

SUPREME COURT OF NOVA SCOTIA

Citation: *Rona Inc. v. Rockhard Construction Limited et al.*, 2020 NSSC 374

Date: 2020 12 22

Docket: *Hfx* No. 444114

Registry: Halifax

Between:

Rona Inc., a body corporate

Plaintiff/Applicant

- and -

Rockhard Construction Limited, formerly known as Greater Homes Construction Limited and Navid Saberi, Mina Karimpour, a.k.a. Mina Karimpour-Saberi and Ali Hadin, a.k.a. Alireza Hadian

Defendants/Respondents

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Judge: The Honourable Chief Justice Deborah K. Smith

Heard: September 18, 2020 in Halifax, Nova Scotia

Subject: Amendment of pleadings.

Summary: In October of 2015, the Plaintiff filed a Notice of Action for Debt against certain Defendants. In July of 2019, the Plaintiff applied to amend its pleadings and join one additional Defendant to the Action. For reasons unknown to the court, that motion did not proceed.

On March 4, 2020, the Plaintiff applied to join two additional parties to the Action. The Defendants (both existing and proposed) took the position that the new claims were statute-barred. In addition, they claimed that they would be prejudiced

by the amendments as they had not preserved relevant evidence.

Issues: Should the amendments be granted and the new parties added to the Action?

Result: The court analysed each of the amendments. Most claims were found to have been filed within the applicable limitation period. Those that were not were saved by s. 22 (b) of the *Limitation of Actions Act*.

In relation to the alleged lost evidence, the court noted that participation in a lawsuit that has been commenced within the applicable limitation period cannot be avoided on the basis of lost witnesses, lost evidence or faded memories. Even for the claims that were outside the limitation period, the court held that alleged lost evidence was insufficient to avoid the amendments where the proposed new Defendants were aware of the proceeding and failed to take steps to preserve evidence.

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SUPREME COURT OF NOVA SCOTIA

Citation: *Rona Inc. v. Rockhard Construction Limited et al.*, 2020 NSSC 374

Date: 20201222

Docket: Hfx No. 444114

Registry: Halifax

Between:

Rona Inc., a body corporate

Plaintiff/Applicant

- and -

Rockhard Construction Limited, formerly known as Greater Homes
Construction Limited and Navid Saberi, Mina Karimpour, a.k.a. Mina
Karimpour-Saberi and Ali Hadin, a.k.a. Alireza Hadian

Defendants/Respondents

Judge: The Honourable Chief Justice Deborah K. Smith

Heard: September 18, 2020 in Halifax, Nova Scotia

Counsel: Tim Hill, Q.C. for the Plaintiff
Derek B. Brett and Nathan D. Kaulback for the Defendants
(present and proposed)

By the Court:

[1] On October 8, 2015, the Plaintiff brought a Notice of Action for Debt against the Defendants in the amount of \$253,107.49 plus pre-judgment interest and costs. The Plaintiff who, it is suggested, previously operated under the business name Buildrite Centres Incorporated (“Buildrite”) alleged that Greater Homes Construction Limited (“GHCL”) opened a credit account with Buildrite in 1994. The Defendants, Navid Saberi, Mina Karimpour and Ali Hadin are all said to have personally guaranteed the debts and liabilities of GHCL to Buildrite.

[2] In the Notice of Action, it is alleged that GHCL became known as Rockhard Construction Limited (“Rockhard”). According to the Statement of Claim, Rockhard’s certificate of registration was revoked by the Registry of Joint Stock Companies for non-payment [of fees] in May 2007. Nevertheless, orders were said to have been placed and payments received on GHCL’s credit account until June 2015. It is suggested that, thereafter, GHCL defaulted on payment of the account.

[3] On October 28, 2015, a detailed Notice of Defence was filed on behalf of all of the Defendants. The Defendants admitted, *inter alia*, the opening of an account by GHCL with Buildrite, which, it is suggested was operating at the time by its trade name, Piercey’s Supplies (“Piercey’s”). However, the Defendants denied any and all liability to the Plaintiff. In the Statement of Defence, it is alleged that:

- In or about 2003, GHCL ceased “its business undertaking” and changed its name to Rockhard;
- In 1999, Navid Saberi’s brother, Saeid¹ Saberi, incorporated Greater Homes Inc. (“GHI”) and further, in 2011, he incorporated Greater Construction Ltd. (“GCL”). Saeid Saberi is said to have been the sole Director and Officer of both of these companies;
- GHI and GCL carried on business completely at arm’s length from GHCL, Rockhard, Navid Saberi, Mina Karimpour and Ali Hadin.

[4] It is suggested in the Statement of Defence that in his operations of GHI and GCL, Saeid Saberi commenced and continued with purchases of building materials from Piercey’s. It is alleged that these purchases had nothing to do with the present Defendants and did not benefit them. It is further alleged that Piercey’s was aware

that GHI and GCL were separate and distinct corporate and business entities from GHCL and Rockhard. Finally, it is alleged that Piercey's invoiced GHCL for building materials purchased by GHI and GCL but that these invoices were directed to GHI and GCL at their addresses and that payments for the invoices were made by GHI and GCL, not by GHCL. In essence, the Defendants allege that the Plaintiff sued the wrong corporate entities at the time that it commenced its action in 2015.²

[5] Navid Saberi was discovered by the Plaintiff on June 14, 2018. Saeid Saberi was discovered on October 23, 2018.

[6] On July 30, 2019 the Plaintiff filed a motion seeking to join Saeid Saberi to the Action and amend its Statement of Claim. Dates were offered to counsel for the hearing of the matter but, for reasons unknown to the court, the motion did not proceed at that time.

[7] On March 4, 2020, a new Notice of Motion was filed seeking to join Saeid Saberi, GCL and GHI to the Action and seeking to amend the Statement of Claim. Both the July 30, 2019 and the March 4, 2020 proposed amended Statements of Claim make new allegations against Navid and Saeid Saberi including deceit, fraudulent and negligent misrepresentation, unjust enrichment and civil conspiracy.³ These causes of action were not included in the original Notice of Action for Debt filed with the court on October 8, 2015.

[8] The Defendants (both existing and proposed) take the position that the new claims are statute-barred. The Plaintiff takes the position that the limitation period for the new claims has not expired. Alternatively, it submits that the new claims should be added pursuant s. 22 of the *Limitation of Actions Act*, SNS 2014, c. 35.⁴

LAW AND ANALYSIS

[9] Civil Procedure Rule 35.05 provides:

How a party joins further parties

35.05 A party who starts a proceeding may join a further party by amending the originating document, or notice of claim against third party, as provided in Rule 83 – Amendment

[10] Rule 35.08 provides:

Judge joining party

35.08 (1) A judge may join a person as a party in a proceeding at any stage of the proceeding.

.....

(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.

.....

[11] Amendments are dealt with in Civil Procedure Rule 83. Rule 83.02 deals with amendments of a notice in an action and 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.

.....

[12] Rule 83.04 deals with amendments to add or remove a party and provides:

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.

.....

[13] Rule 83.11 deals with amendments with by a judge and provides:

Amendment by judge

- 83.11** (1) A judge may give permission to amend a court document at any time.
- (2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.
- (3) 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.

[14] The general law relating to amendments of pleadings has been stated on a number of occasions in Nova Scotia. In *Consolidated Foods Corporation of Canada Limited v. Stacey*, (1986), 76 N.S.R. (2d) 182 (N.S.S.C. A.D.), Clarke, C.J.N.S. stated at ¶ 5:

..... the amendment should have been granted unless it was shown to the judge that the applicant was acting in bad faith or that by allowing the amendment the other party would suffer serious prejudice that could not be compensated by costs.....

[15] In *Global Petroleum Corp. v. Point Tupper Terminals Co.* (1998), 170 N.S.R. (2d) 367 (C.A.) Bateman, J.A. stated at ¶ 15:

The law regarding amendment of pleadings is not complicated: leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs. (**Baumhour et al. v. Williams et al.** (1977), 22 N.S.R. (2d) 564 ; 31 A.P.R. 564 (C.A.)).

[16] While these statements were made in relation to the Nova Scotia Civil Procedure Rules (1972), it has been held that they continue to offer guidance in relation to present Rule 83 (see, for example: *Canada Life Assurance Company v. Saywood*, 2010 NSSC 87; *M5 Marketing Communications Inc. v. Ross*, 2011 NSSC 32 and *Oldford v. Canadian Broadcasting Corporation*, 2011 NSSC 49).

[17] As is clear from the Rules, when deciding whether the Plaintiff is entitled to amend its Statement of Claim and add the proposed new Defendants to this action,

it is necessary to determine the appropriate limitation periods and whether they have expired.

[18] The *Limitations of Actions Act, supra*, (the “*Act*”) came into force on September 1, 2015. Section 8 of the *Act* deals with general limitation periods and provides:

General rules

8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of

- (a) two years from the day on which the claim is discovered; and
- (b) fifteen years from the day on which the act or omission on which the claim is based occurred.

(2) 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.

(3) For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is

- (a) in the case of a continuous act or omission, the day on which the act or omission ceases; and
 - (b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.
- 2014, c. 35, s. 8

Burden of proof

9 (1) A claimant has the burden of proving that a claim was brought within the limitation period established by clause 8(1)(a).

(2) A defendant has the burden of proving that a claim was not brought within the limitation period established by clause 8(1)(b). 2014, c. 35, s. 9.

[19] Section 22 of the *Act* governs the addition of claims brought after the expiry of a limitation period and provides:

Claims added to proceedings

22 Notwithstanding the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim

(a) is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;

(b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits; or

(c) adds or substitutes a claimant or changes the capacity in which a claimant sues, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and the addition of the claim is necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings. 2014, c.35, s.22.

[emphasis added]

[20] When dealing with this motion, I have to determine whether the Applicant is acting in bad faith and, if the amendments are allowed, whether the Defendants (present and proposed) will suffer serious prejudice that cannot be compensated for by way of costs (*Consolidated Foods, supra*). Further, I must determine whether the limitation period has expired for the bringing of these new claims and, if so, whether the amendments can be granted pursuant to s. 22 of the *Limitations of Actions Act, supra*.

[21] These questions need to be answered in relation to the present Defendants as well as the proposed new Defendants.

PRESENT DEFENDANTS

[22] The Defendants acknowledge that Rona is not acting in bad faith in requesting these amendments. That takes me to the issue of whether these Defendants will suffer serious prejudice that cannot be compensated for by way of costs if the amendments are granted.

[23] It is useful, at this stage, to consider the seriousness of the prejudice that must exist before an amendment will be denied. In *Consolidated Foods, supra*, Clarke, C.J.N.S. referred to **serious** prejudice (¶ 5). In the later case of *Global Petroleum, supra*, Bateman, J.A. referred simply to prejudice, relying on *Baumhour et al. v. Williams et al., supra*. Oddly, she did not refer to *Consolidated Foods, supra*, on this issue which was decided after *Baumhour, supra*.

[24] It is notable that in *Baumhour, supra*, Coffin, J.A. referred to the Respondents not being **unduly** prejudiced by the proposed amendment (¶ 16).

[25] In my view, Bateman, J. A. did not intend to suggest in *Global Petroleum, supra*, that an amendment will be denied if there is any prejudice that cannot be compensated for by way of costs regardless of the seriousness of that prejudice. I conclude that the prejudice must be serious enough that it would be unjust to allow the amendment.

[26] Counsel for the Defendants has referred to *Thornton v. RBC General Insurance Company*, 2014 NSSC 215, and submits that the type of prejudice the court is looking for requires a consideration of whether documents and witnesses have been lost due to the passage of time. Navid Saberi (presently a Defendant) has filed an affidavit in which he states:

9. Having thought that this matter was a routine commercial claim, I did not take steps to preserve any evidence that would clear me personally of any form of conspiracy or deceit against Rona through the credit line.
10. Saied [Saeid] and I usually communicate with one another face-to-face. I do not remember the majority of any conversations we would have had concerning the Defendant companies and their involvement with the Rona Inc. credit line.
11. If Rona Inc. had brought this claim at an earlier stage in this lawsuit, I would have taken steps to preserve evidence that would prove that my brother and I are innocent of the intentional deceit and conspiracy claims being made by Rona Inc.

[27] None of the other present Defendants have filed affidavits in response to this motion.

[28] The comments of Wood J. (as he then was) in *Thornton, supra*, were made in relation to a proceeding where the limitation period had been missed. This is significant. In my view, at this stage of the inquiry (before I have considered the

limitation issue), a consideration of lost documents and/or witnesses is not relevant. I will explain.

[29] Participation in a lawsuit that has been commenced within the applicable limitation period cannot be avoided on the basis of lost witnesses, lost documentation or faded memories. Lawsuits regularly proceed despite the fact that witnesses and parties have died, documents have been lost and memories have faded. It is notable that the *Limitation of Actions Act, supra*, allows some actions to proceed decades after a cause of action arose. For example, limitation periods do not run against a claimant who is a minor (s. 18 of the *Act*). An action on behalf of someone who is injured as an infant could therefore be brought twenty plus years after the event in question. Provided that an action is commenced within the appropriate limitation period, matters such as lost documents and faded memories do not determine one's participation in the proceeding.

[30] At this stage of the analysis (before I have considered the limitation period issue), my focus should be on the proceedings themselves. In particular, have pre-trial proceedings already taken place that will prejudice Navid Saberi or the other present Defendants if the amendments are granted, that cannot be compensated for by way of costs?

[31] In my view, nothing has occurred procedurally in relation to this action that would prejudice the present Defendants if the proposed amendments were allowed that cannot be compensated for by costs.

[32] That takes me to the issue of the limitation period.

[33] For the purpose of this decision, I will refer to the original pleadings as the "Debt Action". In the Debt Action, Rona claimed against Rockhard Construction (formerly GHCL) and Navid Saberi for payment of a debt that was said to be owed as a result of a credit account that was opened by GHCL. Navid Saberi, Mina Karimpour and Ali Hadin were all sued as personal guarantors of the debt.

[34] Pursuant to the proposed amended Statement of Claim, Rona now alleges that any attempted distinction between Navid Saberi, Saeid Saberi and GHCL, GHI and GCL is a sham and that Navid and Saeid Saberi are jointly and severally liable to the Plaintiff for the indebtedness owed by these companies to the Plaintiff. The Plaintiff asks the court to pierce the corporate veil and to impose liability on Navid and Saeid Saberi personally for any liability on the part of GHCL, GHI and GCL to the Plaintiff. In addition, as indicated, the Plaintiff's new allegations include the tort of deceit, fraudulent and negligent misrepresentation, unjust enrichment and civil

conspiracy. The question that must be answered is whether these new claims are statute-barred. In order to answer this question, it is necessary to determine when these new claims were discovered or discoverable by the Plaintiff.

[35] The common law principle of discoverability has been well settled for years. In *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, Le Dian, J. stated at ¶ 77:

..... a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence

[36] In *Smith v. Parkland Investments Limited*, 2019 NSSC 74, Jamieson, J. stated at ¶ 64:

Discoverability means knowledge of the facts that may give rise to the action. The knowledge required to start the limitation period running is more than a mere suspicion but less than exacting knowledge. The discovery of the claim does not require that Dr. Smith knew her claim against the Town was likely to succeed. The limitation period runs from when Dr. Smith had or ought to have had knowledge of a potential claim. The discovery of additional facts at a later date does not postpone the discovery of the claim.

[37] Section 8(2) of the *Act* deals with the issue of discoverability and provides:

- (2) 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.

[38] In this case, I must ask when Rona first knew or ought to have known of the facts that it relies on in support of its new claims. It is helpful to review the pleadings in order to answer this question.

[39] As indicated, the original Debt Action was filed on October 8, 2015. On October 28, 2015, a Defence was filed. The Defence is notable for its detail. The Plaintiff was put on notice that, according to the present Defendants, GHCL ceased carrying on business in or about 2003 and changed its name and that it was Saeid Saberi through his operation of GHI and GCL that commenced and continued with purchases of building materials from Piercey's. It is suggested that these purchases had nothing to do with the present Defendants and did not benefit them directly or indirectly.

[40] The discovery examination of Navid Saberi took place on June 14, 2018. His brother, Saeid, was discovered on October 23, 2018. At ¶¶ 14 and 15 of the Plaintiff's Prehearing Memorandum are numerous admissions that are said to have been made during these discovery examinations. Some of the alleged admissions do not appear to be supported by the discovery transcript. Nevertheless, I am satisfied that as a result of these discovery examinations the Plaintiff learned a great deal of additional information concerning the relationship between Navid Saberi and his brother, Saeid, and their various companies including:

- Saeid Saberi worked as a project manager for GHCL in the 1990s. As a project manager for GHCL he would/could order building materials from Piercey's;
- Greater Homes Construction Limited (GHCL), run by Navid Saberi, gave consent to Saeid Saberi to use the name Greater Homes Inc. (GHI) for one of his companies;
- There was a time when GHCL and GHI appeared to share the same address and telephone number;
- GHCL and GHI shared office space for a period of time;
- Navid Saberi had cheque signing authority for GCL (Saeid's company) throughout the time the company was operating. If money was going to suppliers (such as Piercey's), Navid Saberi would sign the cheques;
- Both GHI and GCL acquired building materials from Piercey's on credit and yet Saeid Saberi could not recall either company having an actual account at Piercey's.

[41] As indicated previously, the Plaintiff's proposed amended Statement of Claim includes a number of new causes of action. A number of these claims are directed at Navid Saberi.

[42] While it is alleged at ¶ 26 of the amended Statement of Claim that GHCL derived a benefit from the use of the credit account, that there has been a corresponding detriment to Rona and that there is no juristic reason for the enrichment, counsel for the Plaintiff has confirmed that Rona is not advancing a claim against GHCL for unjust enrichment.

[43] In addition, there do not appear to be any new claims against the other present Defendants. My focus at this stage will, therefore, be on Navid Saberi.

[44] It is important to note the basis upon which the Plaintiff claims against this Defendant in unjust enrichment. It appears from the amended pleadings (¶ 24, 25, 26 & 30 in particular) that the claim being advanced against Navid Saberi relates to the Plaintiff's allegation that GHCL, GHI and GCL are corporate shams (¶ 24); that these corporations have been unjustly enriched (¶ 26) and that the court should pierce the corporate veil and impose personal liability upon Navid (and Saeid) Saberi for any liability on the part of either of these companies to the Plaintiff (¶ 25) including liability on the basis of unjust enrichment (¶ 30). In other words, the Plaintiff is not suggesting that Navid Saberi was enriched directly, rather, it is suggesting that the companies were enriched, that they are shams and that Navid (and Saeid) Saberi should be personally responsible for any liability of the companies to Rona.

[45] I am satisfied from the evidence that has been presented that it was not until the discoveries of Navid and Saeid Saberi in 2018 that the Plaintiffs discovered or ought to have discovered the evidence that gave rise to this claim for unjust enrichment (see s. 8(2) of the *Act*). In other words, it was not until these discovery examinations that the Plaintiff learned that the various companies, while separate corporate entities, may not have been acting at arms length from one another and that there may be evidence that would support a claim to pierce the corporate veils of these corporations.

[46] The Plaintiff applied to amend its pleadings to include a claim for unjust enrichment against Navid Saberi in July of 2019, well within the applicable limitation period of two years. This claim against Navid Saberi is not statute-barred. Nevertheless, based on the general law of amendments, I must consider the issue of prejudice if the amendment is granted.

[47] The prejudice that Navid Saberi alleges is set out in ¶ 26 herein. In particular, he alleges that (1) he did not take steps to preserve evidence relating to the conspiracy or deceit claim; (2) he cannot recall the majority of any conversations that he would have had with his brother, Saeid, concerning the Defendant companies and their involvement with the Plaintiff's credit line and (3) if the Plaintiff had

brought its claim at an earlier stage, he would have taken steps to preserve evidence that would prove he and his brother innocent of the deceit and conspiracy claims being advanced by the Plaintiff. These claims by this Defendant are extremely general in nature. He does not give particulars of any specific evidence that he says has been lost.

[48] The evidence referred to in #1 and #3 above relates solely to the claims of conspiracy or deceit. At this stage, I am dealing only with the claim for unjust enrichment.

[49] As indicated previously, in my view, a claim that has been commenced within the applicable limitation period cannot be avoided based on faded memories or lost documentation. This claim has been brought within the applicable limitation period.

[50] Even if this claim had been brought outside the limitation period, once an action is commenced against a Defendant, that Defendant should be aware that the Plaintiff can amend its pleadings to include any claim arising out of the conduct, transaction or occurrence complained of. In other words, all aspects of the underlying complaint may be fully litigated even though all claims may not have been advanced in the original pleadings. As discoveries are held, documents exchanged and evidence gathered, new information may come to light that supports an amendment to the pleadings. Defendants who have been served with a notice of an action should govern themselves accordingly and preserve any evidence that may be relevant to the matter now or in the future.

[51] I am not satisfied that Navid Saberi's suggestion that he cannot remember the majority of the conversations that he and his brother would have had concerning the Defendant companies and their involvement with the Plaintiff's credit line is sufficient to deny the Plaintiff's motion to amend its pleadings to include a claim for unjust enrichment against this Defendant. Accordingly, the Plaintiff's motion to add a claim for unjust enrichment against Navid Saberi is granted.

[52] The Plaintiff has also advanced new claims against this Defendant for deceit, fraudulent and negligent misrepresentation and civil conspiracy. All of these claims arise out of information that was learned at the discovery examinations of the Saberi brothers. I am satisfied that the material facts in support of these claims were not known by the Plaintiff, nor should they have been known to the Plaintiff, until these discoveries were held in 2018 (see s. 8(2) of the *Act*). As indicated, the Plaintiff applied to amend its pleadings to include these new causes of action in July of 2019, well within the applicable limitation period of two years.

[53] Again, however, I must consider the issue of prejudice to this Defendant if the amendments are granted.

[54] Navid Saberi suggests that he did not take steps to preserve evidence relating to the claims for civil conspiracy or deceit and that if the Plaintiff had brought these claims earlier, he would have taken steps to do so.

[55] As I have indicated, as these new claims were brought within the applicable limitation period, they cannot be avoided on the basis that this Defendant failed to preserve evidence.

[56] The Plaintiff's motion to amend its pleadings to include a claim for deceit, fraudulent and negligent misrepresentation and civil conspiracy against Navid Saberi is granted.

PROPOSED DEFENDANTS

[57] The Plaintiff also seeks to add Saeid Saberi, GCL and GHI to this action. It is acknowledged that Rona is not acting in bad faith in seeking to join these new parties. That takes me to the question of whether these proposed Defendants will suffer serious prejudice that cannot be compensated for by way of costs if the amendments are granted.

[58] At this stage of the analysis (before I have considered the limitation period) my focus is on the proceedings themselves. I conclude that nothing has occurred procedurally in relation to this action that would prejudice the proposed Defendants if the amendments were granted that cannot be compensated for by costs.

[59] That takes me to the issue of limitation periods for the various new claims that have been advanced. I will deal first with the unjust enrichment claim against Saeid Saberi.

[60] The pleadings, as drafted, do not suggest that Saeid Saberi has been enriched directly. Rather, it is suggested that GHCL, GCL and GHI have been unjustly enriched, these corporations are a sham, the corporate veils should be pierced and Saeid (and Navid) Saberi should be held personally liable for any indebtedness owed by these corporations to the Plaintiff (see ¶ 44 herein). This is important in relation to the issue of when the limitation period began to run.

[61] While the Plaintiff was put on notice at the time of the filing of the Defence (October 28, 2015), that it was GCL and GHI who had apparently purchased

materials from Piercey's (not GHCL), it was not until the Saberi brothers were discovered in 2018 that it became aware of the evidence that it now relies on to argue that these corporations were shams and "mere puppets" or "alter egos" of these individuals. In my view, it was not until these discoveries that the Plaintiff knew or ought to have known the facts that gave rise to this claim for unjust enrichment against Saeid Saberi (see s. 8(2) of the *Act*).

[62] The Plaintiff applied to amend its pleadings to include a claim for unjust enrichment against this individual in July 2019, well within the applicable limitation period of two years. This claim against Saeid Saberi is not statute-barred. Nevertheless, based on the general law of amendments, I must consider the issue of prejudice to this Defendant if the amendment is granted.

[63] Saeid Saberi filed an affidavit in response to this motion in which he states:

9 I was not responsible for any of the building material supply orders that were made by the Defendant companies to Rona. These were handled by various project managers at different times. Locating these individuals would be difficult.

10 I no longer have access to Greater Homes Inc. and Greater Construction Limited's accounting software that we used to track company finances. It has been so long that I do not know where I would look to find this.

11 I no longer have access to any of Greater Homes Inc. and Greater Construction Limited's general files on our various construction projects. I would have no idea how to access these files, even if they still exist, since the Defendant companies stopped operating so long ago.

12 My brother and I primarily communicate to one another verbally. It has been so long since these companies operated that I no longer remember all of our conversations relating to the Defendant companies that dealt with Rona.

13 If I had been told that I was being sued by Rona Inc. in 2015, I would have made efforts to preserve the above evidence in order to defend myself.

[64] As I have indicated, in my view, this claim against Saeid Saberi was filed within the applicable limitation period. The fact that this individual may have difficulty locating project managers or his own companies' business records does not afford him an opportunity to avoid the litigation.

[65] I make the same findings in relation to the claims against Saeid Saberi for deceit, fraudulent and negligent misrepresentation and civil conspiracy. I find that the Plaintiff did not know (nor should it have known) of the facts that it relies on in support of these claims until the Saberi brothers were discovered in 2018 (see s. 8(2) of the *Act*). The Plaintiff's motion to include these new causes of action was filed in July of 2019, well within the two-year limitation period. The fact that Saeid Saberi may have difficulty locating certain witnesses or company files or may have difficulty remembering certain events, does not allow him to avoid participation in this proceeding. The motion to join Saeid Saberi to the action is allowed.

[66] That takes me to the proposed new claims against GCL and GHI. Counsel for Rona has confirmed that his client is claiming against both of these companies in unjust enrichment. Unlike the claims against Navid and Saeid Saberi (which rely on the allegation that the various corporations are shams), the claims against these two companies are that they benefitted directly from the use of the credit account and were unjustly enriched.

[67] In my view, on October 28, 2015, when the present Defendants served their detailed Defence, the Plaintiff was aware of the material facts that support this allegation. In that Defence, it was suggested that GHCL ceased its operations in or about 2003 and changed its name to Rockhard. It was also alleged that since that time, GHCL and Rockhard have had limited or no dealings with the Plaintiff. Further, Rona was put on notice that it was allegedly GCL and GHI that purchased building materials from the Plaintiff at the time in question, not GHCL.

[68] In my view, it was at this time that the Plaintiff discovered that these companies may have been unjustly enriched (see s. 8(2) of the *Act*).

[69] The Plaintiff's solicitor notes that the present Defendants have not yet served their Affidavit Disclosing Documents. He suggests that had they complied with the Rules and served this document on time, evidence could have been gathered and the proposed amendments could have been made earlier in the proceeding.

[70] In addition, counsel for the Plaintiff has argued that the information contained in the Defence is not evidence and that the limitation period should be held not to have begun to run until evidence was received supporting this claim at the discovery examinations of the Saberi brothers in 2018. Respectfully, I disagree.

[71] Discoverability does not rely on actual proof, but on knowledge of a potential claim. While I agree that the facts contained in the Defence are not evidence, in my

view, the detailed Defence that was filed in October of 2015 put the Plaintiff on notice of a potential claim against these new Defendants.

[72] Plaintiff's counsel has also suggested that requiring a party to commence an action before actual proof of a claim has been established exposes that party to a possible costs award if it turns out that the claim is not valid. This possibility, in my view, does not change the date that the Plaintiff knew or ought to have known of a potential claim. If a party is concerned about the issue of costs, it can arrange to gather the necessary evidence during the two years that it has to bring its action. For example, in this case, the Plaintiff could have arranged to discover the Saberi brothers shortly after the Defence was filed to ensure that the statements in the Defence were supported by evidence. In this case, those discovery examinations did not take place until the two-year limitation period had expired. (I should indicate that a different solicitor was representing the Plaintiff at this time. Mr. Hill did not become counsel for the Plaintiff until the limitation period for this claim had already lapsed).

[73] I conclude that the limitation period for a claim against GCL and GHI in unjust enrichment began to run on October 28, 2015 (when the Defence was served) and expired two years later.

[74] It was not until March 4, 2020, that the Plaintiff applied to join these two corporations to the action. This was outside of the applicable limitation period.

[75] That takes me to s. 22(b) of the *Limitation of Actions Act, supra*, which provides:

Claims added to proceedings

22 Notwithstanding the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim

.....

(b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits; or

.....

[76] The question of whether an added claim is “related” to the conduct, transaction or events described in the original pleadings has been given a broad interpretation in this province as in other provinces (see, for example, *Dyack v. Lincoln*, 2017 NSSC 187, at ¶¶ 47-55). The threshold to meet this test is not particularly high.

[77] The original claim and the proposed unjust enrichment claim against GCL and GHI arise out of the same factual matrix – the use of the credit account to purchase building materials from the Plaintiff and the subsequent non-payment of the debt. In addition, the quantum of the Plaintiff’s demand has not changed as a result of this proposed amendment. The Plaintiff continues to seek its original claim in the amount of \$253,107.49 plus interest and costs. What has changed is the basis upon which the Plaintiff says that these funds are owing and the parties that it seeks to hold responsible for the debt.

[78] The claim that the Plaintiff is advancing against these two proposed new Defendants for unjust enrichment is the same debt that it advanced in its original pleadings. I am satisfied that the unjust enrichment claim against GCL and GHI is related to the conduct, transactions or events described in the original pleadings. This part of s. 22(b) of the *Act* is complied with.

[79] What about the knowledge requirement? Did these proposed new Defendants receive, before or within the limitation period applicable to the added claims plus the time provided by law for the service of process, sufficient knowledge of the added claims that these Defendants will not be prejudiced in defending against the added claims on their merits?

[80] I have already found that the limitation period for the new claims against GCL and GHI in unjust enrichment began to run on October 28, 2015. What knowledge did these Defendants have relating to these new claims and when did they acquire this knowledge? In order to answer this question, I turn to the evidence of Navid and Saeid Saberi.

[81] As indicated, Navid Saberi was discovered on June 14, 2018. I have been provided with a copy of his discovery transcript. At p. 50 of this transcript, the following is stated:

Q. Your brother is Saeid Saberi. Correct?

A. Correct.

Q. **Have you discussed this case with him?**

A. Not really in detail. **In short, I have. I mean, I have discussed it**, but not in sit down and go over the details of the accounts and stuff.

[Emphasis added]

[82] Saeid Saberi filed an affidavit in response to this motion. At ¶¶ 4 and 6 of his affidavit he states:

4. I have worked for Navid through various companies that primarily deal with home construction projects. I have done so from 1994 to the present day.

.....

6. In my time working for these companies, **this lawsuit had been brought to my attention only very briefly when it began**. I did not know the details of the case, other than that Navid's companies were involved.

[Emphasis added]

[83] Navid and Saeid Saberi are brothers who have worked together on home construction projects through various companies since 1994. A number of companies that they have incorporated have strikingly similar names and, at times, have shared the same address and telephone number. This suggests a close working relationship between these two brothers.

[84] Saeid Saberi acknowledges at ¶ 6 of his July 21, 2020, affidavit that this lawsuit was brought to his attention "very briefly" when it began. Navid Saberi confirms that he discussed the case with his brother.

[85] The Defence that was filed in October of 2015 is extremely detailed. It establishes the facts upon which the claim for unjust enrichment against GCL and GHI is based.

[86] Saeid Saberi confirmed on discovery that he was the president of GCL and GHI for the entire time that these companies existed. These companies would gain any knowledge that they may have through their operating mind, Saeid Saberi.

[87] I am satisfied, and I find based on the evidence, that in October of 2015 Saeid Saberi was aware that that GCL and GHI had purchased building materials from the Plaintiff and that an action had been advanced by the Plaintiff in relation to the purchase of building materials and the credit account in question.

[88] I find it inconceivable that in October of 2015, when Navid and Saeid Saberi discussed this Action, that Navid would not have notified his brother of his proposed Defence suggesting that the wrong companies had been sued. I find, on a balance of probabilities, that in October of 2015 Saeid Saberi had knowledge of a possible unjust enrichment claim by the Plaintiff against GCL and GHI.

[89] In any event, Saeid Saberi clearly had notice of this claim within the time frame set out in s. 22(b) of the *Act*.

[90] I have found that the limitation period for this aspect of the claim began to run on October 28, 2015 (when the Defence was served). Section 22(b) of the *Act* requires that the proposed Defendant have knowledge of the added claim before or within the limitation period applicable to the new claim plus the time provided by law for service of the documents. The limitation period for this claim is two years. That takes us to October 28, 2017. Pursuant to Civil Procedure Rule 4.04(1), a party is given one year to serve a Notice of Action for Debt. That means that the deadline pursuant to s. 22(b) of the *Act* was October 28, 2018.

[91] Saeid Saberi was discovered in relation to this action on October 23rd, 2018. The facts that are being relied upon in support of the unjust enrichment claim were reviewed with him during that discovery examination. I am satisfied, and I find, that he had sufficient knowledge of this claim within the time prescribed by s. 22(b) of the *Act*.

[92] Saeid Saberi suggests that GCL and GHI will be prejudiced if the amendments are allowed joining them to the action. He refers in particular to difficulty locating witnesses and evidence.

[93] I have found that in October of 2015 Saeid Saberi knew of a potential claim against GCL and GHI by the Plaintiff. In my view, he cannot fail to preserve evidence relating to a possible action and then rely on that lack of evidence to avoid the action.

[94] I conclude that GCL and GHI (through their operating mind, Saeid Saberi) had sufficient knowledge of this proposed claim in October of 2015 and that they will not be prejudiced in defending this new claim on the merits.

[95] By virtue of s. 22(b) of the *Act*, Civil Procedure Rule 35.08(5) is not triggered. The Plaintiff's motion to amend the pleading and join GCL and GHI to the action is granted.

[96] The Plaintiff has been successful on this motion. It is entitled to its costs. If the parties cannot agree on costs, the Plaintiff shall file written submissions with the court by January 22nd, 2021. Reply submissions by the Defendants shall be filed with the court by February 12th, 2021.

Deborah K. Smith
Chief Justice

¹ There seems to be confusion surrounding the spelling of this gentleman's first name. His solicitor advises me that the proper spelling is "Saeid". That is the spelling that I will use in this decision.

² Neither party has referred to or relied on CPR 35.06 in relation to this motion. I have, therefore, not analysed this Rule when arriving at my decision.

³ At the hearing of the motion, I raised the issue of whether sufficient facts had been pleaded to support each of the proposed new claims. It was agreed that this issue need not be determined in this motion and that counsel are free to bring a subsequent motion relating to that issue if they deem it appropriate.

⁴ In the materials filed in support of this motion, the Plaintiff also referred to and relied on Civil Procedure Rule 83.11 (3). At the time of the hearing, counsel for the Plaintiff confirmed that his client is no longer relying on this Rule.