NOVA SCOTIA COURT OF APPEAL
Citation: *Howe v. Rees*, 2024 NSCA 16

Date: 20240206
Docket: CA 519966
Registry: Halifax

Between:

Lyle Howe

Appellant

v.

Victoria Rees, Raymond Larkin, and Nova Scotia Barristers' Society

Respondents

Judge:	Justice David P. S. Farrar
Appeal Heard:	October 17, 2023, in Halifax, Nova Scotia
Subject:	*Rule* 13.03(5) -- Summary Judgment on Pleadings – Amendment of Pleadings – Abuse of Process – s. 8 of the *Limitations of Actions Act*
Summary:	The respondent, Raymond Larkin, made a motion for summary judgment on pleadings pursuant to *Rule* 13.03(5). Mr. Howe, in turn, made a motion to amend his pleadings. Neither of the respondents, Victoria Rees nor the Nova Scotia Barristers' Society, made motions for summary judgment. The motions were heard at the same time before Justice Peter Rosinski. He dismissed Mr. Howe's motion to amend his pleadings and granted summary judgment to all the respondents/defendants. He found that Mr. Howe's actions were either statute barred or an abuse of process.
Issues:	(1) Did the motion judge err in dismissing Mr. Howe's actions against the NSBS and Ms. Rees? (2) Did the motion judge err in dismissing the malicious prosecution claim against Mr. Larkin? (3) Did the motion judge err in his consideration of Mr. Howe's motion to amend his pleadings?

Result: The motion judge erred in granting summary judgment to Ms. Rees and the NSBS when he had no motion before him to do so. He also erred in making the determination of the limitation period for the malicious prosecution claim against Mr. Larkin had expired. He also erred in dismissing the malicious prosecution claim against Mr. Larkin as an abuse of process.

Finally, he erred in his consideration of Mr. Howe's motion to amend his pleadings.

Mr. Howe's appeal is allowed, the Order dismissing his actions against the respondents is set aside. Mr. Howe may bring a new motion to amend his pleadings in the Supreme Court should he wish to do so.

The costs order of the motion judge is set aside. Any costs paid by Mr. Howe to the respondents shall be returned to him. Mr. Howe shall have costs of the motion below in the amount of $6,000.00, $2,000.00 payable by each respondent.

Mr. Howe was also awarded costs of the appeal in the amount of $6,000.00, inclusive of disbursements. Again, $2,000.00 payable by each respondent.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 102 paragraphs.

NOVA SCOTIA COURT OF APPEAL
Citation: *Howe v. Rees*, 2024 NSCA 16

Date: 20240206
Docket: CA 519966
Registry: Halifax

Between:

Lyle Howe

Appellant

v.

Victoria Rees, Raymond Larkin, and Nova Scotia Barristers' Society

Respondents

Judges:	Farrar, Bryson and Bourgeois JJ.A.
Appeal Heard:	October 17, 2023, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Farrar J.A.; Bryson and Bourgeois JJ.A. concurring
Counsel:	Laura McCarthy, for the appellant, and Lyle Howe on his own behalf Michael Brooker, K.C. and Daniel Mallov, articled clerk, for the respondents Victoria Rees and Raymond Larkin Geoffrey Breen and Erin Mitchell, for the respondent Nova Scotia Barristers' Society

Reasons for judgment:

Introduction

[1] What started out as a fairly simple motion by the appellant, Lyle Howe, to amend his pleadings and a motion by the respondent, Raymond Larkin, for summary judgment on pleadings, turned into something considerably more complicated. Justice Peter Rosinski rendered a 131-page decision with 118 footnotes which denied Mr. Howe's motion to amend his pleadings and dismissed Mr. Howe's action against all the defendants. Neither Victoria Rees nor the Nova Scotia Barristers' Society (NSBS) had made a motion for summary judgment.[1]

[2] For the reasons that follow, I would allow Mr. Howe's appeal and set aside the decision and Order of the motion judge dismissing the actions against Ms. Rees and the NSBS. I would also set aside the dismissal of the malicious prosecution claim against Mr. Larkin.

[3] Further, I would set aside the motion judge's decision denying Mr. Howe's proposed amendments. Mr. Howe may bring a new motion to amend his pleadings in the Supreme Court should he decide to do so.

[4] I would reverse the costs awarded by the motion judge. Any costs paid by Mr. Howe to the respondents shall be returned to him. Mr. Howe will have costs of the motion below in the amount of $6,000.00, $2,000.00 payable by each respondent.

[5] I would award Mr. Howe costs of $6,000.00 on the appeal, inclusive of disbursements, again, $2,000.00 payable by each respondent.

Background

[6] Despite the length and complexity of the motion judge's decision, the facts of this matter are straightforward.

[7] On May 25, 2015, the NSBS charged Mr. Howe with professional misconduct and professional incompetence for allegedly violating provisions of the *Code of Professional Conduct* and the *Legal Ethics and Professional Conduct: A*

[1] *Howe v. Rees*, 2022 NSSC 230 [*Howe*].

Handbook for Lawyers in Nova Scotia, 2nd ed (Halifax: Nova Scotia Barristers' Society, 1998).

[8] The disciplinary hearing into Mr. Howe's conduct before a Panel of three members[2] commenced on December 10, 2015 and lasted for approximately a year-and-a-half, with 66 hearing dates. Final arguments were heard on April 19, 2017. On July 17, 2017, the Panel rendered its decision and found Mr. Howe guilty of professional misconduct.[3] On October 20, 2017, Mr. Howe was disbarred from the practice of law.[4]

[9] On September 1, 2016, while the disciplinary hearing was ongoing, Mr. Larkin, acting on behalf of the NSBS, made an *ex parte* application to the Complaints Investigation Committee (CIC) of the NSBS seeking the suspension of Mr. Howe in relation to new complaints against him. As a result of that application, Mr. Howe was suspended (the September 2016 suspension).

[10] Mr. Howe appealed his disbarment to this Court. In a decision dated October 24, 2019, (with the exception of the requirement that he pay the NSBS costs prior to applying for reinstatement) his appeal was dismissed.[5] The charges which resulted in the September 2016 suspension were not part of the charges considered by the Panel which disbarred Mr. Howe, nor did they form part of this Court's consideration on the 2019 appeal.

[11] On July 24, 2020, the charges resulting in Mr. Howe's September 2016 suspension were withdrawn by the CIC without a hearing.

[12] On August 31, 2020, Mr. Howe filed a Notice of Action and Statement of Claim against the NSBS, Ms. Rees and Mr. Larkin making various claims, including malicious prosecution, arising from their conduct which, he says, resulted in his September 2016 suspension.

[13] Demands for Particulars were filed by all the defendants. Mr. Howe responded to the demands and eventually defences were filed.

[14] On July 23, 2021, Mr. Larkin filed a Notice of Motion seeking an order for summary judgment on the pleadings or, alternatively, an order dismissing the

---

[2] The Panel consisted of Ronald MacDonald, K.C., Donald C. Murray, K.C. and Dr. Richard Norman.
[3] 2017 NSBS 3.
[4] 2017 NSBS 4.
[5] *Howe v. Nova Scotia Barristers' Society*, 2019 NSCA 81.

proceeding against him as an abuse of process pursuant to *Rule* 88 of the *Civil Procedure Rules*.

[15] On November 15, 2021, Mr. Howe filed a Notice of Motion to amend his pleadings.

[16] Both motions were heard together on April 1, 2022.

[17] On November 4, 2022, the motion judge rendered his decision denying the amendments by Mr. Howe and dismissing his actions against, not only Mr. Larkin, but the NSBS and Ms. Rees as well.

[18] I will provide additional factual background as needed when addressing the grounds of appeal.

Issues

[19] In both his factum and oral argument, Mr. Howe focuses on the malicious prosecution claim and its dismissal by the motion judge. He also raises the issue of the dismissal of the claims against the NSBS and Ms. Rees when there was no motion by either party before the motion judge.

[20] I will restate the issues and address them in the following order:

1. Did the motion judge err in dismissing Mr. Howe's actions against the NSBS and Ms. Rees?
2. Did the motion judge err in dismissing the malicious prosecution claim against Mr. Larkin?
3. Did the motion judge err in his consideration of Mr. Howe's motion to amend his pleadings?

Standard of Review

Issue 1

[21] Whether the motion judge could dismiss the claims against Ms. Rees and the NSBS in the absence of a motion before him is a question of law and will be reviewed on a correctness standard (*McPherson v. Campbell*, 2019 NSCA 23 at ¶18 and cases cited therein).

Issue 2

[22] In allowing Mr. Larkin's motion and dismissing the action against him for malicious prosecution on the basis it was either statute barred or an abuse of process, the motion judge was required to identify and apply the proper law. His analysis is reviewable on a correctness standard (*High Performance Energy Systems Inc v. Halifax (Regional Municipality)*, 2023 NSCA 16 at ¶34).

Issue 3

[23] Whether to allow Mr. Howe to amend his pleadings is a discretionary decision on the part of the motion judge.

[24] This Court will only intervene where there is a clear error of law or a substantial injustice (*Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89 at ¶27-28).

Analysis

Issue 1: Did the motion judge err in dismissing Mr. Howe's actions against Ms. Rees and the NSBS?

[25] In dismissing the actions against Ms. Rees and the NSBS, the motion judge relies on *Civil Procedure Rule* 13.03(5) which permits a judge to determine a question of law on a motion for summary judgment on the pleadings. He proceeded on the basis the *Rule* gave him authority to determine the limitation period for all of Mr. Howe's claims against all the defendants. Having determined the limitation period was the same for all Mr. Howe's claims and the limitation period had expired for each of these claims, the motion judge concluded that none of the claims were sustainable.

[26] With respect, the motion judge was in error in considering summary judgment on the pleadings for Ms. Rees and the NSBS when the issue was not before him.

[27] *Rule* 13.03(5) provides:

> **(5)** A judge who hears ***a motion for summary judgment on pleadings***, and who is satisfied on both of the following, may determine a question of law:

> (a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;
>
> (b) the outcome of the motion depends entirely on the answer to the question.
>
> [Emphasis added.]

[28] The motion judge's reasoning on this particular issue is, for the most part, contained in a long footnote.

[29] In his decision, the motion judge concludes:

> [73] The limitation period for all the causes of action in Mr. Howe's original Statement of Claim filed August 31, 2020, is discernible from his original pleadings and had expired long before that filing date (see *CPR* 13.03(5)). Therefore, the causes of action in the original statement of claim are dismissed as against all defendants. I wholly set aside his original Statement of Claim per *CPR* 13.03(2).[31]
>
> […]
>
> [75] I am further satisfied that his original *and* proposed amended pleadings are not sustainable because they were filed at a point after which each cause of action had been extinguished by a limitation period arising from the *LAA - Aucoin v. Venoit*, 2013 NSSC 37, per [W]ood J., as he then was.
>
> [Emphasis in original; footnote omitted.]

[30] In footnote 31, the motion judge stated:

> I conclude that I can confidently discern the discoverability dates of all causes of action from the pleadings - see *CPR* 13.03(5) which permits me to determine a question of law if I am satisfied that both the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination; and the outcome of the motion depends entirely on the answer to the question. […]

[31] Even though he identified the limitation period issue as a question of mixed fact and law, the motion judge reasoned he was in a position to determine the issue because the pleaded facts were presumed to be true on the motion for summary judgment.[6]

---

[6] *Howe* at FN 31.

[32] Within the same footnote,[7] he determined the limitation period for each of Mr. Howe's claims started to run at the same time:

> Section 8 of the *Limitation of Actions Act* […] establishes that for the present claims the limitation period is "two years from the day on which the claim is discovered"; and that "**a claim is discovered on the day on which the claimant first knew or ought reasonably to have known (a) that the injury, loss or damage had occurred; (b) that the injury, loss or damage was caused by or contributed to by an act or omission; (c) that the act or omission was that of the defendant; and (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding."**
>
> [Emphasis in original.]

[33] Further, in the same footnote,[8] the motion judge briefly discussed the law surrounding the issue of when a plaintiff knew or ought reasonably to have known of an injury, loss or damage before he determined the limitation period for all claims:

> A review of all the pleadings allows this court to conclude that Mr. Howe must have been aware of the harms he has alleged herein, as early as September 2016 and no later than the date of his disbarment on October 20, 2017. Two years thereafter is October 21, 2019. He filed his initial statement of claim on August 31, 2020. **As noted in my analysis of the tenability of [the elements of] the malicious prosecution claim, I reject his argument that the malicious prosecution claim remained unable to be considered completed, and therefore the limitation period did not begin, until the charges were withdrawn on July 24, 2020, which is when Mr. Howe characterizes them as successfully "terminated <u>in his favour</u>".**
>
> [Emphasis in original.]

[34] Based on the above, the motion judge proceeded on the basis that *Rule* 13.03(5) gave him the authority to determine the limitation period for all of Mr. Howe's claims against each of the defendants.

[35] Having found the limitation period for each of these causes of action had expired, the motion judge concluded the claims against all of the defendants were unsustainable, and he wholly dismissed the Statement of Claim.

---

[7] *Ibid* at FN 31.
[8] *Ibid* at FN 31.

[36] Absent a motion on behalf of the NSBS or Ms. Rees, *Rule* 13.03(5) is not engaged, and the motion judge erred in dismissing the claims against them.

[37] Neither the NSBS nor Ms. Rees made any submissions on the summary judgment motion. In its brief filed in response to Mr. Howe's amendment motion, NSBS specifically indicated it was not making its own motion for summary judgment:

> 3. While NSBS is not, at this time, making its own motion for summary judgment or to otherwise strike portions of Mr. Howe's Original Notice, as disclosed by NSBS' defence, it is NSBS' position that Mr. Howe's claim is limitation barred, an abuse of process and otherwise without merit. Therefore, NSBS opposes the substantial expansion of improper claims and allegations as proposed in the Amended Notice.

[38] Similarly, Ms. Rees made no submissions either orally or in writing on the summary judgment motion.

[39] Mr. Howe, in responding to the summary judgment motion, did not make submissions relating to the claims against the NSBS or Ms. Rees.

[40] The motion judge erred in considering summary judgment on the pleadings for the NSBS and Ms. Rees when it was not before him, was not raised by Ms. Rees nor the NSBS, and never addressed by Mr. Howe.

[41] As will be seen, on the summary judgment application the only issue before the motion judge was the malicious prosecution claim against Mr. Larkin. There was no basis or reason for the motion judge to embark on an analysis of any claims against the other defendants.

Issue 2: Did the motion judge err in dismissing the malicious prosecution claim against Mr. Larkin?

[42] The motion judge correctly identified the issues before him:

> [4] Before me are two motions:
>
> 1. Mr. Howe's motion seeking leave from the court to amend his pleadings; and
>
> 2. Mr. Larkin's motion for summary judgment on pleadings, and alternatively, that Mr. Howe's pleadings constitute an abuse of process pursuant to *Civil Procedure Rule* ["*CPR*"] 88.

[43] In Mr. Larkin's brief, he sought dismissal of all the claims against him, including the claims of defamation and negligence. In response to the motion, Mr. Howe conceded his actions for defamation and negligence could not succeed against Mr. Larkin. He limited his action against Mr. Larkin to malicious prosecution. In his brief filed on October 5, 2021, Mr. Howe states:

> 2. Upon reviewing the grounds for the motion received on September 24, 2021, the Plaintiff is conceding the grounds for summary judgment on the claims of negligence and defamation against the Defendant, Raymond Larkin. As such, the following issues raised in the brief of the moving party will not be addressed herein:
>
> a. No Action in negligence or defamation lies against Mr. Larkin under the statutory immunity outlined in the Legal Profession Act;
>
> b. There is no private law duty of care owed by Law Societies to disciplined members; and
>
> c. The Defamation claims are barred by the common law immunity of lawyers as advocates.
>
> 3. ***The Plaintiff is contesting the grounds of the motion as it relates to the claim of malicious prosecution against Mr. Larkin and will focus these submissions on the grounds raised by the moving party in relation to this claim.***
>
> [Emphasis added.]

[44] Before us, Mr. Howe seeks to resurrect his allegations against Mr. Larkin for negligence and defamation. In his factum, he says:

> 90. In addition, while initially conceded, the Appellant reinstates his allegations against Mr. Larkin for negligence and defamation. Mr. Larkin acted with deception an[d] ill-will, and therefore malice, in all his actions in relation to the Withdrawn Complaint and therefore is to be afforded no immunity for his words and actions in relation to the Withdrawn Complaint and associated issues.

[45] In light of his earlier concessions, Mr. Howe cannot now, on appeal, seek to resuscitate the causes of action. It would be unfair to allow him to do so. I will focus on whether summary judgment should have been granted to Mr. Larkin on the malicious prosecution claim.

[46] The high threshold for dismissing claims under *Rule* 13.03 was recognized in *Walsh v. Atlantic Lottery Corporation*, 2015 NSCA 16 where MacDonald C.J.N.S. held:

> [7] Justice LeBlanc was well aware of the heavy burden faced by the Government. It would have to establish that, assuming every alleged fact to be correct, the claim still would have no chance of success. He observed:
>
> > [16] Summary judgment on the pleadings should not be granted lightly. A party whose action is summarily dismissed under Rule 13.03 will be denied his or her day in court. The harsh nature of the remedy demands that the applicant meet a heavy burden. I must be satisfied, even after assuming that all allegations contained in the pleadings are true without the need to call evidence, that the claim "is certain to fail", or is "absolutely unsustainable" or "discloses no reasonable cause of action": *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44 at para. 17, *Cragg v. Eisener*, 2012 NSCA 101 at para. 9.

[47] Similarly, in *Cragg v. Eisener*, 2012 NSCA 101, Saunders J.A. wrote:

> [9] The approach taken when deciding a motion for summary judgment "on the pleadings" is different. There, the judge's inquiry is limited to an examination of the pleadings. No evidence on the motion is permitted. The "test" is drawn from language found in the jurisprudence involving motions to strike out pleadings. In other words, to grant summary judgment on the pleadings, the judge must be satisfied that the claim (or defence, as the case may be) "is certain to fail" or "is absolutely unsustainable" or "discloses no cause of action or basis for a defence". […]
>
> [Citations omitted.]

[48] In order to grant Mr. Larkin's motion for summary judgment, the motion judge would have to be satisfied Mr. Howe's action was "absolutely unsustainable" or "discloses no reasonable cause of action". He did so after embarking on an inquiry about the limitation period for all of the actions, including malicious prosecution.

[49] I have already set out the motion judge's error in allowing summary judgment as against the NSBS and Ms. Rees. His determination of the limitations issue is central to his dismissal of the claim for malicious prosecution against Mr. Larkin. He titled a section of his decision as follows:

> **H - Why the limitation period has expired in relation to all causes of action**
>
> **i) Why the pleadings are unsustainable on an examination of the Limitation of Actions Act, SNS 2014, c. 35 ("LAA")**
>
> [Footnote omitted.]

[50] Following this, the motion judge intertwines the issue of the determination of the limitation period with Mr. Howe's motion to amend his pleadings:

> [193] CPR 83.11(3) reads:
>
> > A judge who is satisfied on both of the following, may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:
> >
> > (a) the material facts supporting the cause are pleaded;
> >
> > (b) the amendment merely identifies, or better describes, the cause.
>
> [194] The defendants argue that, read as favourably as possible for the Plaintiff, the triggering of the running of the limitation period in relation to all the causes of action precludes Mr. Howe from pursuing any of his claimed causes of action.
>
> [195] The Society put it as follows in its brief: "As the original notice was filed August 31, 2020, the basic limitation period would preclude claims arising prior to August 31, 2018."
>
> [196] I am satisfied that the material facts necessary for my determination are entirely contained within Mr. Howe's pleadings, and that ***"the outcome of the motion depends entirely on the answer to the [limitation period] question"***.
>
> [Emphasis added.]

[51] For both motions, the motion judge was focused on the expiration of the limitation period.

[52] In both his oral and written submissions before the motion judge, Mr. Howe made it clear that the heart of the malicious prosecution action was the withdrawal of the complaints which led to the September 2016 suspension.

[53] The four-part test for malicious prosecution is set out in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 and reiterated in the case of *Miazga v. Kvello Estate*, 2009 SCC 51. It requires a plaintiff to prove the prosecution was:

(a) initiated by the defendant;

(b) terminated in favour of the plaintiff;

(c) undertaken without reasonable and probable cause; and

(d) motivated by malice or a primary purpose other than that of carrying the law into effect.[9]

---

[9] *Miazga* at ¶3.

[54] For ease of reference, I repeat the motion judge's determination in footnote 31 of when the limitation period commenced:[10]

> A review of all the pleadings allows this court to conclude that Mr. Howe must have been aware of the harms he has alleged herein, as early as September 2016 and no later than the date of his disbarment on October 20, 2017. Two years thereafter is October 21, 2019. He filed his initial statement of claim on August 31, 2020. **As noted in my analysis of the tenability of [the elements of] the malicious prosecution claim, I reject his argument that the malicious prosecution claim remained unable to be considered completed, and therefore the limitation period did not begin, until the charges were withdrawn on July 24, 2020, which is when Mr. Howe characterizes them as successfully "terminated <u>in his favour</u>".**
>
> [Emphasis in original.]

[55] With respect, although there may be some room for that argument to be made at trial in consideration of all the evidence, it is not clear on the facts as pleaded in this case the limitation period had expired at the time the action was commenced. There is ample support in the caselaw that the limitation period for malicious prosecution starts when the proceedings are terminated.

[56] In *Mark Thompson v. Attorney General of Ontario*, 2014 ONSC 3458, the court stated:

> [30] In an action for malicious prosecution, the limitation period begins to run from the date when the Plaintiff is acquitted: *R. v. Simanek*, [2006] O.J. No. 3692 (C.A.) at para. 3, leave to appeal to SCC refused [2006] S.C.C.A. No. 433, at para. 3; *Leclair v. McLellan*, [2011] O.J. No. 174 at para. 4 (S.C.J.).

[57] In *Terrigno v. Kretschmer*, 2012 ABQB 750, the Alberta Court of Queen's Bench stated:

> [10] […] the law is clear that, for time limitation purposes in malicious prosecution actions, the limitation period does not begin to run until the prosecution terminates: *Montreal (City) v Hall* (1885), 1885 CanLII 50 (SCC), 12 SCR 74 at para 13; *Simanek v Ontario*, 2006 CarswellOnt 5598 (WL Can) at para. 3 (CA).

[10] *Howe* at FN 31.

[58] That was the case, even though Mr. Terrigno was "aware much earlier of [the] conduct, that he allege[d] […] constituted the tort of malicious prosecution".[11]

[59] In *Mayor v. Hall* (1885), 12 S.C.R. 74, cited by the ABQB in *Terrigno*, the claimant started an action for damages he suffered as a result of his removal from office.[12] The claimant had been charged with fraud, but the charge was held to be unfounded on September 17, 1870.[13] In spite of the finding, he had been dismissed "for want of diligence".[14] On appeal, the finding with respect to fraud was upheld, but the judgment dismissing the claimant was reversed on September 20, 1873.[15] The claimant began his action in May 1871.[16] The court of first instance characterized the claim as an action for libel and accordingly concluded the action was barred because it was brought more than one year after the alleged libel came to the knowledge of the claimant.[17]

[60] The Supreme Court of Canada issued multiple sets of reasons, the result of which was the action was characterized as a malicious prosecution claim.[18] For that reason, the limitation period did not start to run until the impugned proceedings were concluded.[19] The Court determined the impugned proceedings were concluded when the claimant was reinstated on September 20, 1873.[20]

[61] In *Hall*, Chief Justice Ritchie explained the reasoning behind his determination with respect to the limitation period for malicious prosecution as follows:

> The complaint is simply that the defendants maliciously and without any reasonable or probable cause instituted legal proceedings with a view to the dismissal of the plaintiff and his co-commissioners from the office of commissioners on false charges of partiality, corruption and improper conduct in the discharge of their duties as such commissioners, by means of which improper proceedings and false charges the plaintiff was damnified.

---

[11] *Terrigno* at ¶10.
[12] *Hall* at p. 99.
[13] *Ibid* at pp. 82 and 106.
[14] *Ibid* at p. 82.
[15] *Ibid* at p. 82.
[16] *Ibid* at p. 84.
[17] *Ibid* at p. 83.
[18] *Ibid* at pp. 82 and 85.
[19] *Ibid* at pp. 82-83, 84-85, 105.
[20] *Ibid* at p. 83.

> ***Until the termination of the legal proceedings how could it be established whether the complaints of the defendants were well or ill-founded, whether the allegations could be proved or not?*** The defendants had the right to go on and prove them if they could.[21]
>
> [Emphasis added.]

[62] In a similar vein, Justice Gwynne explained:

> ***It is apparent that this declaration discloses what in English jurisprudence is known as an action for malicious prosecution, which consists in the prosecution by the defendant of legal proceedings of a civil or criminal nature against the plaintiff, maliciously and without probable cause***, the essential ground of the action being that a prosecution authorized by law, if the grounds which justify its being instituted exist, was carried on without any probable cause, from the absence of which malice may be, and, as said in *Johnstone v. Sutton* [1 T.R. 545] in error, most commonly is, implied. The meaning of a malicious prosecution is that a party, from a malicious motive, and without reasonable or probable cause, sets the law in motion against another; and as the want of probable cause for instituting the legal proceeding complained of is the essential foundation for the action, the termination of such proceeding in favor of the plaintiff must be alleged in the declaration.
>
> *Barber v. Lesiter* [7 C.B.N.S. 186, 190]; *Stewart v. Gromett* [7 C.B.NS. 206]; *Basébé v. Matthews* [L.R. 2 C.P. 684].
>
> ***It is obvious, therefore, that the period when prescription of such an action will begin to run cannot be until such termination. In this case that period did not certainly arrive before, and it is alleged in the declaration to have arrived, upon the delivery of the judgment of Judge Berthelot in the Superior Court upon the 17th September, 1870***, whereby the original plaintiff and Thomas S. Brown were acquitted of the calumnious charges which were made the foundation of the petition, and which in effect were pronounced to be false and without foundation or probable cause; […][22]
>
> [Emphasis added.]

[63] Justice Strong, also writing concurring reasons in *Hall*, cited the House of Lords decision in *Metropolitan Bank Ltd. v. Pooley*, 10 App. Cas. 210 [*Pooley*],[23] in support of his conclusion the limitation period for malicious prosecution should begin to run when the proceedings at issue were terminated:

---

[21] *Ibid* at pp. 82-83.
[22] *Ibid* at pp. 104-105.
[23] *Ibid* at pp. 84-85.

> The present action was instituted by Springle on the 4th of May, 1871. I am of opinion that this was in sufficient time, and that no prescription operated to bar the action. No action could have been maintained until after the judgment of Mr. Justice Berthelot dismissing the application to remove so far as it was based on charges of corruption. In saying this I do not consider that I am acting merely on a technical rule of English law, but on one which, for conclusive reasons, must be of universal application. These reasons are well stated in a recent case [*Metropolitan Bank v. Pooley* 10 App. Cas. 210] in the House of Lords by Lord Selborne L.C., as follows:
>
> > ***An action for a malicious prosecution cannot be maintained until the result of the prosecution has shown there was no ground for it.*** And it is manifestly a matter of high public policy that it should be so; otherwise, the most solemn proceedings of all our courts of justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety might be challenged by actions of this kind.
> >
> > [Emphasis added.]

[64] In the brief filed by Mr. Howe on the summary judgment motion, he referred to *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; *Chimienti v. Windsor (City)*, 2011 ONCA 16; and *MacKinnon v. Halton Regional Police Services Board*, 2020 ONSC 6908.

[65] In *Hill*, the claimants brought actions for both malicious prosecution and negligent investigation by the Police; however, the appeal was only concerned with the negligence claims.[24] The Supreme Court of Canada determined that the limitation period for the negligence claims started to run when the plaintiff was acquitted of all charges of robbery.[25]

[66] Even though the decision in *Hill* related only to the tort of negligent investigation, in *Chimienti*,[26] the Ontario Court of Appeal relied on the following reasoning in the *Hill* decision:

> [96] The limitation period for negligent investigation begins to run when the cause of action is complete. This requires proof of a duty of care, breach of the standard of care, compensable damage, and causation. A cause of action in negligence arises not when the negligent act is committed, but rather when the harmful consequences of the negligence result. (See G. Mew, *The Law of*

[24] *Hill* at ¶12.
[25] *Ibid* at ¶98.
[26] *Chimienti* at ¶13.

> *Limitations* (2nd ed. 2004), at p. 148, citing L. N. Klar et al., *Remedies in Tort* (loose-leaf), ed. by L. D. Rainaldi, vol. 4 (release 5), c. 27, at para. 217, n. 23.)
>
> [97] As discussed above, the loss or injury as a result of alleged police negligence is not established until it is clear that the suspect has been imprisoned as a result of a wrongful conviction or has suffered some other form of compensable harm as a result of negligent police conduct. The wrongfulness of the conviction is essential to establishing compensable injury in an action where the compensable damage to the plaintiff is imprisonment resulting from a wrongful conviction. In such a case, the cause of action is not complete until the plaintiff can establish that the conviction was in fact wrongful. So long as a valid conviction is in place, the plaintiff cannot do so.

[67] The court in *Chimienti* held that this line of reasoning was "directly applicable to" the case before it and applied the same limitation period for the claims of malicious prosecution and negligent investigation:

> [14] […] In *Hill*, the "compensable harm" arising from the alleged negligent police conduct consisted of the incarceration of Mr. Hill, despite the fact that the police were not directly responsible for his incarceration. While the alleged harm in this case -- the inconvenience, indignity and cost of defending a criminal charge for a 34-month period -- is different from that in *Hill*, it also is a result flowing directly from the alleged wrongful actions of the police. If Mr. Hill's incarceration was properly considered harm arising from police misconduct, I fail to see how Mr. Chimienti's prosecution could be considered too distinct from the police actions to be viewed in the same way.
>
> [15] I also have some sympathy for the appellants' policy arguments. In my view, it is unrealistic to ask a person already preoccupied with defending a criminal charge to take on the additional effort and cost of mounting a civil action, particularly given the likely unfounded but understandable concern that, in doing so, he might antagonize the police and Crown counsel. Furthermore, there is something of a logical inconsistency in asking a civil court to rule on the propriety of a criminal prosecution before the criminal court has had the opportunity to assess the merits of the underlying charge.[…]
>
> [16] For these reasons, I conclude that the motion judge erred by determining that the appellants' cause of action was complete on the date of Mr. Chimienti's arrest, March 30, 2000. ***On the contrary, Hill instructs that the cause of action was complete on the date that the charge against Mr. Chimienti was dropped, January 30, 2003.***
>
> [Emphasis added.]

[68] In *MacKinnon*, the court stated that "[t]he presumptive date on which a limitation period begins to run in respect of claims in negligence, negligent

investigation and malicious prosecution is the date on which charges were terminated in favour of a plaintiff".[27] The court determined the limitation period started to run on the date a stay of proceedings was entered by the Crown.[28] The date the stay was entered was the date the "cause of action had fully accrued. This [was] the significant date for the discoverability analysis under s. 5(1)(a)(iv) of the *Limitations Act*, and [was] the date that a plaintiff should know that a proceeding would be an appropriate means to seek a remedy".[29]

[69] The NSBS argues the cases submitted by Mr. Howe with respect to malicious prosecution were all decided in the criminal context and that the Court should differentiate "between malicious prosecution in a criminal sense and malicious prosecution for an investigation by a public regulator."[30]

[70] The underlying reasoning which supports the conclusion that the limitation period for malicious prosecution starts to run when the outcome of the impugned proceedings is known is not specific to the criminal context. Regardless of whether the impugned proceeding was civil or criminal, the individual claiming malicious prosecution cannot know those proceedings have been terminated in their favour until the outcome of the impugned proceedings is known.

[71] The claimant may be aware of the conduct which is later alleged to constitute the tort of malicious prosecution at an earlier date, but the fact the proceedings were terminated in favour of the plaintiff cannot be known or pleaded by the claimant until the outcome of the proceedings is known.

[72] The reasoning is not founded on the premise that the plaintiff should be able to ascertain the full extent of the damage before the limitation period begins to run. Rather, it is about the claimant's ability to plead facts which demonstrate a prosecution was terminated in their favour.

[73] It follows that this premise would apply equally to a claimant pursuing the tort of malicious prosecution in relation to civil proceedings. Regardless of the context, the claimant must know the proceedings were resolved in their favour before they can plead the tort of malicious prosecution. Only at that point is it possible for the plaintiff to discover the injury they have suffered was caused by conduct which meets the criteria for the tort of malicious prosecution.

---

[27] *MacKinnon* at ¶14.
[28] *Ibid* at ¶20-21.
[29] *Ibid* at ¶23.
[30] NSBS Factum at ¶113.

[74] Although I have discussed in some detail the caselaw which suggests the limitation period for malicious prosecution commences when the proceedings are terminated, I am not making the determination that the limitation period in this case commenced on the termination of the proceedings against Mr. Howe. However, it is clearly not untenable that may be the case. Indeed, it is likely to be the outcome, but that is an issue to be determined based on evidence.

[75] The motion judge also rejected outright Mr. Howe's claim the suspension proceedings were commenced by Mr. Larkin or the withdrawn complaints were terminated in favour of Mr. Howe:

> [50] Mr. Howe's pleadings could not permit an inference that the following elements of that tort have been sufficiently pleaded:
>
> 1. that Mr. Larkin *initiated* the "suspension" proceedings; and
> 2. relevant to both Ms. Rees and Mr. Larkin, that the proceeding has been terminated *in favour of* Mr. Howe; *and* that there was an absence of probable cause required *to initiate* the (interim suspension) proceeding.
>
> [51] The only significant alleged intentional misconduct/mis-statement Mr. Howe attributes to Mr. Larkin was that on September 1, 2016, Mr. Larkin "intended to have his statements [that Mr. Howe was on the record as the lawyer for the criminal defendant DE and Mr. Howe had a certificate from Nova Scotia Legal Aid to represent him] mislead the CIC into believing that [Mr. Howe] was double booked and missed the court appearance of his client DE [on one occasion only] ... to wrongfully convince the CIC that a suspension of the practice license of [Mr. Howe] was warranted in the circumstances".
>
> [52] I reject Mr. Howe's argument that the pleadings are sufficient to establish that the proceeding was "terminated *in his favour*" when the charges arising from the suspension hearing were "withdrawn" by the Society on July 24, 2020 (paragraph 36 proposed pleadings), and that therefore the limitation period only began to run at that time.
>
> [53] There is no pleading of the following:
>
> 1. a "decision" about the merits of the allegations/charges that led to his suspension;
> 2. that the charges were withdrawn because there was no basis for them having been initially made against Mr. Howe; or
> 3. that there was no basis on their merits for them to be continued.
>
> [Emphasis in original; footnotes omitted.]

[76] With respect, the motion judge was looking at the pleadings and proposed amendments for what they did not include rather than looking for what they did contain.

[77] I refer to both the pleadings and proposed amended pleadings because it is apparent from the motion judge's decision that the basis for refusing the amendments was because of his determination of the limitation issue:

> [31] Whether Mr. Howe's pleaded or proposed causes of action are considered as untenable, or unsustainable (including being extinguished by a limitation period), or are an abuse of process - they each fail.[9]

[78] Footnote 9 provides:

> Mr. Howe argued that I should determine his motion to amend his pleadings and produce a separate decision *before* dealing with Mr. Larkin's motion for summary judgment on pleadings and a finding of an abuse of process, so that Mr. Howe can make further, more informed arguments in relation to Mr. Larkin's motion. I do not find in the interests of justice to bifurcate the hearing in the manner suggested by Mr. Howe. I am satisfied that it is in the interests of justice for me to notionally first consider Mr. Howe's motion to amend his pleadings and note the parties themselves agreed with me doing so. The parties had agreed to have me hear both motions together, and I do not see any material prejudice to Mr. Howe's position by me dealing with them in one decision. Fairness considerations require me to notionally proceed with Mr. Howe's leave to amend pleadings motion before hearing the defendant's motion for summary judgment on pleadings, especially where a limitation period is in play – see for example Justice Norton's reasons in *Sears v. Top O' The Mountain Apartments Ltd.*, 2021 NSSC 80.
>
> [Emphasis in original.]

[79] Therefore, the motion judge's consideration of the proposed amendments was inextricably linked to his finding the actions were untenable because of the expiration of the limitation period or an abuse of process. (I will address abuse of process later.) The motion judge found Mr. Howe was not acting in bad faith in seeking the amendments nor would the defendants be prejudiced by them:

> [98] The jurisprudence establishes that, in exercising the discretion to grant leave (or not) to amend pleadings, a motion judge should be guided by the following general considerations:
>
> > A. *The parameters of the general rule regarding leave of the court to make amendments*

> 42 In considering whether the court should grant leave, there are three aspects to consider:
>
> 1. Is there sufficient evidence of bad faith on the part of the Southwest Group of Companies to preclude granting leave to amend?
>
> 2. Is there serious non-compensable prejudice to EllisDon flowing from granting leave to amend?
>
> 3. ***Can it be said that any part of the proposed pleadings are unsustainable or untenable in law such that leave to appeal [sic] should not be granted regarding those amendments?***
>
> [99] Firstly, the defendants do not argue that there is bad faith on the part of Mr. Howe.
>
> [100] Secondly, neither do they seriously argue that permitting the amendments will cause them serious non-compensable prejudice. I am satisfied that granting Mr. Howe leave to amend his pleadings as presently proposed will not cause any of the defendants to suffer material non-compensable prejudice.
>
> [101] My proper focus therefore should be on the third factor.[31]
>
> [Emphasis added; footnotes omitted.]

[80] In reviewing the original Statement of Claim, the reply to demand for Particulars, and the proposed amendments it is clear Mr. Howe is alleging: the NSBS through Mr. Larkin, filed for an improper purpose, charges which they knew were unsustainable; Mr. Larkin misled the CIC with respect to Mr. Howe's involvement in the subject matter giving rise to the charges; and Mr. Larkin was improperly motivated in bringing the charges and did so for a primary purpose other than carrying the law into effect.

[81] Similarly, on the pleadings, it is not untenable to infer the proceedings were terminated in Mr. Howe's favour. The proceedings were initiated in 2016, no action was taken with respect to them, no disciplinary action taken against Mr. Howe, and then, without discussion or any consultation with Mr. Howe, they were withdrawn.

[82] The motion judge's rejection of Mr. Howe's argument the proceeding was initiated by Mr. Larkin or the complaints were terminated in his favour is not a

---

[31] The motion judge is quoting from his reasons in *Southwest Construction Management Limited v. EllisDon Corporation*, 2020 NSSC 99.

rejection of an argument, but rather a finding of fact. That was not his role on the motion before him, and he was in error in so finding.

[83] Again, I am not finding the proceedings were initiated by Mr. Larkin nor am I finding they were terminated in Mr. Howe's favour. I am only concluding that on the pleadings, Mr. Howe's action is not "untenable" or "certain to fail".

[84] Mr. Howe's pleadings also provide the backdrop for what was occurring at the time the charges were brought—he was embroiled in a disciplinary hearing where he was defending himself against other charges.

[85] When considering a motion under *Rule* 13.03, the pleadings are not to be parsed, but rather are to be read in their entirety to determine whether an action is sustainable.

[86] In my view, the motion judge unfairly and improperly parsed the pleadings instead of looking at them in their totality. The fact that it took him 131 pages to render a decision on an amendment and a summary judgment motion on pleadings underscores this conclusion.

[87] The motion judge erred in making the determination that the malicious prosecution claim against Mr. Larkin was statute barred or otherwise unsustainable. These were not findings for him to make, but to be determined based on evidence.

Abuse of Process

[88] I am of the view the motion judge's determination on the issue of the limitation period influenced his decision on whether the pleadings constituted an abuse of process.

[89] The focus of the motion judge should have been on whether the actions of the parties relating to the September 2016 suspension, particularly with respect to Mr. Larkin, could constitute malicious prosecution. I have already determined the motion judge should not have gone down the road of making findings of fact with respect to the limitation period and the essential elements of the claim of malicious prosecution. This influenced his analysis with respect to the abuse of process. He was of the view the arguments being raised by Mr. Howe had been dealt with in the NSBS disbarment proceedings and by the Nova Scotia Court of Appeal.

[90] In his decision, he concluded Mr. Howe already "had his day in court":

> [282] He has had his day in court in relation to the core allegations that underlie and run through the administrative proceedings herein as well as in his existing and proposed civil suit – namely, that individual and systemic racism were at the root of how he has been treated by the Nova Scotia Barristers' Society, and specifically its agents Ms. Rees and Mr. Larkin, which ultimately led to his disbarment.
>
> [283] Though Mr. Howe argues his civil suit is focussed on his interim suspension on or about September 1, 2016, not his disbarment, the former is indivisible from the later for present purposes. They are the same proceeding – one is an interlocutory step; the other is a final step.

[91] With respect to the motion judge, they are not the same proceedings. No court or administrative tribunal has made any determination with respect to the charges that led to his September 2016 suspension. One need only ask the rhetorical questions—if it was the same proceeding and if the matters were dealt with, why would it be necessary for the NSBS to lay additional charges, seek a further remedy from the CIC, and then take the step of formally withdrawing the charges?

[92] Again, we can see from the motion judge's reasoning he is treating the cause of action as against Mr. Larkin and the other parties as one indistinguishable cause of action. It is not. Mr. Larkin was not involved in the prior proceedings before the disciplinary panel or this Court.

[93] In fairness to the motion judge, in his Statement of Claim and in his reply to the Demand for Particulars and proposed Amended Statement of Claim, Mr. Howe does plead factual matters that were addressed in the disbarment proceedings. However, as I read the pleadings, the facts are pleaded as a narrative to provide context for the September 2016 suspension. Both before the motion judge and this Court, Mr. Howe made it clear he was not seeking to relitigate what had previously been decided. However, the motion judge was of the view that is exactly what Mr. Howe was doing, again emphasizing his finding on the limitations period:

> [77] Once all the causes of action in his original statement of claim are extinguished by the limitation period, they cannot be relied upon as a springboard to permit him to file even later new claims that also relate to the same defendants, arising out of the same conduct, the same factual matrix, and involving the same core allegations.
>
> […]
>
> [79] I am further satisfied that Mr. Larkin's arguments in support of his **abuse of process** claims are persuasive in relation to all the causes of action pleaded as

> against each of the defendants - except negligence and defamation, which at their core do not involve the alleged racial discrimination and prejudice issues ("unconscionable conduct"), as argued by Mr. Howe regarding each of his other causes of action, ***which issues were amply addressed by the Society's disbarment proceedings, and by the Nova Scotia Court of Appeal.***
>
> [Emphasis added.]

[94] As Mr. Howe points out in his factum, the erroneous focus of the motion judge can be found in the following paragraphs of his decision:

> [298] Mr. Howe's Answers in February and March 2021 support the defendants' position that with his civil suit, Mr. Howe is forum shopping, in an attempt to re-litigate the core allegations he made against the defendants in his disciplinary proceedings.
>
> […]
>
> [302] I deny Mr. Howe's motion for leave to amend his existing pleadings. I grant Mr. Larkin's motion for summary judgment on the pleadings, *and* declare all the causes of action Mr. Howe claims in his original and proposed pleadings (except negligence and defamation) to constitute an abuse of process, as they violate legal doctrines such as *res judicata* (issue estoppel) and the rule against collateral attacks.
>
> [303] The upshot of my conclusions is that I dismiss Mr. Howe's original and proposed civil suits against each of the defendants.
>
> [Emphasis in original.]

[95] The motion judge mischaracterized the very narrow issue which he had to determine—namely whether the malicious prosecution cause of action was untenable.

[96] I would allow this ground of appeal.

Issue 3: Did the motion judge err in his consideration of Mr. Howe's motion to amend his pleadings?

[97] As noted earlier, the motion judge's consideration of the limitations issue influenced his consideration of Mr. Howe's proposed amendments. He concluded:

> [208] On consideration of Rule 83.11, I have concluded that I cannot grant leave to Mr. Howe to make his proposed amendments.
>
> [209] Firstly, he cannot breathe life into his original claims against the defendants (negligence, defamation, and malicious prosecution), which I have

> found are all time-barred, and reinvigorate them merely by proposing to add late new claims in 2021: see e.g. *Stout Estate v. Golinowski Estate*, 2002 ABCA 49; *Condominium Plan No. 012-5764 v. Amber Equities Inc.*, 2015 ABQB 235; *Poff v. Great Northern Data Supplies (AB) Ltd.*, 2015 ABQB 173; *WR v. Alberta (Atty. Gen.)* 2006 ABCA 219 (and references to Alberta legislation as similar to Nova Scotia in *Dyack v. Lincoln*, 2017 NSSC 187, at paragraph 49 per Chipman J.).
>
> [210] There are no remaining original claims against the defendants that have not been extinguished by the limitation period.
>
> [211] On this basis, I must refuse Mr. Howe's motion for leave to amend the pleading as against all the defendants.
>
> [212] Secondly, even if the new claims *had been* included in the original statement of claim, as they could have been, they would also be statute-barred presently.
>
> [Emphasis in original; footnote omitted.]

[98] There may be portions of the proposed amendments that are not appropriate. However, it is impossible to discern from the motion judge's decision which of the amendments may not be permissible. Mr. Howe has the right to have the proposed amendments considered in accordance with the proper application of the law. He would be well advised to tailor the allegations in any proposed amendments to the issues relating to the 2016 suspension.

[99] I would not allow the amendments Mr. Howe sought before the motion judge. However, I am satisfied that the motion judge's approach to the consideration of the amendments was in error. In particular, his consideration was influenced by his earlier findings that all of the causes of action in the original Statement of Claim were statute barred and constituted an abuse of process, both of which were in error.

Conclusion

[100] For these reasons I would allow the appeal and set aside the Order of Justice Rosinski dismissing the actions as against the NSBS and Ms. Rees and the malicious prosecution against Mr. Larkin.

[101] Mr. Howe will be entitled to bring a new motion to amend his pleadings.

[102] The costs ordered below will be reversed and any amounts paid by Mr. Howe will be returned to him. He will be entitled to costs in the amount of $6,000.00, inclusive of disbursements, on the motion below, $2,000.00 payable by

each respondent. On appeal, I would award Mr. Howe $6,000.00 in costs, inclusive of disbursements; again, $2,000.00 payable by each respondent.

Farrar J.A.

Concurred in:

Bryson J.A.

Bourgeois J.A.