



IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHC INVESTMENTS, LLC,)	
)	
Plaintiff-Below,)	No. 146, 2020
Appellant,)	
v.)	CASE BELOW:
)	
FIRSTSUN CAPITAL BANCORP,)	Court of Chancery
WILLIAM D. SANDERS,)	of the State of Delaware
WILLIAM P. SANDERS,)	C.A. No. 2018-0353-KSJM
)	
Defendants-Below,)	
Appellees.)	

APPELLANT'S REPLY BRIEF

PRICKETT, JONES & ELLIOTT, P.A.

OF COUNSEL:

STINSON LLP
Jeffrey J. Goulder
Stefan M. Palys
Christy M. Milliken
Michael A. Vincent
1850 N. Central Avenue, Suite 2100
Phoenix, Arizona 85004
(602) 279-1600

Bruce E. Jameson (DE Bar No. 2931)
John G. Day (DE Bar No. 6023)
1310 North King Street
Wilmington, Delaware 19801
(302) 888-6500

*Attorneys for Plaintiff-Below, Appellant,
CHC Investments, LLC*

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ARGUMENT ON REPLY

I. INTRODUCTION

Defendants' Answering Brief ("AB") proves the point that Delaware's lower courts are divided on how the borrowing statute and *Saudi Basic* should be interpreted. But whether the lower courts are divided is not the issue for this appeal. Regardless of what other lower courts have held, the Court of Chancery was bound to follow the ruling of Delaware's highest court in *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1 (Del. 2005). Contrary to the *Saudi Basic* holding, the Court of Chancery improperly dismissed CHC's claims though CHC had not forum shopped, and though its claim was timely in the jurisdiction where the claim arose.

The dismissal of CHC's § 27.01 claim should likewise be reversed. There, the Court of Chancery also ruled CHC's claim was untimely, despite the fact that Defendants did not move to dismiss on that basis, and though the Court's reasoning was contrary to the very authority it cited.

II. THE SECOND SENTENCE OF THE BORROWING STATUTE DOES NOT APPLY.

Defendants' first argument is that because CHC is a Delaware limited liability company, the second sentence of 10 *Del. C.* § 8121 bars its claim. *See, e.g.* AB at 13-14 (quoting 10 *Del. C.* § 8121: "Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply."); *id.* at 26. That argument was rejected by this Court in *Saudi Basic*. *Saudi Basic*, 866 A.2d at 16 (rejecting the argument that "the application of Delaware's three year statute is similarly mandated by [the borrowing statute's] second sentence, because the two joint venture partnerships were 'resident[s] of this State' at the time the cause of action originally accrued" and citing *Pack v. Beech Aircraft*, 132 A.2d 54 (Del. 1957), where the Court refused to apply the second sentence of the borrowing statute because doing so would subvert the statute's purpose).

This Court concluded the borrowing statute simply did not apply at all because doing so would have enabled SABIC to prevail on a limitations defense not available to it had the claims been brought in the jurisdiction where the claims arose. *Id.* at 17-18. As explained in more detail below, the *Saudi Basic* ruling applies here to except the entirety of the borrowing statute -- both the first and second sentence -- from the Court's limitations analysis.

III. THE FIRST SENTENCE OF THE BORROWING STATUTE ALSO DOES NOT APPLY BASED ON THE SAUDI BASIC HOLDING.

CHC and Defendants expressly agree on these fundamental points: 1) the borrowing statute was intended to eliminate the incentive to forum shop (AB 9); and 2) *Saudi Basic* provides for an exception to the borrowing statute where applying the statute as written would subvert that purpose and would result in “unfair, unjust, or absurd results.” (AB 12-13.) There is also no dispute that CHC did not file this lawsuit in Delaware for purposes of forum shopping (the limitations period in Texas, where the claim arose, is longer than Delaware’s limitations period).

Because this Court’s *Saudi Basic* holding was intended to advance a clear purpose and because applying the borrowing statute here is counter to that purpose, the question then becomes: upon what bases do the borrowing statute and *Saudi Basic* justify dismissing CHC’s lawsuit? Defendants offer several suggestions, but none should persuade this Court.

Defendants begin by surveying trial court decisions addressing *Saudi Basic*, and concluding that the so-called “narrow” approach to its interpretation must be correct because several trial courts have adopted it. (AB at 18-21.) These trial court decisions are not binding on this Court, and the mere fact that some trial courts have adopted Defendants’ preferred narrow approach is legally irrelevant.¹

¹ At the same time Defendants urge this Court to defer to lower court decisions, Defendants also argue that the case that squarely recognized the obligation of lower

The relevant question is whether the trial court’s application of the borrowing statute to these facts is consistent with *Saudi Basic*. The *Saudi Basic* decision itself provides the answer: the borrowing statute does not apply where a literal application would subvert the statute’s purpose of preventing forum shopping. *Saudi Basic*, 866 A.2d at 17. *Saudi Basic* explained that the borrowing statute was meant to prevent instances “where a plaintiff brings a claim in a Delaware court that: (i) arises under the law of a jurisdiction other than Delaware; and (ii) is barred by that jurisdiction’s statute of limitations but would not be time-barred in Delaware, which has a longer statute of limitations.” *Id.* at 16.² CHC’s claims arise under Texas law, which has a longer limitations period than Delaware, and under Texas law, CHC’s claims are timely. Yet, Defendants ask this Court to apply the borrowing statute to

courts to follow *Saudi Basic* be summarily disregarded as an “outlier.” (AB 25.) *See Bear Stearns Mortg. Funding Tr. 2006-SL1 v. EMC Mortg.*, 2015 WL 139731 *9 (Del. Ch. Jan. 12, 2015) (“[T]his court is bound to follow the Delaware Supreme Court’s opinion in *Saudi Basic*.”).

² Defendants are insistent that “CHC’s interpretation of *Saudi Basic*—that the borrowing statute does not apply absent evidence of forum shopping, OB 16—finds no support in [*Saudi Basic*’s] holding or in the text of the statute.” (AB 17.) Yet *Saudi Basic* held just that. It noted that the borrowing statute was meant to prevent forum shopping (*Saudi Basic*, 866 A.2d at 16), and that the trial court correctly ruled the statute need not be literally applied where doing so would subvert the statute’s purpose. *Id.* at 16, 17 and n.34.

bar CHC's claims though the facts here are the opposite of the facts the statute was intended to address.³

Defendants next contend that their narrow interpretation of *Saudi Basic* is compelled by the canon of statutory construction that requires courts to construe statutes to give effect to the legislature's intent. (AB 12, 14-15, 17, 18, 21, 30.) Defendants contend that CHC's interpretation of *Saudi Basic* violates this principle because "it introduces a presumption into a statute where no such presumption exists," and would "require this Court to have rewritten the General Assembly's statute." (AB 17.)

But this argument side-steps the undeniable point that neither a narrow or broader interpretation of *Saudi Basic* applies the borrowing statute as it is written. (OB 22-23.) Even under Defendants' narrow approach, courts still create an exception to the borrowing statute where an absurd result would flow from its literal application. Despite telling the Court it must apply the statute as written, Defendants themselves recognize that under their narrow approach "the court may deviate from the borrowing statute's plain text." (AB 14.)

³ Defendants chastise CHC for "sitting on its hands" for three years before filing this lawsuit, and tell this Court CHC should not be "rewarded" for its delay. (AB 23.) But that argument assumes the ultimate question that CHC's claims are untimely. Under Texas law they are not.

Defendants try to overcome this inconsistency by suggesting that the narrow interpretation of *Saudi Basic* should be adopted because it is supposedly more workable (AB 25-26), but in reality it is not. CHC’s view is that the statute would not apply unless there is evidence of forum shopping -- the very tactic the statute was designed to prevent. This explains why trial courts have routinely determined whether forum shopping is implicated when resolving motions to dismiss, contrary to Defendants’ argument that such an issue would be prohibitively fact-driven. *See, e.g., Dymond v. National Broadcasting Co., Inc.*, 559 F.Supp 734, 739 n. 5 (D. Del. 1983) (granting motion to dismiss where “[t]he only reason the plaintiff now selects this jurisdiction is Delaware’s two year statute of limitations . . . [t]his suit is a blatant attempt to forum shop”).⁴ Indeed, all but three of the cases the parties have cited applying the borrowing statute have done so through a dispositive pre-trial motion, and none required resolution of disputed facts.⁵

⁴ *Accord, e.g., In re Mervyn’s Holdings, LLC*, 426 B.R. 488, 503 (Bankr. D. Del. 2010) (analyzing motion to dismiss and concluding that Delaware’s borrowing statute does not apply because “this is not a case where forum shopping might even remotely be an issue . . . there is absolutely no threat of forum shopping and the Delaware ‘borrowing’ statute is inapplicable”); *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *5 (Del. Super. Apr. 16, 2014) (analyzing motion to dismiss and ruling that Delaware’s borrowing statute does not apply because plaintiff was “not attempting to circumvent the expiration of his claims by filing in Delaware, he only seeks jurisdiction over the parties”).

⁵ The three not decided in the context of a motion to dismiss follow. *Millien v. Popescu*, 2014 WL 463739, at *15 (Del. Ch. Jan. 31, 2014) (post-trial memorandum opinion); *Juran v. Bron*, 2000 WL 1521478 (Del. Ch. Oct. 6, 2000) (post-trial

Applying *Saudi Basic* as Defendants urge to only “unusual circumstances, where application of the borrowing statute would generate an unfair, unjust, or absurd result” (AB 14) is no more definite than CHC’s approach (nor is it necessarily inconsistent with applying it to prevent forum shopping). Here, it would be unfair and unjust to bar CHC’s claim when there was no forum shopping, and CHC’s claims are timely under the limitations period of Texas, where the claim arose.

Defendants next contend that the Delaware forum selection clause in the Subscription Agreement compels application of Delaware’s statute because applying another jurisdiction’s statute “would introduce tremendous uncertainty into all agreements that contain Delaware forum selection clauses.” (AB 28.) This is so, Defendants claim, because those parties “reasonably anticipate that Delaware’s borrowing statute will dictate which statute of limitations may apply” (AB 28.)

This argument is misguided for two reasons. First, Defendants have raised it for the first time on appeal, so it is untimely and thereby waived. *Clouser v. Doherty*, 175 A.3d 86, 2017 WL 3947404, at *5 (Del. 2017) (TABLE) (citing Supr. Ct. R. 8). Second, Defendants’ argument simply re-frames the question about whether *Saudi Basic* should be applied broadly or narrowly. Parties who select this forum know they are subjecting themselves to the borrowing statute, *as construed by this Court*,

opinion); *B.E. Capital Mgmt. Fund LP v. Fund.com Inc.*, 171 A.3d 140 (Del. Ch. 2017) (receiver’s motion to confirm his determination of a creditor’s claim).

just as with any other statute. Under CHC's approach, those parties would have the certainty of knowing whether the borrowing statute will apply is based on whether forum shopping exists. Where the borrowing statute does not apply, parties opting into this forum will know that Delaware courts use the most significant relationship test to determine the applicable statute of limitations. *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).

IV. THE COURT OF CHANCERY ERRED BY CONCLUDING PLAINTIFF'S § 27.01 CLAIM WAS UNTIMELY.⁶

In its opening brief, CHC asserted that the Court of Chancery erroneously held that Delaware's statute of limitations barred CHC's claim under Tex. Bus. & Com. Code § 27.01, given that Defendants never made this argument below. (OB 27 citing to A189.) Defendants now claim that they *did* raise this argument but Defendants are being coy. (AB 32.) In the opening brief in support of their motion to dismiss, Defendants did not argue the § 27.01 claim was untimely under Texas' statute of limitations. (A88 n.7.) In Defendants' reply in support of their motion to dismiss, Defendants conceded that Texas' statute of limitations applied, but then claimed for the first time (in a footnote) that CHC was on sufficient notice of facts so long ago that its claim was supposedly untimely even under Texas' four-year statute of limitations. (A189 n.11.)

But this was not the basis on which the Court of Chancery dismissed the § 27.01 claim, and Defendants in fact never raised the theory the trial court adopted. This Court should conclude that the Court of Chancery erred by finding the § 27.01 claim to be time-barred under Delaware's statute given that Defendants agreed throughout the lower court proceedings that Texas' longer limitations period controlled, and did not contend in their opening brief that the § 27.01 claim was time

⁶ If the Court concludes that the broad approach to *Saudi Basic* is correct, this issue will be moot because Texas' four-year statute of limitations would then apply.

barred, thereby waiving the defense for the purposes of their motion to dismiss. *See Zutrau v. Jansing*, 2013 WL 1092817, at *6 (Del. Ch. Mar. 18, 2013).

Having previously conceded that Texas' four-year statute of limitations applied, Defendants now reverse course and argue the trial court was correct when it concluded that Delaware's statute applied based on another "exception" to the borrowing statute. (AB 33-34.) Defendants claim that this exception applies "only where the 'foreign limitations period is a substantive built-in aspect of the statutory right rather than a procedural issue.'" (*Id.* at 34 (relying on *Pack*, 132 A.2d at 67))

The flaw with this argument is that *Pack* announced no such "exception" – it instead involved a straightforward application of the borrowing statute. There, a plaintiff brought suit for a wrongful death that occurred in New Jersey. *Pack*, 132 A.2d at 56. New Jersey's wrongful death statute had a built-in two-year statute of limitations, whereas Delaware had a three-year limitations period. *Id.* *Pack* applied the borrowing statute to adopt the shorter New Jersey limitations period. *Id.* at 57.

The novelty in *Pack* was that the plaintiff claimed, as a Delaware citizen, that the second sentence of the borrowing statute should call for application of Delaware's *longer* limitations period, thereby trumping the limit in the New Jersey statute. *Id.* at 57-58. This Court rejected the argument, concluding the plaintiff sued

on a foreign cause of action that was subject to a substantive limitation in the same statute, and that the claim was therefore barred. *Id.* at 58-60.

The trial court's conclusion that Delaware's statute of limitations applied *because* § 27.01 had no built-in statute of limitations does not follow from *Pack*. Rather, this case presents the reverse of the situation in *Pack*, so the built-in test does not apply.

Defendants nevertheless argue – again, for the first time on appeal – that the trial court correctly applied Delaware's three-year statute of limitations. Defendants claim that this result was correct because the most analogous cause of action in Delaware to § 27.01 is either Delaware's securities fraud statute or common law fraud which both have three-year statutes of limitations (AB 34-35), but Defendants cite no authority that supports their analogy argument. Defendants point to *Huffington* (AB 33), but that case involved a much more direct comparison of the Massachusetts and Delaware Blue Sky statutes. *Huffington v. T.C. Group, LLC*, 2012 WL 1415930, at *4 (Del. Super. Apr. 18, 2012). Defendants next claim that Italian and Dutch law claims were held subject to Delaware's statute of limitations (AB 33), but in the cited case the issue was conceded. *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 42 (Del. Ch. 2012) (“Philips N.V. does not allege that either Vichi's Italian law claim or Dutch law claim is subject to a limitations period of less

than three years. Therefore, Delaware's three-year statute of limitations also applies to both of these claims.”).

Nor does Defendants' analogy withstand scrutiny. Section 27.01 supplies a remedy that that is not available under Delaware's securities fraud statute or for common law fraud: punitive damages. Likewise, § 27.01 is a poor analog to Delaware's securities fraud statute because § 27.01 applies in situations where Delaware's securities fraud statute does not, such as real estate transactions. Nevertheless, Defendants posit that *both* Texas' securities fraud statute *and* the more general § 27.01 are analogous to Delaware's securities fraud statute, and fault CHC for not providing contrary authority. But as the party seeking dismissal of CHC's claim, it was Defendants' burden to provide authority showing dismissal was warranted. *Batchelor v. Alexis Properties, LLC*, 2018 WL 1053016, at *4 (Del. Super. Ct. Feb. 24, 2018) (“on a motion to dismiss, the moving parties, here the Defendants, bear the burden of demonstrating entitlement to judgment as a matter of law. Defendants . . . have offered no case law or legal authority whatsoever in support of [their] argument. The Court must conclude that Defendants have failed to demonstrate entitlement to judgment as a matter of law”). They have not done so.

Consequently, since there is no Delaware analog to § 27.01, the trial court should have applied Texas' four-year statute of limitations, as Defendants previously conceded. At a minimum, since the borrowing statute could not apply in the absence

of an analogous Delaware statute, the trial court should have utilized the most significant relationship test and applied Texas law given that it is undisputed that the parties' relationship entirely centers around Texas (OB 29).

CONCLUSION

Laws are enacted to accomplish objectives, and should be applied so as to accomplish those objectives. This Court expressly adopted that concept as the law of Delaware in *Saudi Basic* by holding that the provisions of the borrowing statute apply only when there is evidence of forum shopping, which is the conduct the statute seeks to prevent. Here, it is undisputed that there was no forum shopping. As a result, and for the other reasons stated above, the Court of Chancery erred when it dismissed Plaintiffs' claims, and this Court should reverse that dismissal and remand this matter for further proceedings.

PRICKETT, JONES & ELLIOTT, P.A.

OF COUNSEL:

STINSON LLP
Jeffrey J. Goulder
Stefan M. Palys
Christy M. Milliken
Michael A. Vincent
1850 N. Central Avenue, Suite 2100
Phoenix, Arizona 85004
(602) 279-1600

/s/ Bruce E. Jameson

Bruce E. Jameson (DE Bar No. 2931)
John G. Day (DE Bar No. 6023)
1310 North King Street
Wilmington, Delaware 19801
(302) 888-6500

*Attorneys for Plaintiff-Below, Appellant,
CHC Investments, LLC*

Dated: July 16, 2020

CERTIFICATE OF SERVICE

I, Bruce E. Jameson, do hereby certify on the 16th day of July, 2020, that I caused a copy of the foregoing to be served by File&Serve*Xpress* upon the following counsel:

Jon E. Abramczyk, Esquire
William M. Lafferty, Esquire
Sabrina M. Hendershot, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
Wilmington, Delaware 19801

/s/ Bruce E. Jameson

Bruce E. Jameson (DE Bar No. 2931)