

Amending a Pleading to Add a Claim Outside of a Limitation Period

By Allan Sattin, Q.C. and Bottom Line Research¹

Introduction

As a file develops counsel may find themselves in the situation where it is necessary to add a claim a pleading, but a limitation period has expired. When considering whether to permit the addition of a claim outside of the limitation period, a court will consider both the factors under a Rule 132 application to amend and s. 6(2) of the *Limitations Act*.

Rule 132 of the *Rules* allows amendments to be made to the pleadings at any time. In exercising their discretion under Rule 132, a court will generally allow an amendment unless:

- it would be seriously prejudicial and cannot be compensated by costs;
- it could be struck as an original pleading (eg: vexatious);
- it does not disclose a cause of action or is unrelated to a cause of action;
- it is not sufficiently particularized; or
- it would be barred under the *Limitations Act*.

Section 6(2) of the *Limitations Act* allows a new “claim” to be added outside of the limitation period if it relates to the same conduct, transaction or events as the original pleading. Case law shows that the courts interprets “claim” broadly and allow what could be termed new “causes of action” to be added where they relate to the events in the original pleadings.

The case law also shows that the threshold for meeting the requirement that the claim “relates to” the original pleadings is fairly low. It appears that so long as the claim relates generally to the events described in the original pleadings and that the pleadings would have put the opposing party on notice of the nature of the claim, the amendment will be allowed even if it falls outside

¹ With thanks to Rosalia Nastasi for her original research and writing with respect to this article.

the limitation period. Where the court finds delay or prejudice to the opposing party, costs will be awarded as compensation.

Discussion

A general statement of the law relating to amendments was set out in *C.H. S. v. Alberta (Director of Child Welfare)*, 2006 ABQB 528, [2006] A.J. No. 877, *affirmed*, 2006 ABCA 355. As is noted by Justice Slatter, the *Rules of Court* provide the court with wide latitude to allow amendments:

Rules 132 and 133 give the Court a wide power to allow amendments at almost any stage of the proceedings. As a general rule, amendments should always be allowed if they clarify the issues or claims that are being advanced. Amendments are generally only refused when:

- (a) They will create prejudice that cannot be ameliorated by costs, consequent amendments, an adjournment, or other measures.
- (b) The amendments do not disclose a cause of action and are not relevant to a cause of action.
- (c) The amendment would have been improper as an original pleading. That is, no amendment will be allowed if it could have been struck as being vexatious, embarrassing, an abuse of process, etc.
- (d) The amendment is not in proper form, or is insufficiently particularized.
- (e) The amendment is made after a limitation has passed, and does not relate to the same conduct, transaction or events as the original pleading: *Limitations Act*, R.S.A. 2000, c. L-12, s. 6.

Only a modest amount of evidence is needed to support an amendment. An amendment will only be refused based on an argument that it is "bound to fail on the merits" if it is clear that there is no genuine issue for trial, and the amended claim would not survive a summary judgment application.

Section 6 of the *Limitations Act*, R.S.A. 2000, c. L-12 provides:

Claims added to a proceeding

6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.

(2) When the added claim

(a) is made by a defendant in the proceeding against a claimant in the proceeding, or

(b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,

the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

Based on this provision, a claim can be added to a proceeding outside of the limitation period as long as it is related to the conduct, transaction or events described in the original pleadings. In order to see how this provision has been interpreted, the following cases are helpful.

In *Stolk v. 382779 Alberta Inc.*, 2005 ABQB 440, 383 A.R. 203, [2005] A.J. No. 734, the plaintiffs sought to amend their statement of claim after the expiry of a limitation period. The action by the plaintiffs concerned the faulty construction of their home and was originally filed against the builder, developer and related defendants including the City of Medicine Hat. They alleged breach of contract and negligence in their claim. After conducting discoveries the plaintiffs became aware of new documents and wished to add more particulars to their claim, including additional duties and breaches by the City and special damages. Two of the claims were potentially “new claims” that would fall outside of the limitations period; one related to an allegation that the plaintiffs were not advised the developer was not a member of the New Home Warranty Program; the other related to a claim for emotional distress.

The Court clarified that when considering whether amendments add a new claim, the wording in the *Limitations Act* must be kept in mind. A “claim” is defined broadly and is not the same as a cause of action. In the new *Limitations Act*, a new cause of action can be added after the expiry of a limitation period so long as it is related to the “claim”.

I note as a preliminary point that while the parties in this case have focused on whether or not the amendments add a new cause of action, the concept of causes of action does not appear in the current Limitations Act, which uses the broader term "claim". Claim is a defined term and means "a matter giving rise to a civil proceeding in which a claimant seeks a remedial order". As noted by Justice Clackson in *Greentree v. Martin*, 2004 ABQB 365 (at para. 13):

... I think that while the cause of action established by the amendment is different from the cause of action in the original pleading, the [Limitations] Act does not speak of causes of action, but rather events and occurrences. In my view, that is a much broader perspective.

As a result, for the purposes of whether the amendments cause injustice due to the expiration of the limitation period, the question is not whether the amendments raise a new cause of action, but whether they raise a new claim.

Stolk, at paras. 21, 22

As a result, the proposed amendments that added further details about the parties and factual background, as well as further particulars regarding the allegations of negligence and breach of contract already pled, were not a new claim. These additions did not “drastically change the focus of the original claim”, rather they “pertained to the same basic underlying facts arising from the same relationships” already described in the claim, *Stolk*, at para. 26.

As for the claims relating to the New Home Warranty Program and emotional distress, the Court found these possibly went beyond the scope of the original pleadings by adding a matter not previously contemplated. Therefore, the Court went on to consider whether the proposed amendments were related to the conduct, transaction or events described in the original pleadings. The Court noted that based on the case law, the plaintiffs did not have a particularly high threshold to meet:

The second element that must be proven under section 6(2) is that the proposed amendments are related to the conduct, transaction or events described in the original pleadings. This does not appear to be a particularly high threshold. In *Alberta v. Canadian National Railway Co. et al.* (2001), 309 A.R. 157, 2001 ABQB 984, Justice Slatter allowed an amendment to change the name of a defendant under section 6(4)(a) of the Limitations Act. Justice Slatter found that the requirement that the new claim be "related to the conduct, transaction or events described in the original pleading" was clearly met as "everything arises out of the same fire" (para. 26).

Similarly, in *Herman v. Alberta (Public Trustee)*, 2005 ABQB 337, Justice Marceau allowed the plaintiffs to amend their pleadings to include a claim for bereavement damages under the Fatal Accidents Act, R.S.A. 1980, c. F-5. Justice Marceau held that the amendment was not a new claim, but went on to consider section 6 of the Limitations Act in any event. He found that the requirements of 6(2) were met, stating (at para. 44):

There is no question that the added claim for bereavement flows from the airplane crash that caused the death of Joseph Alexander Herman, on which the original pleadings are predicated.

Stolk, at para. 36

The Court allowed the amendments, finding that the amendments were predicated on the events relating to the development, approval and construction of the plaintiffs' home, which were the same events at the heart of the original claim.

The Court also considered whether prejudice was a consideration under s. 6(2) of the *Limitations Act*, and found that it was not. However, it found that prejudice was a relevant inquiry under Rule 132 of the *Rules of Court*, which provides the court with discretion to refuse an amendment where there is prejudice or injustice. No prejudice or injustice was found on the facts of the case, as the Defendants were always aware of the underlying issues in the case and the amendments did not cause any drastic changes.

A similar analysis was used in the case of *Litemor Distributors (Edmonton) Ltd. V. Midwest Furnishings & Supplies Ltd.*, 2005 ABQB 520, 379 A.R. 102, [2005] A.J. No. 843. The issue in the case was whether the plaintiffs could amend their claim after the trial but before judgment had been given. The plaintiffs sought to alter their claim as they understood from the trial judge that their action for breach of contract may fail as it appeared they could not prove the existence of a contract. As a result, the plaintiffs wished to advance a claim of quasi-contractual quantum meruit, which would be a new cause of action outside of the limitation period. The Court considered the application of both s. 6(2) of the *Limitations Act* and Rule 132 of the *Rules of Court*.

In terms of the analysis related to the *Limitations Act*, the Court relied on the judgment in *Stolk* and other cases to find that a claim is defined broadly and that the threshold is not high to connect a new claim to the events in the original pleading.

The term "claim" is defined in s. 1(a) of the Act and means: "a matter giving rise to a civil proceeding in which a claimant seeks a remedial order."

It is unnecessary for me to decide if the contractual quantum meruit claim, or the quasi-contractual claim for that matter, is a new cause of action so long as it is clear that the proposed amendments are referable to the transaction or events described in the original pleading. As noted by Mr. Justice Clackson in *Greentree v. Martin*, 2004 ABQB 365 at para. 13:

... I think that while the cause of action established by the amendment is different from the cause of action in the original pleading, the [Limitations] Act does not speak of causes of action, but rather events and occurrences. In my view, that is a much broader perspective.

I agree with this comment made by Clackson J. and also with that made by Langston J. in *Stolk v. 382779 Alberta Inc.*, 2005 ABQB 440 at para. 36. He concluded that the requirement in s. 6(2) that the proposed amendments relate to the "conduct, transaction or events described in the original pleading" is not a particularly high threshold to be met.

Litemor at paras. 9-11

The Court then analyzed whether the quasi-contractual quantum meruit claim related to the events at issue between the parties. The Court found that underlying events, which involved the plaintiff supplying lighting fixtures to the defendant and not paying for them, were the same in the amended claim as in the breach of contract claim, so met the threshold for s. 6(2).

The Statement of Claim in the present case, as originally pleaded, alleged that the Plaintiff was a supplier of lighting fixtures, the Defendant was a general contractor, the Defendant asked the Plaintiff for credit for the cost of supplying electrical product in the construction of a commercial building and the Plaintiff orally agreed to sell and deliver the product to the site without purchase order. Further it alleges that the Defendant agreed to buy the product and to pay the Plaintiff under the terms of the Plaintiff's invoices and that pursuant to this contract the Plaintiff delivered the product to the site, the Defendant accepted delivery of it, the Plaintiff invoiced the Defendant, and in breach of the contract the Defendant refused to pay the invoices.

The proposed amendments relate to the same transaction and events: the Plaintiff's supply of electrical product to the site at the request or to the benefit of the Defendant general contractor. As a consequence, the Defendant is not entitled to immunity from suit on the basis that the limitation period has expired.

Litemor, at paras. 12, 13

The Court then went on to consider the arguments that arose in the context of the court's discretion under Rule 132, namely that there was serious prejudice and that the amendment was a hopeless case. The Court did not find merit in these arguments and allowed the amendment; however, it did order costs of the application to the defendant due to the delay in bringing the application. The Court also noted that the defendant would likely suffer some prejudice due to the trial likely being reopened, and witnesses recalled, and accordingly ordered the plaintiff to pay solicitor-client costs for one-half of the trial time to date and any further discoveries.

In *Dicorp Operations Ltd. v. Canadian International Jewellers Ltd.*, 2007 ABQB 380, 159 A.C.W.S. (3d) 361, [2007] A.J. No. 621, Justice Sanderman considered whether a plaintiff could expand its claim relating to a fraudulent former tenant in its shopping mall. The plaintiff's original claim was to recover proper rent from the tenant. The plaintiff alleged the tenant had purposely under-reported gross sales in order to pay less rent, as the rent payable was dependent on sales. The plaintiff wished to now add a claim for consequential damages, noting that the under-reporting of sales had affected the eventual sale price of the shopping mall. The defendant argued that the amendment would change the action from one for rent to one for damages.

Justice Sanderman applied Rule 132 of the *Rules of Court* and s. 6(2) of the *Limitations Act*, and allowed the amendment, noting the right to amend has been interpreted "liberally" by the courts. In this case, the plaintiff had alleged fraudulent activity on the part of the tenant and was claiming the wrongdoing caused harm in two ways. As both harms were related to the under-reporting of sales, they were related to the same events. In this sense, the question to be determined was the effect of the under-reporting on the plaintiff, and allowing the amendment would allow the plaintiff to explore its allegations fully.

The contention that allowing the amendment would substitute a new cause of action that prejudices the Defendants cannot be sustained. The request to amend the

Statement of Claim is proper. The Plaintiff has alleged fraudulent activity on the part of the Defendants. The Plaintiff claims that that activity has harmed it in two ways. The Plaintiff should be allowed to explore both allegations fully. Not only should the time frame encompassed by the Statement of Claim be expanded, but the Plaintiff may amend the Statement of Claim to properly explore the effect the alleged wrongdoing had on the sale price of the shopping centre. The real question in issue is whether there was any deliberate under-reporting, and if so, what effect did it have upon the Plaintiff's ability to collect rent and what effect did it have upon the eventual sale price of the shopping centre.

Dicorp., at para. 11.

Finally, the case of *Serdahely Trust (Trustee of) v. Serdahely Estate*, 2008 ABQB 472, 93 Alta. L.R. (4th) 151, [2008] A.J. No. 835, is an example of a case where a court denied an application under s. 6(2) of the *Limitations Act*. The plaintiff in the case sought to amend the pleadings in an estate action to add a claim for reimbursement of costs against one of the parties, a Ms. Bolt. Prior to the application to amend, Ms. Bolt had been named in the action purely for the purposes of giving her notice of the action. She was given notice as she was involved in a holograph will made by the deceased person at the centre of the estate dispute.

The Court considered whether the claim for costs was related to the conduct, transaction or events described in the original pleading. The Court reviewed the original pleadings and noted they concerned a dispute over the validity of three wills by the deceased. The only mention of Ms. Bolt in the pleadings was that the holograph will was “propounded by the plaintiff and Ms. Bolt”. All of the other pleadings related to the contents of the different wills and the administration of the estate by other parties named in the pleadings. The Court determined that the amendment seeking reimbursement was not sufficiently related to the original pleadings and that nothing in the original pleadings would have suggested to Ms. Bolt that she may have a claim pursued against her. Therefore, the application to amend was denied:

In my opinion, the proposed amendments seeking reimbursement from Ms. Bolt are not sufficiently related to the original pleadings to come within the saving provision of s. 6(2). The original pleadings deal with the assertion that there is a further will, that Johnstone J.'s decision was a nullity, and that Ms. Popke and Ms. Boykiw administered the estate without authority based on that decision. The Plaintiff's reference to having sustained costs and expenses refers to the alleged invalidity of

Madame Justice Johnstone's decision. There is nothing in the original pleadings that would have put Ms. Bolt on notice that there was a claim proposed against her. To the contrary, the original pleadings indicated that she was added solely for the purpose of giving her notice of the action.

Therefore, I find that Ms. Bolt has established that the added claim proposed in relation to her should not be permitted as the application was made after the limitation period had passed, and does not relate to the same conduct, transaction or events as the original pleading.

Serdahey, at paras. 18-19.

Conclusion

Based on the foregoing cases, it appears that when considering whether to add a claim outside of the limitation period, a court will consider both the factors under a Rule 132 application to amend and under s. 6(2) of the *Limitations Act*. In the *Limitations Act*, a new cause of action can be added after the expiry of a limitation period so long as it is related to the original pleadings. The cases of *Stolk*, *Litmor* and *Dicorp* all allowed what could be termed new causes of action to be added. Based on these cases, and keeping in mind the broad meaning to be given to the word “claim”, the analysis that a court will generally apply when considering whether to add a claim to a proceeding is as follows:

An amendment is generally allowed unless:

- a) It will create prejudice that cannot be ameliorated by costs, consequent amendments, an adjournment, or other measures.
- b) The amendments do not disclose a cause of action and are not relevant to a cause of action.
- c) The amendment would have been improper as an original pleading. That is, no amendment will be allowed if it could have been struck as being vexatious, embarrassing, an abuse of process, etc.
- d) The amendment is not in proper form, or is insufficiently particularized.
- e) The amendment is made after a limitation has passed, and does not relate to the same conduct, transaction or events as the original pleading.

END