Court File No. **CV-24-00730869-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

TWO SHORES CAPITAL CORP.

Applicant

AND

Productivity Media Inc., Productivity Media Income Fund I LP, Productivity Media Lending Corp. I And 8397830 Canada Inc.

Respondents

APPLICATION UNDER section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, and section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43

Court File No. **CV-24-00731806-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

A N D B E T W E E N:

PRODUCTIVITY MEDIA INCOME FUND I LP, BY ITS GENERAL PARTNER, PRODUCTIVITY MEDIA INC., by its court-appointed receiver and manager, KSV RESTRUCTURING INC.

Plaintiff

AND

THE ESTATE OF WILLIAM GREGORY SANTOR BY ITS EXECUTRIX SONJA SANTOR, SONJA SANTOR, ALSO KNOWN AS SONJA NISTELBERGER, RADIANT FILMS INTERNATIONAL INC., DARK STAR PICTURES (CANADA) INC., CONCOURSE MEDIA INC., JOKER FILMS PRODUCTIONS INC., 8397830 CANADA INC., PRODUCTIVITY MEDIA RELEASING INC., PRODUCTIVITY MEDIA RENTALS INC., PRODUCTIVITY MEDIA PRODUCTIONS (CAYMAN) LTD., PROSAPIA CAPITAL MANAGEMENT CORP., PROSAPIA HOLDINGS INC., PROSAPIA PROPERTY MANAGEMENT INC., PROSAPIA WEALTH MANAGEMENT LTD., ERBSCHAFT CAPITAL CORP., STREAM. TV (CAYMAN) LTD., STARK INDUSTRIES LIMITED, JOHN DOE, MARY DOE, and ABC COMPANY

Defendants

FACTUM

(of Alan Plaunt and 1401713 Alberta Ltd.)

CLAUDIO R. AIELLO

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PART I - OVERVIEW

1 Alan Plaunt and 1401713 Alberta Ltd. (collectively ***Plaunt***) are plaintiffs in a 2023 action (the ***Plaunt Action***) that seeks recovery via a tracing and an accounting of monies originally given to Santor on terms in 2009 and 2020. Part of that action relates to a constructive trust claim over the proceeds of a settlement in another earlier action (the ***Media House Litigation*** as identified below). Those settlement proceeds consist of $2.85 million in currency plus ownership over a series of secured and unsecured loans plus entitlement to royalty payments relating to four movies.

2 The Receiver has spent months negotiating its proposed settlement agreement with Sonia Santor aka Sonja Nistelberger (**Sonja**) and now seeks Court approval for same. In a related step, the Receiver also seeks to amend the Mareva Order. Plaunt does NOT oppose the Receiver making some settlement with Sonja and does not take a position on the amount of money to be paid to Sonja in such a settlement. However, Plaunt does oppose the proposed Settlement Agreement in its current form. It improperly and dramatically impacts Plaunts' rights. The Receiver has the onus of meeting ALL of the *Soundair* principles referenced in its Factum and has failed.

3 According to counsel for the Mareva Defendants (who support approval of the proposed settlement), the proposed settlement was negotiated over a period of months. There was no consultation with Plaunt about the prosed settlement agreement. The proposed settlement was simply presented in the Third Report as a fait accompli. A significant portion of the Third Report is devoted to attacking the Plaunt Action and any entitlement Plaunt may have to assert a constructive trust over specific funds. The proposed settlement and the Third Report are a collateral attack on the Plaunt Action that defacto seek, in this extremely rushed and inappropriate process, to effectively extinguish all or at least part of the Plaunt Action as set out below.

4 The Receiver has adopted an adversarial stance towards Plaunt. Without any sworn testimony or hearing on the merits whatsoever, the Receiver asserts that the Plaunt Action is out of time based on nothing more than speculative inference from a very few cherry-picked emails taken out of context and on conjecture. The Receiver had its counsel unnecessarily assume carriage of the defence of one of the defendants in the Plaunt Action and some of the Mareva Defendants are

also present or pending named defendants in the Plaunt Action as well. Having this Court expressly or implicitly rule on the limitation period issue without a hearing on the merits would serve the interests of those parties.

5 The Receiver also argues that there is insufficient evidence for Plaunt to trace any of the settlement proceeds at issue in the Plaunt Action into any of the assets that are part of the proposed settlement but is unable to definitively say that those proceeds could not be so traced. The Receiver has access to over a million records previously secured by PricewaterhouseCooper LLP investigation, and has been conducting its own ongoing investigation for months and has records that span the time period relevant to Plaunts constructive trust claim but has only produced limited documents and information to Plaunt. Many of its responses to a recent list of questions from Plaunt, for example, are a model of deflection and opaqueness. If Plaunt is to have his claim extinguished in whole or in part, it ought to be done in a hearing on the merits on a full record.

6 Balancing his interests with the desire to secure funds now for Sonja, Plaunt believes the proper resolution of the current motions would be an Order giving Plaunt a general priority charge over all assets recovered by the Receiver pending a trial on the merits of his constructive trust claim up to the value of the Media House Litigation settlement proceeds. If he succeeds at trial, the charge will satisfy his ensuing judgement but if he fails, the charge would be released and the Receiver would distribute those funds in the ordinary course. In addition, the Plaunt Action should be transferred to the Commercial Court and thereafter be timetabled so as to proceed in a timely way. This temporary solution preserves Plaunts' rights while allowing the Receiver to put money into the hands of Sonja now and otherwise carry on with its duties.

7 Finally, in terms of the Mareva Order amendment motion, Plaunts only opposition is that it be modified to ensure that all currently captured documents and records in the time frame relevant to the Media House Litigation settlement proceeds (2017 onwards) be preserved pending his trial.

PART II - FACTS

The Plaunt Action – Parties and others

8 Alan Plaunt and 1401713 Alberta Ltd. (collectively ***Plaunt***) are plaintiffs in a 2023 action (CV-23-00696306-0000) (the ***Plaunt Action***). The named defendants fall into two groups. One group (the ***Santor Defendants***) includes the now deceased William Gregory Santor (***Santor***) and multiple companies he controlled or was otherwise involved with including Productivity Media Inc. (***PMI***), Prosapia Wealth Management Ltd. (***PWML***) and Prosapia Holdings Inc. (***PHI***). The other group (the ***Media House Defendants***) includes Media House Capital (Canada) Corp.. The Santor Defendants and the Media House Defendants have cross-claimed against each other.

9 PMI is a defendant in the Plaunt Action and a Debtor in the Receivership Application (CV-24-00730869-00CL) and a named plaintiff in the Receivers' Fraud Action (CV-24-00731806-00CL). DLA Piper (Canada) LLP (**DLA**) represents PMI in the Receivers' Fraud Action and took over PMI's defence in the Plaunt Action on January 17, 2025.

10 Santor, PWML and PHI are defendants in both the Plaunt Action and are three of the defendants in the Receivers' Fraud Action (Mareva Defendants). They are represented by Bennett Jones LLP in the Plaunt Action and by Fogler Rubinoff LLP in the Receivers' Fraud Action.

11 The Gilbert Defendants are represented in the Plaunt Action by Fasken Martineau DuMoulin LLP who also represented the Applicant, Two Shores Capital Corp., in the Receivership Application.

12 The Plaunt Action also includes Placeholder Defendants (John Doe, John doe Corp, etc.) given the nature of the claim. There is a motion pending to add named defendants which was stayed by virtue of these Commercial Court proceedings and the ensuing death of Santor. That proposed amended pleading will be redrafted so as to add more defendants based on information that has come to light in the interim.

The Plaunt Action – Nature and Status of the Claim

13 The Plaunt action has two distinct components. The first component can be characterized for the purposes of these motions only as a straightforward fiduciary recovery action. Between 2009 and 2010, Plaunt advanced a total of CDN$2,135,000 and US$2,125,000 for the production of four specific movies. The advances were to have been fully secured and repaid with profit on a last dollar in, first dollar out basis. They weren't and as late as December 2022, Santor repeatedly represented to Plaunt that he (Santor) was pursuing recovery litigation on Plaunt's behalf.

14 In fact, Santor and PMWL had been sued by Media House Capital (Canada) Corp and others and PMWL had advanced a counterclaim for some but not all of Plaunts' money (the **Media House Litigation**). Specifically, the Counterclaim sought the recovery of $3,630,000 money which was expressly pleaded, at paragraph 39, to have come from Plaunt. There is no dispute about that.

15 The second component arises out of what happened thereafter. Unbeknown to Plaunt at the time, in September 2017 Santor settled the Media House Litigation and pocketed the proceeds. Those proceeds included $2,850,000 plus the assignment of all the right tile and interest in and to various loan documents pertaining to the four movies at issue, which tile and interest included movie royalties in perpetuity (the **Media House Settlement Proceeds**). The loan documents have not yet been produced but they are itemized in the settlement documents and include several General Security Agreements. Plaunt asserts a constructive trust over all of the Media House Settlement Proceeds regardless of form or present location.

16 The Media House Settlement Proceeds were identified through a Request to Inspect settlement documents referenced in the September 2023 Statement of Defence and Crossclaim of the Gilbert Defendants. That led to a November 2023 CPC attendance to schedule a motion to preserve the settlement proceeds and amend the Statement of Claim. Given the court backlog, the return date was set for May 27, 2025. That motion did not proceed since the Commercial Court proceedings had stayed the Plaunt action and there was a Mareva Order in place.

17 Goodmans LLP had been acting for Santor and PMWL in the Media House Litigation. On October 31, 2024, Plaunt secured an Order from Frank AJ preserving the complete Goodmans file. Goodmans retained an electronic copy of their entire file and transferred the original to Bennett Jones who was then acting for all the Santor Defendants in the Plaunt Action including PMI which is now represented by DLA in that action.

18 The Media House Settlement Proceeds were apparently transmitted by the Gilbert Defendants to Goodmans or its clients in about October 2017. The Goodmans file would presumably contain information about exactly when and how and where the Media House Settlement Proceeds were transmitted. That information is in the possession or control of both the Receiver and the Mareva Defendants but has not been disclosed to Plaunt. Instead, as set out below, the Receiver has indicated that it does not know if any of those proceeds ended up in one of the bank accounts being discussed with respect to the purchase of the Studio City Condo.

The Proposed Settlement

19 The proposed settlement would entitle the Receiver to transmit to Sonjia on terms the proceeds of several assets into which the which the Media House Litigation Settlement Proceeds may be traced. The focus until now has been the Studio city Condo so the proposed settlement would extinguish the right of Plaunt to chase those proceeds later.

20 However, the assets that would be used to pay Sonja are not restricted to the Studio City Condo. The land for the Cayamn Island mansion was also purchased close enough in time to the Media House Settlement that it may have been funded at least in part by the Media House Settlement Proceeds and Plaunt is entitled to a reasonable opportunity and time to investigate that in a meaningful way. He has not been given that opportunity. Presumably the Receiver and Sonja would want Plaunts' right to chase those proceeds as well.

The Studio City Condo Exchanges

21 DLA asserts that the Receiver has a competing constructive trust claim against the Santor assets, including the Studio City property. A June 9, 2025 letter from DLA to Aiello identifies transactions made in 2016 and 2017 to support the assumption that '*It appears that* [a December 22, 2017 $2,700,000 fraudulent loan] *was the source of the funds for the purposes of Studio City*.' That is an assumption made by counsel that has not yet been the subject of a judicial determination on the merits. The itemised list of 2016 and 2017 transactions does, however, reflect the Receivers access to records in a time frame that is relevant both to the Receiver for its purposes and to Plaunt for his.

22 Appended to the June 9, 2025 letter from DLA are a few cherry picked emails involving Plaunt from 2019 and 2020 together with one page which is of unknown origin or providence. In any event, the conjecture of DLA counsel can not supersede the sworn testimony from Plaunt in an Affidavit explaining the delayed discovery of the Media House Litigation settlement that Santor had and never responded to. That conjecture is also no substitute for a judicial determination on the merits at trial on a full record.

23 DLA sent another letter and further attachments on June 24, 2025 in which, among other things, counsel asserts "***We cannot ascertain if the Media House settlement funds went into the 839 Canada bank account whether directly or indirectly***." Of course the Receiver has complete access to the Goodmans file and so could disclose to Plaunt and the Court whether it identifies when the settlement funds would have landed in the Goodmans Trust Account and where those funds were transferred to thereafter. More to the point, in the absence of evidence to the contrary, there is no way to conclude that the Media House Settlement Proceeds did not end up in that account or some other Santor controlled account.

24 The attachments include copies of two Account Statements (December 2017 and January 2018) from a single account 8397830 Canada Inc. (839) held with the National Bank of Canada together with a November 21, 2017 email and a Payment Confirmation Form refereeing a 'Book

Date' of January 2, 2018. They were presented as evidence Santors payment for the Studio City condominium from those accounts but they do not actually match up.

25 Counsel for DLA then sent a further letter and attachments on June 30th which only added to the confusion and raised more questions. Among other things, the attachments included an October 12, 2017 email chain apparently between Santor and a National Bank employee. That email chain suggests that on that day S2.8 million was deposited into an ***unidentified personal account*** that Santor had and that Santor then directed $1 million to be transferred from his personal account to an account held in the name of 839. The Receiver has not produced any bank statements for those transactions.

26 The Receiver had been given copies of seven redacted bank statements Plaunt received from Santor in the Plaunt Action. Attached to the June 30th DLA were unredacted bank statements for two of the months covered by the redacted copies. One of the unredacted bank statements (the one for December 2017) was in fact different from the redacted version. There is no indication as to why the difference exists or, frankly, who generated the changes although Santor is a likely suspect. None of that moves the needle in this motion.

PART III – POSITION OF PLAUNT

27 Plaunt takes no position on how much and when Sonja should be paid.

28 Plaunt does not take issue with the applicability of the Soundair principles but says the Receiver has the onus to establish that it has met all of them and in this case the Receiver has not done so.

28 The process by which the proposed settlement was arrived at and the process by which the Receiver seeks to push through the settlement approval completely deprives Plaunt of his entitlement to establish a tracing into specific funds and would dissipate those funds or at least some of them now.

The Limitation Period Argument

29 In terms of Plaunt, the Receiver seeks to justify the proposed settlement on the assertion that that the Action is statue barred. Whether the court makes that express finding or do so by necessary implication given the nature of the Receivers motion and relief sought, the result is the same. A rushed summary process devoid of any procedural fairness deprives Plaunt of the ability to have the discoverability tried on its merits on a full record.

30 Long before these Commercial Court proceedings began, Plaunt had explained the delayed discovery of the his claim both in his Statement of Claim and again by Affidavit which Santor never responded to or cross-examined on. At most the Receiver can say there is a triable issue but the Receiver and this court should not made any decision that effectively pre-empts that determination on its merits in whole or in part.

31 The determination of when the plaintiff acquired, or ought reasonably have acquired, knowledge of the facts on which her claim was based is a question of fact which should be left for determination by a trial judge on a full evidentiary record.[1]

The Plaunt Can't Prove a Constructive Trust or Trace Funds Argument

32 The Receiver also seeks to justify the proposed settlement by arguing that Plaunt is simply asserting late in the day speculation and in any event has not adduced sufficient evidence to trace into the Studio City Condo or other assets. This argument is exceptionally disingenuous.

33 Plaunt's pleading and the facts to date clearly establish a constructive trust with respect to the Media House Settlement Proceeds. If there is a challenge to be made to that, it too ought to be the subject of a trial on a full record.

34 As for tracing into assets late in the day, Plaunt has been kept in the dark by a sophisticated rogue who was obviously also able to defraud the large sophisticated institutional and commercial

[1] Zapfe v. Barnes, 2003 CanLII 52159 (ON CA), <https://canlii.ca/t/4s1x>

investors that were the victims of the "Fraudulent Scheme". Plaunt was not aware of the existence of the Studio City condo until these Commercial Court Proceedings came to light and continues to learn about the activities Santor engaged in as those proceedings carry on.

35 In any event, the Receiver, who has the onus to establish that the Soundair principles have been met, can not itself definitively claim that the Media House Settlement Proceeds did not end up in any of the assets at issue.

36 Plaunt does not yet have access to the voluminous records and investigatory powers of the Receiver so he attempted to get some of that information though his questions. As will be discussed during the motion, the Receiver was not particularly responsive in many areas and often just gave 'non-answer answers' that lacked substance.

37 The point is that Plaunts lack of relevant information that is within the possession or control of the Receiver and/or the Mareva Defendants should not be used to as an excuse to deprive Plaunt of his entitlement recover assets captured by his pre-existing constructive trust claim. That is especially true where, as here, the defendants to Plaunts' pre-exiting constructive trust claim participated in negotiated the proposed settlement and will benefit from it to Plaunts' detriment.

The Stay Argument

38 Both the Receiver and the Mareva Defendants argue that any opposition by Plaunt to the Receivers Settlement Approval Motion and the Receivers Mareva Discharge ought to fail because the Plaunt Action is stayed and Plaunt has not sought an order to continue. This argument fails on the following grounds.

39 First, Plaunts participation in these motions is independent of any stay affecting the Plaunt Action. As a person effected by relief sought in the two pending motions, the Receiver was obligated to notify Plaunt of the pending motions per Rule 37.07(1)[2] and the point of that

[2] 37.07 (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise.

notification requirement is to afford an "*affected party or other person*" an opportunity to address the court and yes, oppose the motions if they wish. That entitlement is independent of any stay in other litigation. The fact that the motivation for any opposition may be related to other litigation which may or may not be stayed is immaterial.

40 In this particular case, not only do the Receiver and the Mareva Defendants seek to dispose, in the absence of any hearing on the merits, of assets that may be the subject of a constructive trust, they seek an order extinguishing the rights of Plaunt in connection with those assets.

41 Secondly, the Rule 11 stay arising out of the death of Santor only applies "…*with respect to the party whose interest or liability has been transferred.*…"[3]. It does not stay the entire action. Further, in the case of a death, a continuation order ought to identify the executor or estate trustee. Santor died in the Cayman Islands. Plaunt only became aware that anyone had stepped forward for the estate given all the fraud allegations after seeing the reference to that fact in recent Notices of Motion and it was only on July 3rd, that the Receiver provided the May 15, 2025 Affidavit of Mr. R. Kaufman appending Santors' will and the March 25, 2025 Grant of Probate from the courts in the Cayman Islands. By that point, opposing the pending motions was the priority.

42 Further, Rule 11 envisions that some "*reasonable time*"[4] will naturally pass between the transmission and the time a continuation order is obtained and Rule 2.01[5] make non-compliance in

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[3] 11.01 Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the proceeding shall be stayed with respect to the party whose interest or liability has been transferred or transmitted until an order to continue the proceeding by or against the other person has been obtained.

[4] 11.03 Where a transfer or transmission of the interest of a plaintiff takes place while an action is pending and no order to continue is obtained within a reasonable time, a defendant may move to have the action dismissed for delay, and rules 24.02 to 24.05 apply, with necessary modifications.

[5] 2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
>
> (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

the interim an irregularity and not a nullity which irregularity can be fixed and not used instead to derail the determination of any issue on its merits.

43 In any event, once the Santor will was probated at the end of March, the Estate had access to the Bennett Jones file pertaining to the Plaunt Action yet it did not notify Plaunt or itself take any steps to obtain a continuation order so hiding behind that procedural irregularity is not appropriate.

RELIEF REQUESTED

44 Plaunt respectfully requests that:

a) the proposed settlement with Sonja not be approved in its current form;

b) the proposed Mareva Order amendment be modified so as to clearly continue all obligations to preserve information and records from 2017 onwards pending further order of the Court;

c) that the Plaunt Action as defined herein be transferred to the Commercial List and thereafter be timetabled;

d) that the Receiver set aside and not distribute or dissipate at least as much money and other assets as are necessary to satisfy the constructive trust component of the Plaunt action all as previously defined, which money and other assets are subject to a first charge in favour of Plaunt pending further order of the Court;

e) such further and other relief as counsel may request and or this Honourable Court may deem just.

All of which is respectfully submitted

Claudio R. Aiello

(digital signature)

Claudio R. Aiello, counsel for Plaunt

Schedule A - List of Authorities

Zapfe v. Barnes, 2003 CanLII 52159 (ON CA), https://canlii.ca/t/4s1x

Schedule B - Statutory Provisions

Rule 2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part. Rule 37.07 (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise.

Rule 11.01 Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the proceeding shall be stayed with respect to the party whose interest or liability has been transferred or transmitted until an order to continue the proceeding by or against the other person has been obtained.

Rule 11.03 Where a transfer or transmission of the interest of a plaintiff takes place while an action is pending and no order to continue is obtained within a reasonable time, a defendant may move to have the action dismissed for delay, and rules 24.02 to 24.05 apply, with necessary modifications.

Rule 37.07 (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise.

Zapfe v. Barnes; The Town of Strathroy et al., Third Parties

[Indexed as: Zapfe v. Barnes]

66 O.R. (3d) 397
[2003] O.J. No. 2856
2003 CanLII 52159
Docket No. C38413

Court of Appeal for Ontario,
Feldman, Cronk and Armstrong JJ.A.
July 14, 2003

Limitations -- Municipalities -- Discoverability -- Defendant in motor vehicle action bringing third party proceedings against two municipalities -- Plaintiff bringing motion to add municipalities as defendants in main action well after three-month limitation period in Municipal Act -- Plaintiff's solicitor swearing affidavits explaining why it was not possible for plaintiff with reasonable diligence to discover facts to form basis of claim against municipalities until examination for discovery of municipalities in third party proceeding -- Motions judge erring in dismissing motion -- Determination of when plaintiff acquired or ought reasonably to have acquired knowledge of facts on which claim against municipalities was based constituting question of fact which should be left for determination by trial judge on full evidentiary record -- Discovery of tortfeasor involving more than ascertaining identity of one who may be liable and also involving determination of any acts or omissions which constitute liability -- Municipal Act, R.S.O. 1990, c. M.45, s. 284(1), (1.1), (2), (5) -- Rules of Civil Procedure, R.R.O. Reg. 194, rules 5.04(2), 26.01.

The plaintiff was involved in a motor vehicle accident in

January 1999. She commenced a negligence action against the defendant in December 2000. At the time of the issuance of the statement of claim, the plaintiff and her solicitor had [page398] no knowledge of the possible involvement in, or responsibility for the accident of two municipalities. No mention was made in the defendant's statement of defence of the possible responsibility of third parties for the accident, or of the weather conditions at the time of the accident. In April 2001, the defendant commenced third party proceedings against one of the two municipalities, alleging that her view of the plaintiff's vehicle was obstructed by large piles of snow lining the perimeters of the parking lot and adjacent roadway as she was attempting to leave the parking lot. In July 2001, the defendant obtained an order permitting her to amend her third party claim to add the other municipality. In November 2001, the plaintiff brought a motion under Rules 5 and 26 of the Ontario Rules of Civil Procedure for an order amending her statement of claim to add the two municipalities as defendants in the main action. The motion was resisted by the municipalities on the basis that the applicable three-month limitation period under s. 284(2) of the Municipal Act, R.S.O. 1990, c. M.45 had expired. The plaintiff's solicitor swore affidavits in support of the motion explaining why it was not possible for the plaintiff to discover with reasonable diligence the facts to form the basis of a cause of action against the municipalities before the examination for discovery of the proposed defendants in the third party proceeding. That explanation was not challenged in any way by evidence from the municipalities. The motion was dismissed. The plaintiff appealed.

Held, the appeal should be allowed.

It was not clear that the motions judge considered the discoverability principle, which was raised by the plaintiff as an issue on the amendment motion. The determination of when the plaintiff acquired, or ought reasonably have acquired, knowledge of the facts on which her claim was based was a question of fact which should be left for determination by a trial judge on a full evidentiary record. The discovery of a tortfeasor involves more than ascertaining the identity of one

who may be liable; rather, it also involves the determination of any acts or omissions which constitute liability. The plaintiff's solicitor provided an unchallenged explanation for why she was unable to determine the facts about the alleged snow build-up in the relevant location on the day of the accident. There was no evidence on what steps the plaintiff could have taken to attempt to substantiate the defendant's allegations prior to discovery and the production of documents. Since both municipalities denied the facts asserted by the defendant, without an affidavit from them or cross-examination of the plaintiff's solicitor as to what inquiries could properly have been made outside the litigation process to substantiate or disprove the facts alleged by the defendant, there was no basis on the record for rejection of the evidence from the plaintiff's solicitor. The question of whether the plaintiff's solicitor was reasonably diligent could not be answered with finality. Whether the solicitor's explanation as to why no inquiries could be made prior to discoveries to substantiate or disprove the defendant's claims would survive scrutiny on cross-examination, or whether evidence existed that information was available to the plaintiff upon proper inquiry prior to her amendment motion to ground a cause of action against the municipalities, could not be determined at this stage. The municipalities should have been added as parties in the main action, with leave to the municipalities to plead the limitation period.

Cases referred to

Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161, 156 D.L.R. (4th) 222, 17 C.P.C. (4th) 219 (C.A.), revg (1997), 33 O.R. (3d) 615 (Gen. Div.); Bannon v. Thunder Bay (City), [2002] 1 S.C.R. 716, 210 D.L.R. (4th) 62, 284 N.R. 190, 27 M.P.L.R. (3d) 31, 2002 SCC 20, [2002] S.C.J. No. 18 (QL); Basarsky v. Quinlan, [1972] S.C.R. 380, 24 D.L.R. (3d) 720, [1972] 1 W.W.R. 303; [page399] Bisoukis v. Brampton (City) (1999), 46 O.R. (3d) 417, 180 D.L.R. (4th) 577, 7 M.P.L.R. (3d) 1, 1 M.V.R. (4th) 42 (C.A.), revg (1997), 42 M.P.L.R. (2d) 44 (Ont. Gen. Div.) [Leave to appeal to S.C.C. denied (2000), 261 N.R. 200n]; Burt v. LeLacheur (2000), 186 N.S.R.

(2d) 109, 189 D.L.R. (4th) 193, 581 A.P.R. 109, 49 C.P.C. (4th) 53, 6 M.V.R. (4th) 1, 2 C.C.L.T. (3d) 206, 18 C.P.C. (5th) 1, 2000 NSCA 90 (C.A.), revg in part (1999), 180 N.S.R. (2d) 88, 557 A.P.R. 88, 46 M.V.R. (3d) 230, 49 C.P.C. (4th) 69 (S.C.); Central Trust Co. v. Rafuse, [1988] 1 S.C.R. 1206, varg [1986] 2 S.C.R. 147, 75 N.S.R. (2d) 109, 31 D.L.R. (4th) 481, 69 N.R. 321, 86 A.P.R. 109, 34 B.L.R. 187, 37 C.C.L.T. 117, 42 R.P.R. 161 (sub nom. Central & Eastern Trust Co. v. Rafuse); Consumers Glass Co. v. Foundation Co. of Canada (1985), 51 O.R. (2d) 385, 9 O.A.C. 193, 20 D.L.R. (4th) 126, 30 B.L.R. 87, 33 C.C.L.T. 104, 1 C.P.C. (2d) 208 (C.A.); Deaville v. Boegeman (1984), 48 O.R. (2d) 725, 6 O.A.C. 297, 14 D.L.R. (4th) 81, 47 C.P.C. 285, 30 M.V.R. 227 (C.A.); Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, 66 B.C.L.R. 273, 10 D.L.R. (4th) 641, 54 N.R. 1, [1984] 5 W.W.R. 1, 29 C.C.L.T. 97, 26 M.P.L.R. 81; M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, 142 N.R. 321, 14 C.C.L.T. (2d) 1; Mazzuca v. Silvercreek Pharmacy Ltd. (2001), 56 O.R. (3d) 768, 207 D.L.R. (4th) 492, [2001] O.J. No. 4567 (QL), 152 O.A.C. 201, 15 C.P.C. (5th) 235 (C.A.); Peixeiro v. Haberman, [1997] 3 S.C.R. 549, 151 D.L.R. (4th) 429, 217 N.R. 371, 30 M.V.R. (3d) 41, 12 C.P.C. (4th) 255

Statute referred to

Municipal Act, R.S.O. 1990, c. M.45, s. 284(1), (1.1), (2), (5) [rep. S.O. 2001, c. 25, s. 484]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 5.04(2), 26.01

APPEAL by a plaintiff from an order dismissing a motion to amend a statement of claim to add two municipalities as party defendants.

Alan A. Farrer, for appellant.

Brian McCall, for respondent, Town of Strathroy.

Maura Helsdon, for the respondent, The Corporation of the County of Middlesex.

The judgment of the court was delivered by

[1] FELDMAN and CRONK JJ.A.: -- The appellant, Doris Zapfe, appeals from an order of Hockin J. of the Superior Court of Justice dated December 14, 2001, dismissing her motion to amend her statement of claim to add two municipalities as party defendants in a negligence action arising out of a motor vehicle accident. The primary question on this appeal is whether the commencement of the three-month limitation period established by s. 284(2) of the Municipal Act, R.S.O. 1990, c. M.45 (the "Act"), as amended, which concerns actions against municipalities for the non-repair of highways, was postponed by the operation of the discoverability principle until after the date of the appellant's [page400] amendment motion. In that event, the appellant's proposed claims against the municipalities are not statute-barred. If the limitation period had expired, however, the issue is whether the requested pleadings amendment should have been permitted in the exercise of the court's discretion under rules 5.04(2) and 26.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

[2] For the reasons that follow, we would allow the appeal with leave to the respondents to plead the expiry of the limitation period under s. 284(2) of the Act.

I. BACKGROUND

[3] On January 5, 1999, the appellant's motor vehicle collided with a vehicle driven by Aileen Mary Barnes while Barnes was exiting a parking lot in Strathroy, Ontario. The appellant commenced an action in negligence against Barnes on December 22, 2000, claiming damages for personal injuries allegedly sustained by her in the accident. At the time of the issuance of her statement of claim, the appellant and her solicitor had no knowledge of the possible involvement in or

responsibility for the accident of The Town of Strathroy ("Strathroy") or The Corporation of the County of Middlesex ("Middlesex").

[4] Barnes delivered her statement of defence on March 29, 2001. She denied the appellant's claims and asserted that the appellant's own negligence was the cause of the accident. No mention was made in Barnes' statement of defence of the possible responsibility of third parties for the accident, or of the weather conditions at the time of the accident.

[5] Subsequently, on April 3, 2001, Barnes commenced third party proceedings against Strathroy (wrongly named, initially, as The Township of Strathroy-Caradoc) and The Royal Canadian Legion, Sir Arthur Currie Branch 116 (the "Legion"). Barnes alleged in her third party claim that her view of the appellant's vehicle was obstructed by large piles of snow lining the perimeters of the parking lot and the adjacent roadway as she was attempting to leave the parking lot. She claimed that the parking lot was owned by the Legion, the snow was on lands occupied by Strathroy and the Legion, and they failed to properly maintain the roadway. She sought contribution and indemnity from the third parties for any sums for which she might be found liable to the appellant at trial, or which might be advanced to the appellant by way of settlement.

[6] Barnes' third party claim was served on the appellant or her solicitor on or about April 3, 2001.

[7] On July 4, 2001, Barnes brought a motion seeking to amend her third party claim to add Middlesex as a third party. Barnes' [page401] supporting motion record contained a letter from her adjusters dated May 16, 2001, in which it was suggested that Middlesex was responsible for the roadway and that Strathroy was responsible for the adjacent sidewalks.

[8] On July 31, 2001, Barnes obtained an order permitting her to amend her third party claim to add Middlesex as a third party. Barnes alleged in her amended claim that Middlesex and/or Strathroy were negligent for failing to maintain the

roadway by ensuring that the snow banks lining the street were reduced to such a level as to permit clear vision of the roadway by motorists. She further alleged that Middlesex was responsible for maintenance of the roadway and that Strathroy was responsible for maintenance of the sidewalks. Barnes also repeated her earlier allegation that her view of the roadway was obstructed by large piles of snow at the time of the accident. As a result, she sought contribution and indemnity from Strathroy, the Legion and Middlesex.

[9] On September 26, 2001, Strathroy delivered a defence to the third party claim and to the appellant's statement of claim. Middlesex followed suit on October 15, 2001. In those pleadings, the municipalities denied any negligence or responsibility for the accident. They also denied any knowledge of the condition of the roadway and the sidewalks at the time of the accident, including any knowledge of a snow build-up.

[10] On or about November 5, 2001,1 the appellant brought a motion under Rules 5 and 26 of the Rules of Civil Procedure for an order amending her statement of claim to add the third parties as defendants in the main action. In her proposed amended pleading, she alleged that the two municipalities breached their duty to repair a highway by failing to remove the snow on the roadway and the sidewalks where the accident occurred. The appellant's motion was resisted by Strathroy and Middlesex on the basis that the applicable three-month limitation period under s. 284(2) of the Act2 had expired.

[11] The appellant's solicitor swore two affidavits in support of the appellant's amendment motion. In her affidavits, the solicitor, who is an experienced litigation counsel, explained why it [page402] was not possible for the appellant to discover, with reasonable diligence, the facts to form the basis of a cause of action against the municipalities before the examination for discovery of the proposed defendants in the third party proceeding. First, she stated that the appellant had no knowledge of the snow banks which Barnes alleged, in her third party claim, blocked her view and caused her to hit the appellant's car. Second, she said that she knows only the allegations made by Barnes, which are denied by the third

parties in their pleadings. Further, because of the Rules of Civil Procedure, she asserted that she cannot obtain any information directly from the proposed parties except within the litigation process. Consequently, she has only Barnes' allegations, of which she learned only upon service of the third party claim, but no facts to substantiate those allegations.

[12] The appellant's solicitor was not cross-examined on her affidavits; nor did the municipalities file any affidavit materials in response to her affidavits. Accordingly, the evidence of the appellant's solicitor is uncontradicted on the record before this court.

[13] No examinations for discovery have been held to date in the main action or in the third party proceeding.

II. THE DECISION OF THE MOTIONS JUDGE

[14] The appellant's motion was argued before Hockin J. of the Superior Court of Justice on December 14, 2001. For reasons dated June 3, 2002, the motions judge dismissed the motion in relation to Strathroy and Middlesex and granted the requested amendment concerning the Legion. The Legion did not appear on the motion and does not appear to have contested it.

[15] In dismissing the appellant's motion concerning the two municipalities, the motions judge observed that the effect of the requested amendment, if granted, would be to add Strathroy and Middlesex as party defendants after the expiry of the applicable limitation period. In that regard, ss. 284(1), (1.1), (2) and (5) of the Act provided at the relevant time:

> 284(1) The council of the corporation that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in light of all the circumstances, including the character and location of the highway or bridge.
>
> (1.1) In case of default, the corporation, subject to the Negligence Act, is liable for all damages any person sustains

because of the default.

. . . . .

(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of a reasonable state of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained. [page403]

. . . . .

(5) No action shall be brought for the recovery of the damages mentioned in subsection (1) unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered mail to the head or the clerk of the corporation, in the case of a county or township within ten days, and in the case of an urban municipality within seven days, after the happening of the injury, nor unless, where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time. S.O. 1996, c. 32, s. 54.

III. ISSUES

[16] There are two issues on this appeal: (i) has the commencement of the limitation period under s. 284(2) of the Act been postponed by the operation of the discoverability principle; and (ii) if the limitation period had expired by the date of the appellant's amendment motion, should the appellant's requested pleadings amendment nonetheless have been permitted in the exercise of the court's discretion?

IV. ANALYSIS

(1) The Application of the Discoverability Principle

[17] It is common ground that the three-month limitation period under s. 284(2) of the Act applies to the claims sought

to be advanced by the appellant against Strathroy and Middlesex. The limitation period expired naturally on April 5, 1999, three months after the date of the accident, unless the discoverability principle operates to postpone the commencement of the limitation period to, at least, until after the appellant's motion to amend her statement of claim was brought at the beginning of November 2001.

[18] The discoverability principle was described by Justice Le Dain in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, at p. 224 S.C.R. in the following terms:

> [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.

See also Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641.

[19] The discoverability principle is an interpretive tool of general application which guides the interpretation of limitations statutes. Consideration of whether it applies in a given case is concerned with balancing fairness for both the plaintiff and the proposed defendant. On the one hand, the plaintiff, through no lack of diligence, is unaware of her cause of action prior to the [page404] natural expiry date of the limitation period. In those circumstances, the principle is designed to avoid the injustice of precluding an action or claim before the plaintiff is in a position to commence proceedings. On the other hand, the proposed defendant is entitled to reasonably rely upon limitations statutes in the ordering of its affairs. Application of the discoverability principle postpones the running of a limitation period and therefore precludes the proposed defendant from relying on the protection of the natural expiration of a limitation period: Peixeiro v. Haberman, [1997] 3 S.C.R. 549, 151 D.L.R. (4th) 429. See also Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161, 156 D.L.R. (4th) 222 (C.A.), and Consumers Glass Co. v. Foundation Co. of Canada (1985), 51 O.R. (2d) 385, 20 D.L.R. (4th) 126 (C.A.).

[20] The need for the balancing of those competing fairness concerns was confirmed by the Supreme Court of Canada in M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289. In that case, La Forest J., writing for a majority of the court, described the policy reasons for statutory limitations of suits from the perspective of a potential defendant. They include: (i) recognition of the fact that there comes a time when a proposed defendant may reasonably expect that it will not be held to account for past obligations (at para. 22); (ii) the desirable objective of foreclosing claims based on stale evidence, that is, once a limitation period has expired, the potential defendant should be relieved from the need to preserve evidence relevant to the claim (at para. 23); and (iii) the important public benefit to be achieved by requiring plaintiffs to act diligently and not to "sleep on their rights", thus fostering the timely commencement of suits and closure of claims (at para. 24). At the same time, however, as observed by La Forest J., at para. 27, "[F]airness to the plaintiff must also animate a principled approach to determining the accrual of a cause of action."

[21] In Peixeiro, Major J. emphasized the requirement for fairness to plaintiffs, but also underscored their due diligence obligations (at para. 39):

> In balancing the defendant's legitimate interest in respecting limitations periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration. The diligence rationale would not be undermined by the application of the discoverability principle as it still requires reasonable diligence by the plaintiff.

[22] It is not contested that the discoverability principle applies to s. 284(2) of the Act. The principle has been judicially recognized to apply to the limitation of actions against municipalities, including limitations established by the Act: Peixeiro, supra; [page405] Bannon v. Thunder Bay

(City), [2002] 1 S.C.R. 716, 210 D.L.R. (4th) 62; and Bisoukis v. Brampton (City) (1999), 46 O.R. (3d) 417, 180 D.L.R. (4th) 577 (C.A.), leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 52.

[23] Rather, the appellant asserts here that the effect of the application of the discoverability principle is to postpone, to the date of the examinations for discovery, the commencement of the limitation period under s. 284(2) of the Act. In contrast, the respondents submit that application of the discoverability principle is irrelevant in this case because the appellant was aware of a potential cause of action as against Strathroy by April 1, 2001 (as a result of Barnes' original third party claim), and as against Middlesex by July 31, 2001 (when Barnes' third party claim was amended to include a claim against Middlesex).

(2) The Postponement of the Limitation Period

[24] As appears from the decisions of the Supreme Court of Canada in Central Trust Co. and Peixeiro, the discoverability principle rests by definition on the requirement of due diligence by the plaintiff. Judicial respect for that requirement is inherent to proper regard for the diligence policy rationale which underlies limitations statutes. That requirement dictates the test to be applied in determining the start of a limitation period under the discoverability principle: when can it be said that the plaintiff knew, or by reasonable diligence could have discovered, the material facts on which to base a cause of action against the proposed defendant?

[25] The appellant advances two main arguments in support of her submission that the limitation period under s. 284(2) of the Act has not yet expired.

[26] First, the appellant relies on the decision of this court in Aguonie, supra, in support of her assertion that the determination of when a plaintiff acquired, or ought reasonably to have acquired, knowledge of the facts on which her claim is based is a question of fact which should be left for

determination by a trial judge on a full evidentiary record.

[27] Second, the appellant submits that discovery of a tortfeasor involves more than ascertaining the identity of one who may be liable; rather, it also involves the determination of any acts or omissions which constitute liability.

[28] In response, the respondents argue that the appellant's amendment motion was brought outside the three-month limitation period, on any view of the facts. They claim that regardless of which date is considered to be the date upon which the limitation period commenced to run, it has expired. More particularly, more than three months have expired from any of: (i) the date of [page406] the accident, which occurred on January 5, 1999; (ii) the appellant's receipt of Barnes' original third party claim on April 3, 2001; (iii) the appellant's receipt of Barnes' motion materials to add Middlesex as a third party on July 4, 2001; or (iv) the delivery to the appellant of Barnes' amended third party claim on July 31, 2001. Accordingly, even assuming that the appellant satisfied her due diligence requirement, the respondents submit that the prescription period has now expired and had expired by the time of the appellant's amendment motion.

[29] On the record in this case, we agree with the appellant's position, for several reasons.

[30] First, it is not clear to us that the motions judge considered the discoverability principle, which was raised by the appellant as an issue on the amendment motion. The motions judge's analysis proceeded from the premise that the limitation period had expired. He went on to address the issues of prejudice and special circumstances in the context of the rules governing pleadings amendments. In doing so he stated:

> The discovery process was never to be used as a tool to investigate possible causes of action. The plaintiff's obligation is to investigate and, if so advised, to commence proceedings, within time, against those who may have caused or contributed to the injury claimed by the plaintiff as a result of the accident.

[31] While that statement properly recognized the appellant's due diligence obligation, it does not indicate that the motions judge related that obligation to the discoverability principle; nor do the reasons of the motions judge suggest that he assessed the evidentiary record before him in the context of the discoverability principle.

[32] Second, in Aguonie, the discoverability principle was held to apply to the identity of the tortfeasor and, in addition, to the acts or omissions of a potential tortfeasor identifying him or her as such. Justice Borins (ad hoc), writing on behalf of the court in Aguonie, stated, at p. 170 O.R.:

> While it is true that many of the cases in which [the discoverability principle] has been applied concern a plaintiff's discovery of the extent of an injury, or the delayed effect or result of a defendant's negligence, this case concerns the discovery of a tortfeasor. The discovery of a tortfeasor involves more than the identity of one who may be liable. It involves the discovery of his or her acts, or omissions, which constitute liability.

(Emphasis added)

[33] Later in his reasons, Borins J. (ad hoc) said (at p. 172 O.R.):

> The starting point for the application of the discoverability rule . . . is the time when the appellants' cause of action arose. This will define the starting [page407] date of the limitation period. It is a question of fact when the cause of action arose and when the limitation period commenced. The application of the discoverability rule is premised on the finding of these facts: when the appellants learned they had a cause of action against the respondents; or, when, through the exercise of reasonable diligence, they ought to have learned they had a cause of action against the respondents. These facts constitute genuine issues for trial . . .

(Emphasis added)

[34] In this case, the appellant's solicitor provided an explanation for why she was unable to determine the facts about the alleged snow build-up in the relevant location on the day of the accident. That explanation was not challenged in any way by evidence from the respondents. In addition, there is no evidence before this court on what steps the appellant could have taken to attempt to substantiate Barnes' allegations prior to discovery and the production of documents in the litigation. Since both municipalities deny the facts asserted by Barnes, without an affidavit from them or cross-examination of the appellant's solicitor as to what inquiries could properly have been made outside the litigation process to substantiate or disprove the facts alleged by Barnes, there is no basis on the record for rejection of the evidence from the appellant's solicitor.

[35] In most cases one would expect to find, as part of a solicitor's affidavit, a list of the attempts made by the solicitor to obtain information to substantiate the assertion that the party was reasonably diligent. In this case, however, the solicitor has explained why she could take no such steps. No information to the contrary was provided by the respondents.

[36] On the record before us, therefore, the question of whether the appellant's solicitor was reasonably diligent cannot be answered with finality. The appellant herself claims that she had no knowledge of the snow banks. Therefore, everything within her knowledge is mere allegations by Barnes, denied by the third parties. Thus, a claim by the appellant against the municipalities at this stage rests only on bare allegations.

[37] Whether the appellant's solicitor's explanation as to why no inquiries could be made prior to discoveries to substantiate or disprove Barnes' claims will survive scrutiny on cross-examination, or whether evidence exists that information was available to the appellant upon proper inquiry prior to her amendment motion to ground a cause of action

against the respondents, cannot be determined at this stage. As observed by the Nova Scotia Court of Appeal in Burt v. LeLacheur (2000), 189 D.L.R. (4th) 193, 49 C.P.C. (4th) 53 (N.S.C.A.), at p. 207 D.L.R., the precise amount of knowledge necessary to trigger the running of time [page408] under a limitation period must be determined upon application of the legislation creating the limitation period, using the discoverability principle, to the facts as found. In this case, the crucial fact-finding exercise has not yet occurred and the appellant's asserted version of the facts concerning the discoverability of a cause of action against the municipalities was uncontradicted on the motion before the motions judge. Accordingly, the testing of the appellant's assertion that the limitation period has not yet commenced to run must await either a summary judgment motion or a trial.

[38] In our view, therefore, given the evidentiary record before the motions judge, this is a case where the municipalities should have been added as parties in the main action, with leave to the respondents to plead the limitation period.

(3) Other Issues

[39] Two additional matters bear mention in this case.

[40] First, the three-month limitation period under s. 284(2) of the Act is a prescription of very short duration. The length of that limitation period signifies the high value attached by the legislature at the time of this accident to the control, and timely closure, of potential negligence actions against a municipality for the non-repair of highways or bridges. The duration of the limitation period suggests that judicial caution should be exercised in relieving against the limitation period.

[41] That interpretation is reinforced by s. 284(5) of the Act, which provides in part that no action shall be brought for the recovery of damages in connection with the non-repair by a municipal corporation of a highway or bridge unless written notice of the claim and of the injury complained of has been

provided to the municipality within ten days (in the case of a county or township) or within seven days (in the case of an urban municipality) after the injury.

[42] Thus, s. 284 of the Act, as in force at the time of this accident, imposes two discrete limitations on the ability to sue a municipality in negligence for damages occasioned by the non-repair of a highway or bridge: (i) the three-month limitation period established by s. 284(2) for commencement of an action; and (ii) the provision for prior written notice of the claim and the alleged injury required under s. 284(5). Those statutory provisions, in combination, serve to underscore the requirement for diligence and timely action by a prospective plaintiff concerning such a claim. The respondents on this appeal, however, did not allege a breach by the appellant of s. 284(5); nor did the appellant [page409] claim compliance with it. In those circumstances, it is inappropriate to further comment on the significance of s. 284(5), if any, in this case.

[43] Second, before this court, the appellant argues that the reasoning underlying rule 5.04(2) of the Rules of Civil Procedure is not applicable to the determination of her right to amend her statement of claim to add the respondents as party defendants. We disagree.

[44] A pleadings amendment to add a party to an existing action is governed by the Rules of Civil Procedure. In some cases, the relevant rules must be applied in the context of an amendment sought after the expiry of a limitation period. In other situations, the issue of the expiry of a limitation period does not arise. In no event, however, can the reasoning which supports the rules for pleadings amendments simply be ignored; nor are the rules displaced by the discoverability principle.

[45] In this case, the motions judge declined to grant the requested amendment following consideration of rules 26.01 and 5.04(2) of the Rules of Civil Procedure. Those rules read as follows:

5.04(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

. . . . .

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[46] The motions judge considered rules 26.01 and 5.04(2) in the context of this court's recent decision in Mazzuca v. Silvercreek Pharmacy Ltd. (2001), 56 O.R. (3d) 768, 207 D.L.R. (4th) 492 (C.A.). It is settled law that the courts retain a discretion to permit a pleadings amendment to change the parties to a proceeding, notwithstanding the expiry of a limitation period, if special circumstances justifying the amendment and the absence of non-compensable prejudice to the party opposing the amendment are demonstrated: Basarsky v. Quinlan (1971), [1972] S.C.R. 380, 24 D.L.R. (3d) 720; and Deaville v. Boegeman (1984), 48 O.R. (2d) 725, 14 D.L.R. (4th) 81 (C.A.). Mazzuca confirmed that those principles apply to rules 5.04(2) and 26.01 under the current Rules of Civil Procedure.

[47] In this case, the motions judge proceeded on the basis that the applicable limitation period had expired. He did not expressly address the discoverability principle. Application of that principle, [page410] depending on the facts concerning the exercise of due diligence by the appellant, may result in the postponement of the commencement of the limitation period under s. 284(2) of the Act. Further, on the record before the motions judge, the appellant's solicitor's uncontradicted explanation concerning the inability to determine, prior to discoveries and productions, if material facts exist in support of a cause of action against the respondents was relevant to the exercise of the court's discretion under rules 5.04(2) and 26.01. It is not clear from the motions judge's reasons that her explanation was

considered by him in the context of the discoverability principle.

V. DISPOSITION

[48] For the reasons given, we would allow the appeal. The appellant is entitled to her costs of the appeal on a partial indemnity basis, fixed in the sum of $3,750, inclusive of disbursements and Goods and Services Tax.

Appeal allowed.

COURT FILE NO.: **CV-24-00730869-00CL**

TWO SHORES CAPITAL CORP. Applicant **v.** **PRODUCTIVITY MEDIA INC. ET AL** RESPONDENTS

(ONTARIO)
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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