SUPREME COURT OF NOVA SCOTIA
Citation: *Mariner Holdings Inc. v. Rhyno*, 2017 NSSC 121

Date: 20170518
Docket: Hfx No. 328460
Registry: Halifax

Between:

Mariner Holdings Inc.

Plaintiff

v.

Timothy Ray Rhyno

Defendant

LIBRARY HEADING

Judge:	The Honourable Justice Ann E. Smith
Heard:	March 1, 2017
Final Written Submissions:	March 17, 2017; April 7, 2017
Written Decision:	May 18, 2017
Subject:	An assignee of the debts owed by the defendant to the assignor sought to be substituted as the plaintiff.
Summary:	Mayfair Developments Inc. is the assignee of debts which it claims are owed to Mariner Holdings Inc. and Mariner Seafoods Inc. by the Defendant. Holdings commenced an action in debt against the defendant within the applicable limitation period, which has now expired.

Issues:

(1) What *Civil Procedure Rules* and law applies to Holdings' Motion?

(2) Should the Motion be denied on the grounds that a claim by Mayfair is outside the applicable limitation period as contemplated by *Civil Procedure Rule 35.08*?

(3) Has there been undue delay on the part of the Plaintiff in bringing this Motion?

Result:

Mayfair is substituted as plaintiff. As assignee of Holdings and Seafoods accounts receivables, it is not limitation barred from continuing this action since it was commenced by Holdings within the applicable limitation period. In the alternative, if the limitation period has expired against Seafoods, it was "re-started" in 2012 when Mr. Rhyno acknowledged his debt to Seafoods in a sworn affidavit. Mayfair has not unduly delayed bringing this motion.

SUPREME COURT OF NOVA SCOTIA
Citation: *Mariner Holdings Inc. v. Rhyno*, 2017 NSSC 121

Date: 20170518
Docket: Hfx No. 328460
Registry: Halifax

Between:

Mariner Holdings Inc.

Plaintiff

v.

Timothy Ray Rhyno

Defendant

Judge:	The Honourable Justice Ann E. Smith
Heard:	March 1, 2017
Final Written Submissions:	March 17, 2017; April 7, 2017
Written Decision:	May 18, 2017
Counsel:	Peter Coulthard, Q.C., Gillian Lush; for the Plaintiff Hugh MacIsaac, for the Defendant

By the Court:

INTRODUCTION

[1] Mariner Holdings Inc. ("Holdings") moves pursuant to *Civil Procedure Rule 83.02(2)* for an order substituting Mayfair Developments Inc. ("Mayfair") for it, as Plaintiff. Holdings also seeks to amend its Statement of Claim to add new allegations against Mr. Rhyno.

[2] The underlying action is for an outstanding debt arising out of an agreement between Holdings and Mr. Rhyno dated February 9, 2007. The agreement provided that Holdings would loan Mr. Rhyno the sum of $75,000.00 plus interest at 10% per annum. Additional amounts were later advanced by Holdings at the same interest rate. The loan was to be repaid by September 30, 2007. Neither the interest or the loan was repaid and the amount outstanding is in the range of $138,014.35.

[3] Mr. Rhyno's ownership of a fishing vessel called "Kelly & Dawn" was to be transferred to Holdings, and was to be transferred back to Mr. Rhyno when the loan and interest were repaid in full.

[4] Holdings and Mr. Rhyno disagree as to who, if anyone, currently has the right to recover these debts from Mr. Rhyno, given that Mr. Rhyno alleges that the money was loaned to him by Mariner Seafoods Inc. ("Seafoods"), not Holdings. Seafoods and Holdings are related companies. Mayfair now holds the accounts receivable of both Holdings and Seafoods.

[5] Mr. Rhyno says that the limitation period for Mayfair to commence an action against him has long expired, and that *Civil Procedure Rule 35.08(5)* bars a new claim against him.

ISSUES

[6]

(1) What *Civil Procedure Rules* and law applies to Holdings' Motion?

(2) Should the Motion be denied on the grounds that a claim by Mayfair is outside the applicable limitation period as contemplated by *Civil Procedure Rule 35.08*?

(3) Has there been undue delay on the part of the Plaintiff in bringing this Motion?

Issue (1): What *Civil Procedure Rules* and law apply to Holdings' Motion?

[7] Mayfair says that it is the assignee of Holdings' rights under the legal action that Holdings commenced within the required limitation period. Holdings commenced this action in debt on May 4, 2010 in relation to an alleged breach of contract occurring on September 30, 2007 when Mr. Rhyno failed by that date to repay the loan.

[8] What Mariner seeks on motion is to be "substituted" for Holdings. It moves under *Rule 83.02* which provides:

> **Amendment of notice in an action**
>
> **83.02** (1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.
>
> (2) The amendment must be made no later than ten days after the day when all parties claimed against have filed a notice of defence or a demand of notice, unless the other parties agree or a judge permits otherwise.
>
> (3) A pleading respecting an undefended claim in an action may be amended at any time, but the party claimed against is entitled to receive notice of the amended pleading in the manner provided in Rule 31 – Notice for notice of an originating document.

[9] *Rule 83.04* deals with amendments to add or remove a party:

> **Amendment to add or remove party**
>
> **83.04** (1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).
>
> (2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:
>
> (a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;
>
> (b) the expiry precludes the claim
>
> (c) the person protected by the limitation period is entitled to enforce it.

> (3) A notice may be amended to remove a party from a proceeding, but the removed party may make a motion for costs or other relief.

[10] *Rule 83.04(2)* only deals with amendments involving a new claim against a party, so does not apply to Mayfair's situation.

[11] *Rule 35* deals with adding and removing parties. *Rule 35.01* describes the scope of the Rule as follows:

> **35.01** The following persons may do the following things, in accordance with this Rule:
>
> (a) persons may join together as plaintiffs, applicants, applicants for judicial review, or appellants to start a proceeding;
>
> (b) a person who starts a proceeding may make two or more persons defendants or respondents;
>
> (c) a party may make a motion to be removed, or to remove another party;
>
> (d) a party may make a motion to add another person as a party;
>
> (e) a person may make a motion to be added as a party, including as an intervenor.

[12] *Rule 35.01* does not explicitly address the "substitution" of a party, but I interpret subsections (c) and (d) to have the combined effect of substitution of a party in the circumstances before me.

Issue (2): Should the Motion be denied on the grounds that a claim by Mayfair is outside the applicable limitation period as contemplated by *Civil Procedure Rule 35.08*?

[13] *Rule 35.08*, unlike *Rule 83.04(2)*, provides that a party may not be added as a plaintiff, or as a defendant, once an applicable limitation period has expired.

> **Judge joining party**
>
> **35.08** **(1)** A judge may join a person as a party in a proceeding at any stage of the proceeding.
>
> **(2)** It is presumed that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing.
>
> **(3)** The presumption is rebutted if a judge is satisfied on each of the following:

> (a) joining a person as a party would cause serious prejudice to that person, or a party;
>
> (b) the prejudice cannot be compensated in costs;
>
> (c) the prejudice would not have been suffered had the party been joined originally, or would have been suffered in any case.
>
> **(4)** Despite Rule 35.08(1), a judge may not join a person as a plaintiff, applicant, applicant for judicial review, or appellant, unless the person consents.
>
> **(5)** Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.
>
> **(6)** A judge who joins a person as a party to a proceeding may give directions for the party's participating in the proceeding, including any of the following:
>
> (a) an amendment to the hearing;
>
> (b) a process by which the party may give notice of a claim, defence, or ground;
>
> (c) a process by which each other party may respond to the notice;
>
> (d) requirements for the new party to make disclosure and be discovered.
>
> (emphasis added)

[14] Counsel for Mr. Rhyno says that the claim that would be advanced by Mayfair is one for which the limitation period has expired, contrary to *CPR 35.08(5)*.

[15] I agree with counsel for Holdings that *CPR 35.08(5)* does not preclude Mayfair's claim because the claim to be advanced by Mayfair is the same one for which Holdings had commenced an action within the applicable limitation period.

[16] The rights of an assignee are matters of substantive law, as provided in s. 43(5) of the *Judicature Act*:

> (5) **Any absolute assignment by writing under the hand of the assignor**, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, **shall be and be deemed to have been effectual in law**,

> subject to all equities which would have been entitled to priority over the right of the assignee if this subjection had not been enacted, **to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same**, and the power to give a good discharge for the same, without the concurrence of the assignor.
>
> (emphasis added)

[17] The effect of an assignment under s. 43(5) of the *Judicature Act* is to pass and transfer the legal right to a debt and "all legal and other remedies for the same […]." The "legal rights" that are transferred with the assignment include the benefit of an action started by the assignor within the applicable limitation period.

[18] Section 8(1) of the *Limitations of Actions Act*, S.N.S. 2014 provides for a general two-year limitation period. Many lawsuits are not completed within two years. If the Defendant's argument is accepted, in circumstances where a plaintiff who had commenced an action for any reason had their rights assigned after the two-year period, the assignee would be precluded from carrying on the proceeding because the limitation period would have expired. That cannot be the case.

[19] I find that Mayfair is entitled to replace Holdings as the Plaintiff in this proceeding pursuant to *Rule 35*.01. Mr. Rhyno cannot avail himself of the limitation defence. He suffers no prejudice in the circumstances – he has always known that he faced an action in debt and he has known since July, 2015 that the debt owed to Holdings had been assigned to Mayfair.

[20] Although Seafoods was not a party to the Holdings debt action, Mayfair also is an assignee of whatever rights Seafoods may have against Mr. Rhyno.

[21] The evidence discloses the following facts:

1. Mr. Rhyno has maintained since the outset of this proceeding that the proper plaintiff is Seafoods, not Holdings.

2. Seafoods went bankrupt on June 9, 2014 after being in receivership since January 14, 2010.

3. Mr. Rhyno became aware of Seafood's receivership on January 16, 2012.

4. Mayfair is an assignee of whatever rights Seafoods may have against Mr. Rhyno with respect to any accounts receivable owed by him to Seafoods.

[22] The evidence shows that Mr. Rhyno signed a loan agreement and promissory note with Holdings, but he nevertheless insists that his debt obligation is to Seafoods. He admits that he owes the debt to Seafoods. He can hardly complain that Mayfair, as assignee of the accounts receivables of Seafoods, be added as a plaintiff.

[23] Mr. Rhyno says that any rights Seafoods has to be added as a party are barred by Section 2(e) of the "old" *Limitation of Actions Act*, R.S.N.S. 1989, c. 258.

[24] I conclude that Mariner, as assignee of the accounts receivables of Seafoods, is entitled to claim against Mr. Rhyno despite the expiry of the applicable limitation period. If I am wrong in that regard, I nonetheless find that Mr. Rhyno recently acknowledged the debt he owed to Seafoods, thereby restarting the limitation clock.

[25] As noted above, the loan agreement with Holdings provided that the anticipated date for repayment of the loan was September 30, 2007. The loan was not repaid by that date so the cause of action arose and expired six years later, on September 30, 2013.

[26] In response to a summary judgment motion brought by Seafoods in 2012 (Seafoods withdrew the motion before it was heard) Mr. Rhyno gave the following evidence in his Affidavit sworn January 13, 2012.

> 10. I have never received any statement of account from Mariner Holdings Inc. for this loan. Apart from the loan documents themselves, all of my dealings were with Mariner Seafoods Inc.

[27] Mr. Rhyno also attached to his January 13, 2012 Affidavit copies of two statements showing "amounts owed by me to Mariner Seafoods." These amounts total $138,014.35.

[28] Section 6 of the "old" *Limitation of Actions Act* is relevant and provides as follows:

> **Sufficiency of acknowledgment or promise**
>
> 6(1) In any action grounded upon simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the preceding Sections of this Act, or to deprive any person of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable thereby, or his agent duly authorized to make such acknowledgment or promise.
>
> (emphasis added)

[29] I find that the sworn statements that Mr. Rhyno made in his affidavit are an acknowledgment by him of his indebtedness to Seafoods. These January 13, 2012 sworn statements were made prior to the expiry of the six-year limitation period.

[30] In *Aucoin v. Murray*, 2013 NSSC 37, 2013, Carswell NS 70, Wood J., considered an acknowledgment made by a debtor after the limitation period had expired. He held that in such instances, since the obligation had ceased to exist with the expiry of the limitation period, it could not be "revived" by an acknowledgment after the limitation period had expired (see paragraph 39). However, he went on to state as follows:

> [40] The following passage from Mew, *The Law Of Limitations* supports my conclusion (p. 115):
>
> > An acknowledgment or part payment cannot revive a right that has been extinguished. It does, however, provide an additional limitation period for the pursuit of a remedy where a right still exists.
>
> [41] In 2005, the Uniform Law Conference of Canada approved a *Uniform Limitations Act* which included a section codifying rules with respect to acknowledgments and part payments. Section 11(10) of the proposed legislation provided that an acknowledgment would only be effective if made before the expiry of the limitation period:
>
> > (10) This section does not apply unless the acknowledgment is made to the person with the claim, the person's agent or an official receiver or trustee acting under the *Bankruptcy and Insolvency Act* (Canada) before the expiry of the limitation period applicable to the claim.
>
> [42] Many provinces in Canada have now enacted similar provisions. In those provinces, it is unnecessary to resort to the interpretation of *Tolofson* and subsequent jurisprudence in order to conclude that state barred claims cannot be reinstated by acknowledgment or part payment. Nova Scotia has not yet adopted a statutory approach to this issue.

[31] Justice Wood further stated:

> [50] Mr. Murray is alleged to have made some payments on the 1979 and 1980 loans during the 1980's and 1990's. There are no dates specified; however, for purposes of this summary judgment motion, **I will assume that a payment was made at the latest possible date, ie. December 31st, 1999. If this is the case, the limitation period would have expired on December 31st, 2005.** As of that date, the loans were extinguished and so the alleged acknowledgment in 2008 and part payments in 2009 could not have been effective to reinstate them.

> [emphasis added]

[32] Implicit in Wood J.'s comments is that an acknowledgment or part payment that is made before the limitation period expires serves to "re-start" the limitation period as of that date.

[33] I conclude that the limitation period for Seafood's claim is extended to six years from January 13, 2012, subject to the end-date of September 1, 2017 established by Section 23 of the new *Limitations of Actions Act*.

[34] The case law relied upon by Mr. Rhyno in support of his argument that the evidence set forth in his Affidavit does not constitute admissions is distinguishable from the facts before the Court. I quote, in part, from the brief of counsel for Holdings since I agree with his description of these cases and how they differ from the facts before this Court:

> (a) *Canada (Attorney General) v Fekete*, 1999 ABQB 262
>
> This case was [*sic*] involved bankruptcy proceedings, which by their very nature requires the bankrupt to state their debts.
>
> Clearly, the instant case is not a bankruptcy proceeding. Mr. Rhyno was not required to acknowledge the debt to Seafoods in order to respond to the summary judgment motion by Holdings. He could have said, for example, "Attached hereto and marked Exhibit "D" are copies of two statements issued to me by Mariner Seafoods Inc."
>
> (b) *FS Industries Limited v MacDonald*, (1991) 105 NSR (2d) 271 (NSSC)
>
> In this case the Court considered whether a letter in which the Defendant proposed a payment plan, and subsequently sent 3 cheques to the Plaintiff, was an acknowledgement of the debt, sufficient to entitle the plaintiff to summary judgment. The Court found that there was no binding agreement between the parties arising out of their correspondence and therefore the defendant was entitled to continue with his defense.
>
> However, this case involved a consideration of the merits of the claim and the defence, and whether or not there was an arguable issue for trial. This motion is not about the acknowledgement being binding upon Mr. Rhyno at a trial on the merits – it is only about whether or not the acknowledgement is sufficient to bring into operation Section 6(1) of the *Act*.
>
> …
>
> (c) *Household Finance Corporation of Canada v Hington*, [1975] 5 WWR 609 (ABQB)

In this case the Court was asked to determine whether a wage assignment constituted an acknowledgement of debt in the context of the *Act*. The Court determined that the assignment of the wages coupled with an outstanding promissory note did not amount to a written acknowledgement.

Mr. Rhyno relies on this case as authority for the proposition that a suggestion or a logical inference that there is a debt does not constitute an acknowledgment.

Holdings says that may well be the case. However, the case here is not about a suggestion or a logical inference. It is about a clear and unequivocal statement by Mr. Rhyno that he owes money to Seafoods. There is no need to make inferences, as the plain language meaning is apparent.

(d) *Canada (Attorney General) v Simpson*, 1995 CarswellOnt 1734

In this case the Court noted that an application for interest relief on outstanding student loans did not include any particulars of the loan amount, and that the defendant would not have seen any particulars of the loan amount at the time he completed the form. The Court held that even if the form had included the particulars, it would be logical for anyone to apply for interest relief on a loan that is claimed to be outstanding, even if the amount it debated, because if that person was ultimately found to be liable for the debt at least some interest would be forgiven.

Ultimately, the Court found that "The words are too equivocal".

It is noted that in the *Simpson* case, the defendant did not ever state that he owed money to the lender – whereas in the instant case there was a clear an unequivocal statement of money in a specific amount owed by Mr. Rhyno to Seafoods.

(e) *Gibson v Canada*, 2004 FC 809

This case was overturned in *Gibson v R*, 2005 FCA 180, (leave to appeal to the Supreme Court of Canada denied, [2005] SCCA No 326). The lower Court did not consider the correct legislative provisions in rendering its decision.

In any event, the factual finding by the lower Court was the Defendant's request for a loss carry-back "cannot be read as an express acknowledgment of the tax debt claimed to be owing. Nothing in the brief cover letter from the applicant indicates acknowledgment of the debt, nor is there such acknowledgment in the forms signed by the applicant requesting the loss carry-back." (at para 17).

As noted previously, that is not the situation in the case at bar.

(f) *Ryan v Moore*, 2005 SCC 38

This case considers "acknowledgement" in the context of acknowledging the existence of a case of action, as opposed to existence of a debt. The Court stated that:

43 In order to establish confirmation, one of two events must be proven: (1) that the party acknowledged the cause of action; or (2) that there was a payment made in respect of the cause of action (see Mew, at p. 115).

44 The term "acknowledges" as used in s. 16(1)(a) of the *Limitations Act* has been described by Lord Denning in *Good v. Parry*, [1963] 2 All E.R. 59 (C.A.), at p. 61, as requiring an "admission". While care must be shown when applying English case law, as the English *Limitation Act*, 1939, 2 & 3 Geo. 6, c. 21, does not provide for the acknowledgment of the "cause of action" but the acknowledgment of the "claim", it is still persuasive authority for the present interpretation.

45 Thus, a party can only be held to have acknowledged the claim if that party has in effect admitted his or her liability to pay that which the claimant seeks to recover (see *Surrendra Overseas Ltd. v. Government of Sri Lanka*, [1977] 2 All E.R. 481 (Q.B.)). As the British Columbia Court of Appeal concluded in *Podovinikoff v. Montgomery* (1984), 1984, 1984 CanLII 52 (BC CA), 14 D.L.R. (4th) 716, at p. 721, a person can acknowledge as a bare fact that someone has asserted (by making a claim) a cause of action against him, without acknowledging any liability. Simple acknowledgment of the "existence" of a cause of action is insufficient to meet the requirements of s. 16(1)(a). Acknowledgment must involve acknowledgment of some liability.

In the instant case Mr. Rhyno's express words were "amounts **owed by me** to Mariner Seafoods Inc." This was not an acknowledgement that a claim was being made against him – indeed, at that time no claim had been made against Mr. Rhyno by Seafoods. This was an "acknowledgment of some liability" – indeed of a specific amount – owed by Mr. Rhyno to Seafoods.

(g) *Wheaton v Palmer*, 1999 CanLII 19727 (NLSCTD)

This case considered a similar situation to *Ryan*, *supra*, where the argument was made that payments made by an insurer to a plaintiff's doctor for medical reports were a sufficient acknowledgement so as to prevent a limitation defence from applying. The decision relied on here by the Defendant was overturned on appeal (2001 NFCA 43), and that appeal decision was discredited in *Ryan* (*supra*) at paragraph 47, where the Court stated,

47 The same conclusion applies to the second way that confirmation can occur, through payment. Of importance is the fact that both payments mentioned by Ryan, payments for Ryan's medical chart and Dr. Landells' medical report, were not evidence of liability by Cabot Insurance; nor did they indemnify Ryan, at least in part, for damages caused by the accident. Thus, they cannot be payments in respect of the "cause of action". Ryan relies on the Newfoundland Court of Appeal decision in *Wheaton v. Palmer* (2001), 2001 NFCA 43 (CanLII), 205 Nfld. & P.E.I.R. 304, for the proposition that a payment made to a physician, but sent to the plaintiff's solicitor will constitute confirmation. With respect, I am of the view that the Court of Appeal erred in

> this determination. I prefer the contrary position of the British Columbia Court of Appeal in *MacKay v. Lemley* (1997), 1997 CanLII 3031 (BC CA), 44 B.C.L.R. (3d) 382, at para. 21. Payment for a medical report with a cheque payable to a physician, but sent to the plaintiff's solicitor, does not constitute confirmation of the plaintiff's cause of action.
>
> The mere fact that the payment, although made payable to the doctor, was directed through the lawyer's office for forwarding does not, in my view, bring the payment into the express wording of the section. **The payment here, as in *Germyn*, was intended to pay to the doctor. The doctor was not a person through whom the appellant could claim. This was not a reimbursement to anyone for having paid for the medical report but a direct payment to the doctor by [the Insurance Corporation of British Columbia].**
>
> 48 The purpose for which these types of payments and correspondence are made is critical. In this case, they were not intended as admissions of liability, but only to promote investigation and early resolution of certain aspects of the claim.
>
> (emphasis added)
>
> Clearly, this case is distinguishable from the case at bar, as it involved payment which the Court found was made not to the plaintiff, or in respect of any liability to the plaintiff. The payment therefore could not be seen as any acknowledgement of an obligation to the plaintiff.

[35] Counsel for Mr. Rhyno says that the statements made in his affidavit have been taken out of context, because the affidavit was provided in response to a summary judgment motion. He contends that these statements were required to show that there was a material fact to be determined and therefore the matter required a trial. It was not necessary for Mr. Rhyno to swear that he owed a specific sum to Seafoods in order to demonstrate that there was a material fact in issue. As counsel for Mayfair submits, it would have been sufficient for Mr. Rhyno to swear that he had received no statements of account from Holdings. Rather, Mr. Rhyno swore an affidavit saying he did not owe any money to Holdings, and that he owed a specific amount to Seafoods.

[36] I find that Mr. Rhyno made a clear and unequivocal acknowledgement that he owed a debt to Seafoods in his January 13, 2012 Affidavit. As such, s. 6(1) of the *Limitation of Actions Act* is engaged. As of that date, the limitation period for commencing an action was restarted. Mayfair is not precluded from pursuing Seafoods' claim against Mr. Rhyno.

[37] Mayfair also seeks to amend the Statement of Claim to include allegations that actions taken by Mr. Rhyno with regard to his fishing boat, after he had

transferred ownership of that boat as security for the loan, imperiled that security and rendered it valueless.

[38] In *Garth v Halifax (Regional Municipality)*, 2006 NSCA 89, the Court stated that amendments are made by judicial discretion and states at paragraph 30:

> "The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs: *Baumhour v. Williams* (1977), 22 N.S.R. (2d) 564 (N.S. C.A.); *Consolidated Foods Corp. of Canada v. Stacey*, [1986] N.S.J. No. 356 (N.S. C.A.); *White v. Pellerine*, [1988] N.S.J. No. 191 (N.S. C.A.); *P.A. Wournell Contracting Ltd. v. Allen* (1980), 37 N.S.R. (2d) 125 (N.S. C.A.).[…]"
>
> (emphasis added)

[39] As McDougall J. noted in *Canada Assurance Co. v. Saywood*, 2010 NSSC 87, the older cases refer to the predecessor *Rule 15* but he concluded at para. 10 that, "While these cases were all decided prior to the implementation of the new rule they continue to offer guidance despite these recent changes." MacAdam J. allowed an amendment to the pleadings in *Wall v. Horn Abbot Ltd.* (2000), 183 NSR (2d) 383 (NSSC), upheld by the Court of Appeal (2000 NSCA 113) but said the following about a party's undue delay, bad faith and undue prejudice at paras. 6-7:

> A further factor considered by the courts, particularly in respect to the onus on the respective parties on an application to seek an amendment, is whether there has been undue delay in bringing the application. In this respect, Justice Davison in *Gillis Construction v. Nova Scotia Power Corp.* (1988), 86 N.S.R. (2d) 167 (N.S. T.D.), at para. 11, said:
>
> > In my opinion, where a party opposes an application for an order to amend a pleading, he must demonstrate that he would be seriously prejudiced or that an injustice would be done by the amendment. On the other hand, if there has been substantial delay in seeking an amendment which, by its nature, involves findings of fact and issues of credibility, the same principles apply as that which would apply to one who opposes an application to dismiss for want of prosecution. That is to say, the lengthy delay and the nature of the amendment raises the presumption of prejudice which must be rebutted by he who seeks the amendment.
>
> At issue, therefore, is whether the plaintiff is acting in bad faith in seeking this amendment, whether there has been undue prejudice to the defendants which cannot be compensated in costs and whether there has been undue delay in bringing this application […].
>
> (emphasis added)

[40] In his January 13, 2012 Affidavit, Mr. Rhyno swore that he understood that the loan agreement he signed with Holdings on February 7, 2009 provided that he would receive the sum of $75,000.00 in exchange for the transfer of the ownership of his fishing boat, the M/V "Kelly & Dawn" to Holdings and that if he did not repay the loan, Holdings had the right to sell the "Kelly & Dawn" and apply the proceeds to the loan.

[41] At paras. 11 and 12 of his January 13, 2012 Affidavit, Mr. Rhyno swore:

> Upon the transer [*sic*] and registration of the Kelly & Dawn in the name of Blair Aitken it was my view that he had full care and control of the said vessel on behalf of Mariner Seafoods Inc. I made no use of it after the date of transfer and expected Mr. Aitken and Mariner Seafoods Inc. to take possession of it and eventually sell it if the loan was not paid in full.
>
> At the time of the transfer the vessel was at the Sampson Boatyard in Richmond County. The Kelly & Dawn was a 55 foot deep sea crab boat of 42 tons weight. The vessel had valuable equipment on it including two hauler and sounders, pumps, plotters, two sets of batteries, a computerized black box, two life rafts and other electronic equipment. The transmission had recently been rebuilt at a cost of approximately $8, 500.00.

[42] The evidence on this motion establishes that the "Kelly & Dawn" was not in the Sampson Boatyard on the date of the transfer. Rather, the fishing boat was not taken there until September, 2007 when Mr. Rhyno delivered it there. Mr. Rhyno did indeed use the vessel after it was transferred to Seafoods. There are matters to be determined at trial by the trial judge as to the value of the "Kelly & Dawn" and the circumstances which resulted in its destruction.

[43] I find that the amendments sought have been made in good faith and Mr. Rhyno suffers no prejudice by allowing them.

Issue (3): Has there been undue delay on the part of the Plaintiff in bringing this Motion?

[44] There was some delay occasioned by Seafood's financial difficulties. Following its June 9, 2014 bankruptcy, the Trustee did not release its interest in the accounts receivables over which Mayfair's predecessor, Montague Cold Storage Inc., held security, until April 13, 2015. On July 23, 2015, counsel for Montague wrote to Mr. Rhyno's counsel advising that Montague had acquired the receivables of Seafoods and that he had instructions from Mariner to proceed with the recovery of the amount owed by Mr. Rhyno to Mariner. After this delay, the matter has

proceeded in a reasonably timely manner. I find that Mayfair has not unduly delayed bringing this motion.

CONCLUSION

[45] Mayfair is substituted for Holdings as the Plaintiff in this action.

[46] Mayfair may amend the Statement of Claim to make the allegations noted above. Mr. Rhyno may file an amended Defence to any amended Statement of Claim.

COSTS

[47] Mr. Rhyno shall pay costs to Mayfair in the amount of $1,000.00 payable within 30 calendar days of this decision.

[48] Mr. Coulthard shall provide the Court with a form of Order incorporating the terms of this decision.

Smith J.