IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Holmes v. Lund,*
2025 BCSC 1989

Date: 20251010
Docket: S228475
Registry: Vancouver

Between:

**Jarett Holmes, Alleson Sheldan,
Christopher Weiss, and Michael Weiss**

Plaintiffs

And

**Robert Lund and Republic Records,
a division of UMG Recordings Inc.**

Defendants

Before: The Honourable Justice Kirchner

On appeal from: A decision of an Associate Judge of the Supreme Court of British Columbia, dated April 2, 2025 (*Holmes v. Lund*, 2025 BCSC 878, Vancouver Registry S228475)

Reasons for Judgment

Counsel for the Plaintiffs and named Respondents in the Notice of Appeal:	Y. Gao T. Elneweihi
Counsel for the Defendant and named Appellant, Robert Lund in the Notice of Appeal:	H.A.A. Krige
No other appearances	
Place and Date of Hearing:	Vancouver, B.C. October 6, 2025
Place and Date of Judgment:	Vancouver, B.C. October 10, 2025

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Background

[1] The defendants, Robert Lund and Republic Records (the "Appellants") appeal an April 2, 2025 order of an Associate Judge to remove three persons as defendants in this proceeding and add those same three persons as plaintiffs. The Associate Judge also ordered that any limitations defences be preserved as against the three new plaintiffs up to the date that the original notice of civil claim was filed on October 19, 2022. The Appellants take issue only with the order as it relates to the preservation of any limitations defence. They argue the Associate Judge should have preserved any limitations defences that might have accrued against the three new plaintiffs at any time, before or after the filing of the original notice of civil claim.

[2] The underlying action concerns the alleged unlawful sampling by the defendants of a recording made and owned by the plaintiffs. The original plaintiff, Jarett Holmes, is a music producer and songwriter. The three new plaintiffs, Alleson Sheldan, Christopher Weiss, and Michael Weiss (the "Band Members"), are members of a band called "Legs Occult". The Band Members hired Mr. Holmes to engineer, produce, and mix master recordings for their album, "Dark Rituals", which was released in 2013. Dark Rituals includes a song called "Breathe", which was an original composition.

[3] In 2016, the defendant, Robert Lund, independently released a recording of a song called "Broken". In 2019, Mr. Lund entered into an agreement with Republic Records for the commercial release of Broken. At that time, Mr. Lund approached the plaintiffs and received their permission to "interpolate" elements of Breathe into the commercial release of Broken. "Interpolation" involves the re-recording of elements of another song into the new song. It requires the consent of the composer of the original song. By contrast, "sampling" is where a portion of the actual recording of the original song is incorporated into the new song. Sampling

requires the permission of the composer of the sampled song and the holder of the recording licence for that song.

[4] The plaintiffs allege that Mr. Lund expressly represented that no portion of Breathe would be sampled and they relied on that representation in granting permission to interpolate it. It is alleged that, contrary to this representation and the terms of their authorization, the commercial release of Broken includes a sample from Breathe. Broken was released on April 17, 2020 to great success. As of March 2025, it has had over 388 million streams on Spotify. It has also been released on other streaming platforms, presumably to similar success.

[5] The plaintiffs say that in 2021, they learned Mr. Lund may have infringed on the original master recording of Breathe by sampling it rather than interpolating it. The Band Members decided to seek more details about this potential breach and agreed to negotiate with Mr. Lund over a potential infringement of their copyright. Sometime after that, Mr. Holmes started this action on his own, claiming copyright infringement against Mr. Lund and Republic. At the time, Mr. Holmes and the Band Members were in a dispute over the ownership of the copyright for the original master recording of Breathe. Thus, Mr. Holmes named the Band Members as defendants in the action but he did not seek any relief against them. He named them because of their potential ownership interest in Breathe.

[6] Mr. Lund and Republic did not immediately file responses to civil claim. Instead, their counsel sent Mr. Holmes' counsel a document titled "Demand for Amendments and Particulars" which purported to demand that Mr. Holmes make certain amendments to the notice of civil claim, including the removal of the Band Members as defendants because no relief was sought against them. Among the particulars demanded were a list of all individuals who allegedly co-authored Breathe, details about each individual's contribution to Breathe, and particulars about an alleged agreement between Mr. Holmes and the band members as to ownership shares of Breathe.

[7] Apparently spurred on by this demand document, Mr. Holmes and the Band Members worked to resolve their dispute over the rights to Breathe and reached an agreement by September 2024. By letter dated September 26, 2024, counsel for the plaintiffs wrote to counsel for Mr. Lund and Republic enclosing a copy of the

agreement and a proposed amended notice of civil claim that would remove the Band Members as defendants and add them as plaintiffs.

[8] On December 20 and 23, 2024, Republic and Mr. Lund filed their responses to civil claim. They did not consent to the proposed amendments to the notice of civil claim and thus Mr. Holmes and the Band Members brought the application that came before the Associate Judge. As noted, she granted leave to file the amended notice of civil claim, remove the Band Members as defendants and add them as plaintiffs, and preserved any limitations defences that may have accrued against the Band Members up to the date that the original notice of civil claim was filed. Mr. Lund and Republic appeal from the latter part of that order.

The Associate Judge's Decision

[9] The Associate Judge added the Band Members as plaintiffs under Rule 6-2(7)(c) which states:

> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
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> …
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> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
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> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
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> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[10] The Associate Judge correctly observed that, under this rule, the court must be satisfied firstly that there is a question or issue between the parties relating to the relief, remedy, or subject matter of the suit; and, secondly, that it is just and convenient to determine the issue in the proceeding. She was satisfied the first branch was clearly met given that "the parties are the same, the rights alleged are regarding the same song, and the alleged breaches are similar, if not identical" (para. 14).

[11] She found the second branch turned on the question of delay because the Band Members were seeking to be added as plaintiffs after the potential expiry of limitation periods under the *Limitation Act*, S.B.C. 2012, c. 13 and the *Copyright*

Act, R.S.C. 1985, c. C-42. She therefore considered the factors in *Letvad v. Fenwick*, 2000 BCCA 630 at para. 29 which are: the extent of the delay in bringing the application, the reasons for the delay, any explanation for the delay, the degree of prejudice caused by the delay, and the extent of the connection between the existing claims and the proposed new causes of action.

[12] As to the extent, reasons, and explanation for the delay, the Associate Judge referred to the Band Members' decision to seek more details about the alleged breach, their agreement to negotiate with Mr. Lund, and Mr. Lund's alleged representations that Breathe was interpolated in Broken but not sampled. She also referred to the fact that Mr. Lund and Republic did not immediately file responses to civil claim but instead issued their demand document which prompted the plaintiffs to resolve their dispute over the ownership of Breathe.

[13] She then considered prejudice to Mr. Lund and Republic and was unable to find any real prejudice other than presumed prejudice. She stated at para. 23:

> The action remains essentially the same. The allegations are well known or have been well known since even prior to the filing of the notice of civil claim. The causes of action remain unchanged and the factual scenario is virtually identical.

[14] She did not specifically say whether she found the plaintiffs' explanation for the delay satisfactory but appears to have weighed that explanation against her finding of no real prejudice. With that, she concluded it was in the interest of justice to add the Band Members as plaintiffs.

[15] She then turned to the defendants' potential loss of a limitations defence against the Band Members and cited the following analysis from *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 47-48 [*Neilson Architects*] which is often referred to in applications of this nature:

> [47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s.4(1)(d) of the *Limitation Act* is to extinguish such a defence if the proposed defendant is added. *In Brito (Guardian ad litem of) v. Wooley* (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three step approach to considering a possible limitation defence, which was adopted by this Court in *Strata Plan LMS 1725 v. Star Masonry Ltd.,* 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:

> 1 If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.
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> 2 If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.
>
> 3 If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s.4(1)(d) of the *Limitation Act*.
>
> [48] There is also a fourth option, an alternative to the third step, set out by Lambert J.A. in *Lui v. West Granville Manor Ltd.,* 1987 CanLII 164 (BC CA), [1987] W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.) [Lui No. 2]. He suggested that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s.4(1) of the *Limitation Act*, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial.

[16] The Associate Judge could not determine whether a limitations defence had accrued against the Band Members because of disputes over when time started to run on the potential limitation periods. Thus, she found herself faced with the third or fourth options in *Neilson Architects*. She concluded it would be absurd to apply the third option because it would result in the extinguishment of any limitations defences against the Band Members while maintaining those defences that may have accrued against Mr. Holmes, the original plaintiff.

[17] She then considered whether to order the preservation of limitations defences against the Band Members that may have accrued up to date they sought to be added as plaintiffs. However, she concluded that would lead to “a similar problem” because it would result different plaintiffs potentially being subject to different limitation periods. She therefore decided to preserve any limitation defences that had accrued against the band members up to the filing of the

original notice of civil claim. That put all four plaintiffs on the same footing for limitations.

[18] It is this part of her order the defendants now challenge on appeal.

Standard of Review

[19] The standard of review for appeals from associate judges is set out in *Abermin Corp. v. Granges Exploration Ltd*., 1990 CanLII 1352, 45 B.C.L.R. (2d) 188 at 193 (S.C.). On purely interlocutory matters, the associate judge's order will only be set aside or overturned where it is "clearly wrong". However, on questions that are "vital to the final issue in the case" or that results in a final order which an associate judge is permitted to make, a "rehearing is the appropriate form of appeal." Where there is a rehearing, the judge hearing the appeal "may quite properly" substitute their own view for that of the associate judge.

[20] In *Ningbo Zhelun Overseas Immigration Service Co. Ltd. v. USA-Canada International Investment Inc*., 2024 BCSC 682 [*Ningbo Zhelun*], Justice Morley thoroughly considered the authorities relating to adding parties after the expiry of a limitation period and concluded that such orders are vital to the final issue in the case because they effectively confirm or extinguish limitation defences. Thus, he found the rehearing standard of review applies on an appeal of such orders. He wrote at para. 63:

> … Limitation periods are substantive, not procedural, questions of law and thus it is the loss of that defence under s. 22(1)(d) of the *Limitation Act* that is "vital to the final issue in the case", namely whether the respondents to the application are substantively liable to the applicant: see *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 1994 CanLII 44 (SCC).

[21] Justice Morley went on to express reluctance with this conclusion because an associate judge's decision to add parties is discretionary, and it seems antithetical to ordinary principles of appellate review for an appellate judge to substitute their view for that of judge whose discretionary decision is under appeal. As he stated at para. 37:

> Associate judges are now a central institution of civil justice in British Columbia and it is difficult to understand why their discretionary decisions on applications entrusted to them should be subject to a uniquely non-deferential form of review.

[22] He found the associate judge made no error in principle in reaching his conclusion to add new plaintiffs after the expiry of a limitation period. He found the associate judge set out the correct test, analyzed each of the factors based on the evidence before him and came to an overall judgment which, in Morley J.'s view, was not clearly wrong even if a different judgment was possible: *Ningbo Zhelun*, para. 99. However, because of his conclusion on the standard of review, Morley J. found himself compelled to exercise his own discretion on the matter and he determined that he would weigh the factors differently than did the associated judge. He concluded that the new plaintiffs' delay in applying to be added to the proceeding was "very lengthy and unexplained" and came some 5.5 years after they had been put on notice that their absence may be fatal to the overall claim. In his view, to permit the addition of the new plaintiffs in these circumstances was antithetical to avoiding "a culture of complacency with respect to delay in the civil justice system": *Ningbo Zhelun*, paras. 8 and 106.

[23] There is authority by which this Court and the Court of Appeal has held that final decisions of associate judges in foreclosure proceedings attract some measure of deference given that they have "gained a level of experience in these difficult matters which is higher than that of most judges": *British Columbia v. Baron Enterprises Ltd.*, 2000 BCCA 317 at paras. 44-45. See also *Kokanee Mortgage MIC Ltd. v. 669655 B.C. Ltd*, 2014 BCSC 458; *366671 British Columbia Ltd. v. Arbutus Bay Estates Ltd*., 2021 BCSC 884 at para. 3; *J. Simons Management and Development Ltd. v. 1365651 B.C. Ltd.*, 2025 BCSC 1355. Since foreclosure orders are final orders, they would otherwise be reviewable on appeal by way of a rehearing under the *Abermin* formulation. Thus, there exists some flexibility in the standard, at least as it applies to foreclosure proceedings.

[24] This may also extend to other areas where associate judges have particular experience such as interim orders for the sale of a family home which, by their nature are "always final": *Von Sturmer v. Von Sturmer*, [1998] B.C.J. No 1646 (S.C.) at paras. 44-45 and 49.

[25] Ultimately, I do not need to decide whether this measure of deference might extend to an application to add a party after the potential expiry of a limitation period because I reach the same conclusion as the Associate Judge in any event. I note, though, that applications of this nature are a steady part of the work routinely done by associate judges.

Analysis

[26] In my view, the order made by the Associate Judge in this case is the just and convenient one. I would exercise my discretion in the same way that she did for the following reasons.

[27] First, as the Associate Judge found, there is no real prejudice to the defendants occasioned by the delay. That finding was not challenged on appeal and I can see no reason to disagree with it. The Band Members' claim is not just "essentially the same" as Mr. Holmes' claim, as the Associate Judge noted, it is the very same claim.

[28] Second, the Band Members have been part of the proceeding from the outset, albeit originally as defendants. Mr. Holmes named them as defendants because he recognized they had a claim to ownership and composition rights for Breathe. That is also the basis for the Band Members now joining in the claim as plaintiffs. Thus, their ownership interests in Breathe has been a factor in the litigation from the start. Mr. Lund and Republic were clearly on notice of this fact by the wording of the notice of civil claim and as evidenced by their "demand" that Mr. Holmes amend his notice of civil claim to remove the Band Members as defendants. Mr. Holmes eventually responded to that demand with the application to add the Band Members plaintiffs. While that is quite unusual, it could not have come as a surprise to Mr. Lund and Republic.

[29] I would add that Mr. Lund and Republic also demanded particulars of Mr. Holmes' alleged agreement with the Band Members as to the ownership of Breathe. That also shows they were cognizant of the Band Members' claims.

[30] Third, the Band Members agreed to negotiate their dispute with Mr. Lund before Mr. Holmes filed the notice of civil claim. While that would not suspend the running of a limitation period, it at least alerted Mr. Lund to the fact the Band Members claimed ownership in the Breathe master recording and shows they were not wholly inactive in the pursuing their claim, albeit through negotiations.

[31] I will say that do not necessarily share the Associate Judge's concern that the Band Members could be subject to a different limitation period than Mr. Holmes, had had she preserved any limitation defences that accrued up to the date they sought to be added. She suggested this gave rise to a "similar problem"

to the absurdity of limitations defences being extinguished as against the Band Members but not Mr. Holmes. I agree that would be an absurdity, but I do not view the other scenario of different limitation periods applying to newly added plaintiffs as standing on the same footing as the absurdity. Nor does it seem unmanageable, although that may be hard to predict. Nevertheless, for the reasons I have outlined, I am of the view that the order made by the Associate Judge is the just and convenient one, and I would exercise my discretion to make the same order.

Conclusion

[32] For those reasons, I would dismiss the appeal with costs to the plaintiffs.

"Kirchner J."