been dissolved. As such, the respondents argue that "the expiration of a limitation period did not arise in the case at bar".

[43] I would not give effect to this argument. It is true that as a general rule in British Columbia a limitation period is an affirmative defence that must be pleaded: *Gourlay v. Crystal Mountain Resorts Ltd.*, 2020 BCCA 191 at para. 61. The pleading requirement is a matter of procedure within each jurisdiction. Where there is a requirement to plead a substantive limitation defence, such as the one advanced by the appellants in this case, a failure to plead the limitation period may constitute a waiver of the defence: *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022 at 1073, 1994 CanLII 44.

[44] However, in the present case there can be no dispute that the appellants were advancing a substantive limitation defence. Two months before the rescheduled trial date, the appellants identified the limitation issue in their trial brief. The issue was squarely before the trial judge, and extensively argued, and she issued reasons on the point. While it would have been preferable if the appellants had amended their responses to civil claim in advance of trial to plead the limitation defence, their failure to do so in these circumstances does not amount to a waiver. Nor has it resulted in any prejudice to the respondents. The respondents raised no objection at trial to the appellants' ability to argue the limitation issue despite the fact

that there was no pleaded limitation defence. Had they done so, the appellants would have had the opportunity to request leave to amend their pleadings.

[45] Given this context, the failure to plead the limitation period is at most a procedural irregularity that should not operate to deprive the appellants of their substantive right to advance a limitation defence to 092's claim. Therefore, I would not accede to the respondents' argument that a limitation issue does not arise at all in the absence of a pleaded limitation defence.

Did the judge err in her analysis of the *BCA*?

[46] As I have reviewed, the judge found that s. 364(4) of the *BCA* had the effect of overcoming any potential expiry of a limitation period prior to a company's restoration. For ease of reference, this is the key passage from the trial judgment:

> [161] I find that, to the extent a company is deemed to have continued in existence as though it had never been dissolved by operation of s. 364(4) of the *BCA*, it would be true (if that company had initiated an action while dissolved) so long as that action was initiated in accordance with any applicable limitation period, the limitation period should not be deemed to have elapsed just because the restoration of the company occurs after the limitation might have otherwise elapsed.

[47] In my view, this passage reflects a legal error in the judge's analysis in that she focused on s. 364(4) of the *BCA*, without reference to the important qualification on retroactivity contained in s. 358(2). While the parties referenced *Shell Canada* in their submissions to the judge, she did not refer to that case in her reasons. If the judge considered *Shell Canada* to be distinguishable, she did not explain why.

[48] I see no difference in substance between the language of s. 358(2) ("without prejudice to the rights acquired by persons before the restoration") and the provisions in issue in *Shell Canada* and *Munday* ("subject to…rights acquired by any person after its dissolution"). Following the reasoning in *Shell Canada* and *Munday*, the combined effect of ss. 344, 364(4), 358(2) of the *BCA* is that: (1) upon its dissolution in 2017, 092 ceased to exist as a legal entity; (2) 092 had no status to commence a proceeding when the notice of civil claim was filed in November 2020, and therefore the claim was a nullity at the time it was filed; (3) upon 092's

restoration, the impediment was cured and 092 was entitled to pursue its claims against the appellants; (4) however, this was without prejudice to any pre-restoration rights acquired by the appellants; (5) the expiry of a limitation period creates a pre-restoration acquired right; and (6) the date of restoration (September 9, 2022) should be treated as the effective filing date of the notice of civil claim for the purpose of determining whether the limitation period has expired.

[49] Although *Shell Canada* and *Munday* are not binding on this Court, they are persuasive precedents and I consider the analysis in those decisions to be informative for the purpose of resolving the issue on this appeal. The finding of those appellate courts that an expired limitation period creates an accrued right on the part of a defendant to be free from future claims is well supported by Supreme Court of Canada authority: *Martin*; *Tolofson* at 1073: *Castillo v. Castillo*, 2005 SCC 83 at para. 7. Indeed, the respondents did not argue that *Shell Canada* and *Munday* were wrongly decided and should not be followed. Instead, they focused their submissions on the objection that the appellants did not plead the limitation issue. For the reasons I have already stated, I consider there to be no merit in that submission.

[50] I am therefore of the view that the judge's dismissal of the limitation defence cannot be supported on her interpretation of the relevant provisions of the *BCA*. The retroactive effect of s. 364(4) is expressly subject to rights acquired by persons prior to the restoration. If, in fact, the limitation period expired prior to 092's restoration, the appellants would have an acquired right to apply to have the action dismissed on that basis.

Did the limitation period expire?

[51] As noted, the trial judge made no finding as to whether the limitation period had expired. The parties' factums on appeal did not address the question of whether the limitation period had expired. Following the hearing of the appeal, the Court requested further written submissions from the parties on this question.

[52] The parties agree in their further submissions that the respondents' claims in this case are governed by the basic limitation period in s. 6 of the *Limitation Act*,

S.B.C. 2012, c. 13. Section 6 provides that a proceeding may not be commenced more than two years after the date on which the claim is discovered. The common ground ends there.

[53] The appellants argue that the question of when the claim was discovered must be assessed in accordance with the general discovery principles set out in s. 8 of the *Limitation Act*, rather than the discovery rule in s. 12 for claims "based on fraud". However, regardless of which discovery rules apply, the appellants maintain that Mr. Waheed was fully aware of the claims well before September 9, 2020 (i.e., two years prior to 092's restoration). The appellants also say that the respondents did not argue at trial that the limitation period had expired, and did not lead evidence from Mr. Waheed as to when the claims were discovered. Finally, they say the respondents have conceded in their submissions on appeal that the limitation period had expired by the time of 092's restoration.

[54] The respondents contend that the special discovery rules in s. 12 of the *Limitation Act* apply, and this has the effect of extending the limitation period beyond even the filing of the notice of civil claim. The respondents further point to the COVID-19 suspension of limitation periods as relevant to the question of when the limitation period expired. The respondents dispute that they have ever conceded that the limitation period has expired, and fault the appellants' failure to plead a limitation defence as the real source of the difficulty.

[55] As a starting point, I am not persuaded that the respondents have made any clear concession that the limitation period expired. It is certainly true that the respondents' original submissions on appeal did not focus on this issue in the manner it deserved. It may be that the same could be said of their submissions at trial. However, as the respondents emphasize, the burden to establish the limitation defence is on the appellants. The appellants' original submissions on appeal assumed the expiry of the limitation period, without particularizing when and how the expiry occurred. It is not clear from the record on appeal whether the appellants made more specific submissions to the trial judge. The process by which the

limitation defence has been litigated to date is, to say the least, unfortunate. It seems to me that both sides share some responsibility for this state of affairs.

[56] For the reasons I have stated, I am of the view that the trial judge erred in her analysis of the provisions of the *BCA*, and therefore her rejection of the limitation defence on that basis cannot be maintained. However, a determination must be made as to whether the limitation period has, in fact, expired. The record before this Court is insufficient to permit a fair and proper adjudication of this issue. Among other things, factual findings must be made about the timing of the discovery of the claim. Such findings cannot be made on the basis of the record on appeal.

[57] Accordingly, the appropriate remedy in my view is to remit the matter for trial on the sole question of whether the limitation period had expired in relation to 092's claim prior to 092's restoration. If the appellants succeed on their limitation defence, 092's claim would be dismissed. For this reason, it is a necessary part of the remedy on this appeal that the trial judge's orders, as they relate to the claim of 092, be set aside so that the limitation defence can be effectively adjudicated in the trial court.

Disposition

[58] I would allow the appeal, set aside the orders of the trial judge as they relate to the claim of 092, and remit the matter to the Supreme Court for trial on the question of whether the limitation period for 092 to commence its claim had expired prior to its restoration.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Iyer"