McNaughton Automotive Limited v. Co-Operators General Insurance Company
[Indexed as: MaNaughton Automotive Ltd. v. Co-operators General Insurance Co.]

95 O.R. (3d) 365

Court of Appeal for Ontario,

Laskin, Simmons and R.P. Armstrong JJ.A.

August 29, 2008*
* This judgment was recently brought to the attention of the editors.

Civil procedure -- Class proceedings -- Costs -- Motion judge dismissing proposed class actions against automobile insurer pursuant to Rules 20 and 21 of Rules of Civil Procedure -- Motion judge holding that actions did not collectively constitute test case for purposes of s. 31(1) of Class Proceedings Act and awarding costs to successful defendants -- Plaintiffs' application for leave to appeal dismissed -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 20, 21 -- Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 31(1).

Civil procedure -- Costs -- Substantial indemnity -- Motion judge awarding costs of defendants' successful summary judgment motions on substantial indemnity scale where plaintiffs persisted with unsubstantiated allegations of fraud, dishonesty and deceit in effort to establish fraudulent concealment in respect of running of limitation period -- Plaintiffs' application for leave to appeal dismissed.

A number of class actions against automobile insurers were commenced after the Court of Appeal released its judgment in McNaughton Automotive Ltd. v. Co-operators General Insurance Co. The defendants succeeded on motions pursuant to Rules 20 and 21 of the Rules of Civil Procedure. The motion judge (who was the case management judge for all of the actions) rejected the plaintiffs' argument that the actions collectively constituted a test case for the purpose of [page366] s. 31(1) of the Class Proceedings Act, 1992, so that costs should be awarded in their favour. He concluded that the costs of the motions should be payable to the successful parties. The costs awards were to be on a partial indemnity scale, except for the summary judgment motions where the unproven allegation of fraudulent concealment was pleaded in relation to the running of the limitation period and the

defendant showed that there was no genuine issue for trial relating to the limitation period. In the latter cases, costs were awarded on a substantial indemnity scale. The plaintiffs brought an application for leave to appeal the costs orders.

Held, the application should be dismissed.

The motion judge was clearly aware of the underlying goals of the Class Proceedings Act and, in particular, the objects of access to justice and judicial economy. He regarded the Act's underlying goals as relevant not only to quantum, but also to entitlement and scale. There was no merit in the plaintiffs' submissions that the motions could be collectively characterized as a test case and that they raised novel points of law. The motions did not engage the public interest in the broader sense meant by the Act. An award of substantial indemnity costs was justified where the plaintiffs persisted with unsubstantiated allegations of fraud, dishonesty and deceit in an effort to establish fraudulent concealment.

Cases referred to

131843 Canada Inc. v. Double "R" (Toronto) Ltd., [1992] O.J. No. 3879, 7 C.P.C. (3d) 15, 31 A.C.W.S. (3d) 907 (Gen. Div.); Brad-Jay Investments v. Szijjarto, [2006] O.J. No. 5078, 218 O.A.C. 315, 154 A.C.W.S. (3d) 226 (C.A.); David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co. (2005), 76 O.R. (3d) 161, [2005] O.J. No. 2436, 255 D.L.R. (4th) 633, 199 O.A.C. 266, 23 C.C.L.I. (4th) 191, 15 C.P.C. (6th) 1, [2005] I.L.R. I-4422, 19 M.V.R. (5th) 205, 140 A.C.W.S. (3d) 166 (C.A.); First City Capital Ltd. v. British Columbia Building Corp., [1989] B.C.J. No. 130, 43 B.L.R. 29, 14 A.C.W.S. (3d) 12 (S.C.); Georgialee Lang & Associates v. Wigod, [2003] B.C.J. No. 1792, 2003 BCSC 1178, 17 B.C.L.R. (4th) 362, 124 A.C.W.S. (3d) 438; Guerin v. Canada, [1984] 2 S.C.R. 335, [1984] S.C.J. No. 45, 13 D.L.R. (4th) 321, 55 N.R. 161, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1; Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, 235 D.L.R. (4th) 193, 316 N.R. 265, J.E. 2004-470, 184 O.A.C. 209, 40 B.L.R. (3d) 1, [2004] CLLC Â210-025, 128 A.C.W.S. (3d) 1111; Hollick v. Toronto (City), [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, 2001 SCC 68, 205 D.L.R. (4th) 19, 277 N.R. 51, J.E. 2001-1971, 153 O.A.C. 279, 42 C.E.L.R. (N.S.) 26, 13 C.P.C. (5th) 1, 24 M.P.L.R. (3d) 9, 108 A.C.W.S. (3d) 774; Inter-Trust Mortgage Investment Corp. v. Robinson, 1999 CarswellOnt 1733 (C.A.); McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2001), 54 O.R. (3d) 704, [2001] O.J. No. 2312, 200 D.L.R. (4th) 449, 151 O.A.C. 252, 33 C.C.L.I. (3d) 165, 10 C.P.C. (5th) 1, [2001] I.L.R. I-3997, 15 M.V.R. (4th) 179, 106 A.C.W.S. (3d) 331 (C.A.); M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, [1992] S.C.J. No. 85, 96 D.L.R. (4th) 289, 142 N.R. 321, J.E. 92-1644, 57 O.A.C. 321, 14 C.C.L.T. (2d) 1, 36 A.C.W.S. (3d) 466; Murano v. Bank of Montreal (1998), 41 O.R. (3d) 222, [1998] O.J. No. 2897, 163 D.L.R. (4th) 21, 111 O.A.C. 242, 41 B.L.R. (2d) 10, 5 C.B.R. (4th) 57, 22 C.P.C. (4th) 235, 81 A.C.W.S. (3d) 319 (C.A.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 31, (1)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 133(b)

Insurance Act, R.S.O. 1990, c. I.8 [page367]

Real Property Limitations Act, R.S.O. 1990, c. L.15

Trustee Act, R.S.O. 1990, c. T.23, s. 38

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 20, 21, 57.01(1) [as am.]

Statutory Conditions -- Automobile Insurance, O. Reg. 777/93, ss. 6(7), 9(4)

APPLICATION for leave to appeal from the costs orders of Haines J. (2005), 74 O.R. (3d) 216, [2005] O.J. No. 179 (S.C.J.).

Kirk Baert, for appellant.

Alan L.W. D'Silva and Adrian C. Lang, for respondents Economical Insurance Group and Liberty Mutual Insurance Company.

Kevin L. Ross and Ian F. Leach, for respondents AXA Insurance (Canada), Allianz Insurance Company of Canada, the Personal Insurance Company of Canada, Trafalgar Insurance Company of Canada, Royal & SunAlliance Insurance Company of Canada and Middlesex Mutual Insurance Co.

Howard B. Borlack and Lisa La Horey, for respondent Zurich Canada.

Michael Eizenga and Matt Baer, for respondents Co-operators General Insurance Company and the Guarantee Company of North America.

Annie M.K. Finn, for respondents the Dominion of Canada General Insurance Company, the Wawanesa Mutual Insurance Company, Belair Insurance Company and ING Halifax.

Kevin S. Adams, for respondents Pilot Insurance Company and CGU Insurance Company of Canada.

Sheldon A. Gilbert, Q.C., for respondent Allstate Insurance Company.

Theodore P. Charney, for respondents Security National Insurance Company and Primmum Insurance Company (formerly known as Canada Life Casualty Insurance Company), Coseco

Insurance Company and TD General Insurance Company.

Catherine A. Bruder, for respondent the Citadel General Insurance Company.

Deanna M. Stea, for respondent York Fire & Casualty Insurance Company.

Jean-Marc Leclerc, for respondent State Farm Insurance Company of Canada.

Russell M. Raikes and John D. Goudy, for Law Foundation of Ontario (Intervenor). [page368]

The judgment of the court was delivered by

R.P. ARMSTRONG J.A.: --

Introduction

[1] The appellants ("plaintiffs") and the Law Foundation of Ontario seek leave to appeal from the costs orders of Justice Haines of the Superior Court of Justice in respect of several class action proceedings. There are 42 motions for leave to appeal, which have been consolidated into a single proceeding in this court. See Schedule A for a list of motions for leave to appeal.

[2] Some of the respondents (the insurers) seek costs orders in respect of substantive appeals that were rendered moot by this court's decision in David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co. (2005), 76 O.R. (3d) 161, [2005] O.J. No. 2436 (C.A.), in which the court overruled its previous decision in McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2001), 54 O.R. (3d) 704, [2001] O.J. No. 2312 (C.A.) ("McNaughton I"). After oral argument, we received notification from counsel on behalf of a number of the defendant insurers that they were prepared to forego any claims for costs in respect of the appeals that had become moot. All counsel received copies of this notification. We have not been advised that any other defendant insurer takes a contrary position. I therefore proceed on the basis that we need not deal further with the costs related to the substantive appeals.

[3] The issue of costs in the David Polowin Real Estate Ltd. appeal remains outstanding and will be released separately.

Procedural History

[4] In June 2001, this court released its judgment in McNaughton I, which decided that the practice of automobile insurers charging a deductible on total loss claims, where the insurer took title to the salvage, breached s. 6(7) of O. Reg. 777/93 of the Insurance Act, R.S.O. 1990, c. I.8. The

McNaughton I judgment was the catalyst for proposed class actions in 37 different cases, which include the insurers in this proceeding.

[5] Justice Haines (the "motions judge") was designated as the case management judge for all 37 actions. The respondent insurers brought several preliminary motions pursuant to Rules 20 and 21 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. Each of the representative plaintiffs brought motions for certification. The motions judge case managed all of the actions for more than six years. [page369]

[6] In the motions pursuant to Rules 20 and 21, the respondents submitted that

(i) the court had no jurisdiction over out-of-province plaintiffs;
(ii) the actions were filed too late since the limitation period was one year under statutory condition 9(4) of O. Reg. 777/93 under the Insurance Act, and not six years pursuant to the Limitations Act, R.S.O. 1990, c. L.15;
(iii) "actual cash value" in statutory condition 6(7) of O. Reg. 777/93 under the Insurance Act had a different meaning from that submitted by the plaintiffs;
(iv) any plaintiff who was insured under an "Ontario Policy Change Form 43 Endorsement" had no cause of action;
(v) there was no reasonable cause of action relating to the claim of the tort of conversion;
(vi) there was no reasonable cause of action relating to the claim of unjust enrichment or constructive trust;
(vii) the defendant was not the proper representative in Lupsor v. Middlesex Mutual Insurance Co.; and
(viii) the action in Japetco and Barash v. Allstate Insurance Co. was an abuse of process.

The insurers succeeded on all of their motions.

[7] In the motions where the status of the named representative plaintiff was in issue, there were cross-motions by the plaintiffs to add or substitute another representative plaintiff. The cross-motions were dismissed in Giuliano v. Allstate Insurance Co.,[1] Steven Johnston v. State Farm Insurance Co. and Shaw v. Zurich Canada.

[8] The motions judge's decisions on costs were limited to entitlement and scale. The assessment in each action was adjourned to be considered at a future date when all issues related to entitlement and scale were resolved.

[9] The motions judge concluded that the costs of the various motions should be payable to the successful parties. The costs [page370] awards were to be on a partial indemnity scale, except for the Rule 20 motions where the defendant insurer showed that there was no genuine issue for trial relating to the limitation period and the plaintiffs had "persisted with unsubstantiated allegations of

fraud, dishonesty and deceit". In the latter cases, the costs award were to be on a substantial indemnity scale.

The costs decisions

(a) The January 19, 2005 decision

[10] This decision addressed the issue of costs in numerous motions in 30 separate actions. The Law Foundation was granted standing before the motions judge because it had provided financial support to the plaintiffs through the Class Proceedings Fund and, as a result, the insurers were entitled to apply to the Law Foundation's board for the payment of any costs awarded to them. The Law Foundation has also received standing in this court on the application for leave to appeal.

[11] Before the motions judge, the plaintiffs and the Law Foundation relied upon s. 31 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "CPA") in support of their position that costs should be awarded in their favour. Section 31(1) of the CPA provides:

> 31(1) In exercising its discretion with respect to costs under subsection 131(1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

[12] Counsel for the plaintiffs and the Law Foundation submitted that McNaughton I was a test case and that because they had brought all of the actions then before the court under the same case management regime, these actions collectively constituted a test case for the purpose of s. 31(1) of the CPA.

[13] Counsel for the plaintiffs and the Law Foundation further submitted that the various matters brought by the insurers raised novel points of law for which there was no existing decision on point or for which the applicable law was unclear.

[14] Finally, counsel for the plaintiffs and the Law Foundation submitted that the issues raised by the various motions involved matters of public interest because they affected insured motorists in Ontario and in other provinces where automobile insurance policies are similar.

[15] The motions judge rejected the arguments of counsel for the plaintiffs and the Law Foundation on each of their submissions.

[16] On the submissions of whether the various motions raised novel points of law or engaged the public interest, the motions [page371] judge concluded that while the motions may have involved novel facts, they were decided using settled law. He agreed that the interpretation of statutory condition s. 6(7) raised a novel issue concerning a matter of public interest. However, he concluded that that issue had already been decided in McNaughton I. The motions judge stated:

> In my view, the issues addressed in the several generic motions before this court were

> all related to defining the class within these proceedings and as such did not impact anyone beyond the reach of these proceedings. The interpretation of the subject statutory condition would obviously have an impact on the manner in which the insurers resolved total loss claims in the future, but that issue which was both novel and because of its impact on the practice of settling certain claims, a matter of public interest, was already resolved by McNaughton.

[17] As indicated above, the motions judge awarded the costs to the insurers on a partial indemnity scale, except in respect of the Rule 20 motions where the plaintiffs persisted with unsubstantiated allegations of fraud and similar conduct.

(b) The September 16, 2005 decision

[18] This decision was a sequel to the decision of January 19, 2005. It addressed the issues of costs relating to actions that the motions judge had dismissed in that earlier decision, but not specifically addressed in his reasons. One action in particular requires mention here -- Japetco and Barash v. Allstate.

[19] In Giuliano v. Allstate Insurance Co., it became apparent that Mr. Giuliano had a problem with his claim: he had, in fact, been reimbursed for his deductible. When the defendant insurer moved for judgment, counsel for the plaintiff brought a motion to add Japetco Corporation and Cheryl Barash as plaintiffs. Some seven months later, a separate action was commenced in the style of Japetco and Barash v. Allstate. The plaintiffs in the second action were the same parties as the plaintiffs sought to add in the Giuliano action. Ultimately, the motion judge declined to add Japetco and Barash as plaintiffs. A motion to dismiss the second action as an abuse of process followed and was granted. The motions judge concluded that there was no justification for the second action and ordered substantial indemnity costs in favour of the insurer.

(c) The October 13, 2006 decision

[20] This decision related to Lupsor v. Middlesex Mutual Insurance Co. In that case, the insurer moved for a finding that it was not an appropriate party to be certified as a representative defendant. The insurer also moved for judgment on the [page372] ground that the plaintiff's personal claim fell outside the limitation period. The plaintiff brought a cross-motion under s. 38 of the Trustee Act, R.S.O. 1990, c. T.23 to extend the limitation period. This cross-motion was dismissed. The action was dismissed because the plaintiff's personal claim was caught by the limitation period and the defendant was not an appropriate party to be certified as a representative defendant.

[21] The motions judge awarded the insurer substantial indemnity costs on the motion for judgment on the plaintiff's personal claim. He made no order as to costs on the motions regarding whether the insurer was a proper representative defendant on the ground that this raised a novel point. On the balance of the issues, the insurer was awarded partial indemnity costs.

The Motion for Leave to Appeal

[22] The plaintiffs and the Law Foundation submit that the motions judge, in awarding costs to the insurers, committed the following errors in principle:

(i) the motions judge failed to give proper consideration to the underlying goals of the CPA;
(ii) the motions judge failed to give proper consideration to the factors in s. 31(1) of the CPA;
(iii) the motions judge failed to give proper consideration to the factors in rule 57.01(1) of the Rules of Civil Procedure;
(iv) the motions judge erred in awarding costs on a substantial indemnity scale in those summary judgment motions where the limitation period defence was successful; and
(v) the motions judge erred in awarding costs on a substantial indemnity scale in Japetco and Barash v. Allstate.

The test for leave to appeal

[23] Appeals in which the sole issue is costs lie only with leave of the court: see Courts of Justice Act, R.S.O. 1990, c. C.43, s. 133(b).

[24] In Brad-Jay Investments Ltd. v. Szijjarto, [2006] O.J. No. 5078, 218 O.A.C. 315 (C.A.), at para. 21, this court said:

> Leave to appeal a costs order will not be granted save in obvious cases where the party seeking leave convinces the court that there are "strong grounds upon which the appellate court could find that the judge erred in exercising his discretion".

[25] This court has also said that "[l]eave to appeal a costs order, standing alone, is granted only sparingly": see [page373] Inter-Trust Mortgage Investment Corp. v. Robinson, 1999 CarswellOnt 1733 (C.A.), at para. 12.

[26] As to the grounds upon which an appellate court should set aside a costs order, Arbour J. said in Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, at para. 27:

> A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong (Duong v. NN Life Insurance Co. of Canada (2001), 141 O.A.C. 307, at para. 14).

[27] I am also mindful that a costs award is a discretionary order and that the judge of first instance is in the best position to determine the entitlement, scale and quantum of any such award.

In this case, the motions judge, a trial judge of great experience, has lived with these cases for more than six years. He knows and understands all the subtleties of the cases. I must grant him considerable deference unless I conclude that there are obviously strong grounds of appeal.

Analysis

(i) Did the motions judge fail to give proper consideration to the underlying goals of the CPA?

[28] Counsel for the plaintiffs and the Law Foundation submit that the CPA is remedial legislation that should be interpreted purposively to give effect to its underlying goals, including judicial economy, improved access to the courts and modification of behaviour of actual or potential wrongdoers. Counsel relied on the following articulation of the goals of the CPA by McLachlin C.J.C. in Hollick v. Toronto (City), [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, at para. 15:

> The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in Western Canadian Shopping Centres Inc. (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs among a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public ... In my view, it is essential therefore that the courts not take an overly restrictive approach to the legislation, but rather interpret the Act in such a way that gives full effect to the benefits foreseen by the drafters. [page374]

[29] The plaintiffs and the Law Foundation make the somewhat surprising submission in their consolidated factum that the motions judge's reasons of January 19, 2005 "do not address in any way the underlying goals of the Class Proceedings Act". They further argue that the failure to address these underlying goals in determining entitlement and scale of costs constitutes a fundamental error in principle upon which this court should grant leave to appeal.

[30] I disagree. Paragraph 7 of the motions judge's reasons [(2005), 74 O.R. (3d) 216, [2005] O.J. No. 179 (S.C.J.)] under the heading "General Principles of Costs in Class Proceedings" expressly states:

> One of the often cited goals of the CPA is to improve access to the courts so that certain claims may be asserted that might otherwise never be litigated because of, inter alia, the cost of litigation in relation to the value of the claim. The plaintiffs contend

> that these actions would not be economically viable except in a class proceedings context. They submit that these actions challenge an insurance industry practice where the amount in issue for any individual claimant is very modest and where there is an enormous disparity in the financial resources and sophistication of the defendants, in comparison to the members of the proposed plaintiff classes, a circumstance which, the plaintiff's maintain, the CPA was specifically designed to address.

[31] In my view, the above excerpt clearly indicates that the motions judge was aware of the underlying goals of the CPA and, in particular, the objects of access to justice and judicial economy.

[32] Counsel for the plaintiffs and the Law Foundation make a further surprising submission in their factum as follows:

> It is submitted that Justice Haines erred in principle in considering that the underlying goals of the Act were not relevant to entitlement and scale and only relevant to quantum.

I see no basis whatever for the above submission. At a minimum, it distorts the motions judge's reasons. In the following passage from para. 30 of his reasons of September 16, 2005, the motions judge makes clear that he regarded the CPA's underlying goals as relevant not only to quantum, but also to entitlement and scale:

> During the course of argument with respect to these matters, counsel for the plaintiffs made further submissions relating to those principles on costs that apply specifically to class proceedings. I had considered and addressed those principles in my reasons of January 19, 2005 and see no reason to expand on those reasons at this time; although I indicated then and reiterate now that I will entertain further submissions from counsel on the extent, if any, the underlying goals of the Class Proceedings Act, 1992 should impact the quantum of costs awarded.

(Emphasis added)

The above excerpt expressly confirms that the motions judge, in his reasons of January 19, 2005, considered and addressed the [page375] relevance of the CPA's underlying principles to entitlement and scale.

> [33] I see no merit in this potential ground of appeal.

(ii) Did the motions judge fail to give proper consideration to the factors in s. 31(1) of the CPA?

[34] The plaintiffs and the Law Foundation concede that the motions judge, in his reasons,

addressed the factors in s. 31(1) of the CPA. However, they disagree with his conclusion that the various motions before him did not constitute a test case, did not raise novel points of law and did not involve matters of public interest.

[35] Before addressing the motions judge's assessment of the s. 31(1) factors, I note that the decision of how much weight to accord these factors is discretionary. The discretionary character of the decision is evident not only from the s. 31(1)'s reference to the court's "discretion with respect to costs" under the Courts of Justice Act, but also from the second part of the provision: "the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest" (emphasis added).

[36] The plaintiffs commenced all of these actions before the court after the court's decision in McNaughton I on the premise that this court had decided in their favour the interpretation of statutory condition 6(7). There is no issue that McNaughton I was a test case. As for the cases at bar, however, I agree with the motions judge when he accepted the insurers' characterization of the preliminary motions in these cases [(2005), 74 O.R. (3d) 216, [2005] O.J. No. 179 (S.C.J.) at para. 12]:

> The defendants contend that the preliminary motions relating to jurisdiction, the limitation period, the OPCF 43 endorsement, the meaning and application of "actual cash value" and the alternative pleadings in conversion and unjust enrichment may have involved novel facts but were resolved with the application of settled law. I agree with this characterization of these issues. I accept that the interpretation of the subject statutory condition represented a novel issue involving a matter of public interest and I indicated as much in my reasons for making no order as to costs in disposing of the original application on August 14, 2000.

[37] I see no merit in the submissions of the plaintiffs and the Law Foundation that the various motions in issue here can be collectively characterized as a test case and that these motions raise novel points of law. Apart from some motions that revisited the issue of the interpretation of statutory condition 6(7) (not the subject of this application), the issues raised by the remaining motions could fairly be described as typical of everyday civil litigation. [page376]

[38] For similar reasons, I agree with the motions judge that the issues raised in the generic motions do not "impact anyone beyond the reach of these proceedings" and therefore do not engage the public interest in the broader sense meant by the CPA.

(iii) Did the motions judge fail to give proper consideration to the factors in rule 57.01(1) of the Rules of Civil Procedure?

[39] Although counsel for the plaintiffs and the Law Foundation listed the failure to consider properly the factors in rule 57.01(1) as a separate ground in support of their application for leave to appeal, there was very little elaboration of the issue in their factum. In any event, I am unable to

find anything in the reasons of the motions judge that runs afoul of rule 57.01(1).

(iv) Did the motions judge err in awarding costs on a substantial indemnity scale in the summary judgment motions where the limitation period defence was successful?

[40] The plaintiffs and the Law Foundation submit that the motions judge erred in awarding costs on a substantial indemnity scale where the unproven allegation of fraudulent concealment was pleaded in relation to the running of the limitation period. Unlawful concealment, they submit, is a form of equitable fraud, which is not the same as civil fraud. They rely upon the classic definition of equitable fraud adopted by Dickson J. in Guerin v. The Queen, [1984] 2 S.C.R. 335, [1984] S.C.J. No. 45, at p. 390 S.C.R.:

> The fraudulent concealment necessary to toll or suspend the operation of the [limitation period] need not amount to deceit or common law fraud. Equitable fraud, defined in Kitchen v. Royal Air Force Association, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient.

[41] The plaintiffs and the Law Foundation argue that an unproven allegation of equitable fraud is not sufficient to attract an award of substantial indemnity costs. In support of this submission, they cite three cases: M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, [1992] S.C.J. No. 85, at paras. 63-65; First City Capital Ltd. v. British Columbia Building Corp., [1989] B.C.J. No. 130, 43 B.L.R. 29 (S.C.); and Georgialee Lang & Associates v. Wigod, [2003] B.C.J. No. 1792, 2003 BCSC 1178, at paras. 42, 48-49.

[42] The first two cases, M. (K.) and First City Capital, do not stand for the proposition advanced by the plaintiffs and the Law Foundation. [page377]

[43] In the third case, Georgialee Lang & Associates, the trial judge said, at para. 49:

> I find that neither the allegations of equitable fraud or negligence in this case justify an order for special costs. A claim of equitable fraud falls short of deceit, and is distinct from an allegation of fraud: First City Capital Ltd. v. British Columbia Building Corp., [1989] B.C.J. No. 130 (S.C.).

As I read this passage, it does not say that unproven allegations of equitable fraud can never justify substantial indemnity costs, but only that substantial indemnity costs may not be justified where the claims of equitable fraud do not involve allegations of deceit.

[44] No Ontario case was provided to us in support of the proposition that unproven allegations of equitable fraud are not a sufficient ground for an award of substantial indemnity costs.

[45] I also observe that it is not only unproven fraudulent conduct that may attract substantial indemnity costs. In Hamilton v. Open Window Bakery, supra, at para. 26, Arbour J. held that unproven allegations of dishonesty, as well as of fraud, are capable of attracting substantial indemnity costs.

[46] The plaintiffs and the Law Foundation further submit that the plaintiffs did not plead fraud, fraudulent misrepresentation or deceit as causes of action against the insurers. Their position is that the allegations the motions judge relied upon to support an award of substantial indemnity costs related to punitive damages claims that were not before the motions judge because the actions were dismissed at a preliminary stage.

[47] To resolve this issue, it is necessary to review the relevant allegations in the statements of claim. By agreement, statements of claim in four of the actions were filed as representative of all the actions. I will rely on these four statements.

[48] In Ross v. Coseco Insurance Co., the particulars pleaded in support of the tolling of the limitation period included the following, at para. 17:

> The defendant breached the duty of good faith owed by the defendant, and its agents, servants and employees, to the class members, by:
>
> . . . . .
>
> (c) orchestrating a claims adjustment process in a deliberate and planned fashion so as to deprive the class members, of payment for the actual cash value of their vehicle;
> (d) instructing its agents, servants and employees to embark upon a course of conduct designed to deprive the class members of their ownership rights in their damaged vehicles as described in a manual, or as part of their training;
> (f) deliberately and actively concealing from the class members, their right to demand payment of the actual cash value of their vehicle, or [page378] their right to retain property of their vehicle and salvage rights once the deductible was applied.

In my view, the above allegations are tantamount to allegations of fraud, dishonesty and deceit.

[49] In respect of punitive damages, the plaintiff in Ross pleaded, at para. 20(a):

> The particulars of the conduct of the defendant relied upon by the plaintiff as supporting a substantial award of punitive damages are:

(a) the defendant's breach of its duty of utmost good faith to the class members as described in paragraphs 17(a) -- (h) [dealing with discoverability and limitation periods] was highly reprehensible conduct that departs to a marked degree from ordinary standards of decent behaviour;
(b) the defendant's conduct was motivated by greed and resulted in the defendant accumulating substantial wealth and profit at the expense of the class members.

The above allegations appear to relate not only to punitive damages but also to the breach of the duty of utmost good faith in respect of the limitation period, an issue that the motions judge resolved.

[50] In Hayner v. Trafalgar Insurance Co. of Canada, the plaintiff pleaded, at para. 19:

Discoverability Doctrine

19. The plaintiff and other class members had no means of knowing they were either entitled to the actual cash value of the motor vehicle that had been classified as a total loss, or the salvage from the sale of that motor vehicle. Accordingly, no limitation period has begun to run.

The above pleading does not allege the kind of conduct that, if unproven, would attract substantial indemnity costs. In support of punitive damages, the plaintiff in Hayner pleaded as follows:

Punitive Damages

25. For commercial reasons of monetary gain, the defendant has engaged in a practice it knew or ought to have known was unlawful, and in breach of the Statutory Condition, and further in breach of its duty of utmost good faith to the plaintiff and other class members.
26. The defendant's conduct was callous and high-handed, and took advantage of the ignorance and vulnerability of the plaintiff and other class members. The plaintiff and other class members are therefore entitled to a substantial award of punitive damages.

[51] Unlike the pleadings on punitive damages in Ross, these pleadings do not appear connected to the limitation period issue. Because the issue of punitive damages was not resolved before the motions judge, then, the above allegations, if [page379] unproven, would not attract a costs award on a substantial indemnity scale.

[52] In Shaw v. Zurich Canada, under the heading "Concealment by Defendant Triggers

Discoverability Doctrine", the plaintiff pleaded:

> 16. The Class Members had no means of knowing what the defendant did with the vehicles or the amounts of the salvage unless advised by the defendant. As a result of the defendant's failure to reveal to the Class Members the aforesaid Statutory Condition, and the defendant's systematic concealment of the amount of the proceeds of the sale of the salvage, the Class Members did not know they were entitled to the proceeds of the sale of the salvage. Accordingly, no limitation period begins to run against the Class Members unless and until they learn whether their vehicles were salvaged, except in Alberta where the applicable limitation period is 10 years.

(Emphasis added)

The allegation that the insurer engaged in the "systematic concealment of the amount of the proceeds of the sale of the salvage" is an allegation of an act of intentional dishonesty which, if unproven, may attract substantial indemnity costs.

[53] In Shaw, the plaintiff's allegations in support of an award of punitive damages are virtually identical to those contained in the statement of claim in Hayner.

[54] In the fourth representative statement of claim, Jory v. Primmum Insurance Co., the allegations in respect of the discoverability doctrine are identical to the allegations in Shaw. In respect of punitive damages, the original allegations are virtually identical to those in both Shaw and Hayner. However, the statement of claim was subsequently amended to add several further allegations concerning the callous and high-handed conduct on the part of the defendant insurer.

[55] The above excerpts from the four representative statements of claim indicate that three of the four -- Ross, Shaw and Jory -- contain allegations of fraudulent or dishonest conduct that, in my view, are capable of attracting substantial indemnity costs if such allegations are unproven.

[56] I now return to consider what the motions judge said about these allegations in respect of the scale of costs. In his reasons of January 19, 2005, he referred to the judgment of R.A. Blair J. in 131843 Canada Inc. v. Double "R" (Toronto) Ltd., [1992] O.J. No. 3879, 7 C.P.C. (3d) 15 (Gen. Div.), for the proposition that only exceptional cases attract substantial indemnity costs. Along these lines, the motions judge also cited this court's judgment in Murano v. Bank of Montreal (1998), 41 O.R. (3d) 222, [1998] O.J. No. 2897 (C.A.), at pp. 243-33 O.R. The motions [page380] judge was thus alive to the exceptional nature of substantial indemnity costs.

[57] The motions judge concluded his reasons on this issue as follows [at paras. 18-19]:

> Counsel for the plaintiffs and the Law Foundation of Ontario contend that there are no special circumstances in these cases that warrant an award of costs on a substantial

> indemnity scale. They maintain that the allegations in the pleadings raise the issue of unlawful concealment, which is essentially an allegation of unconscionability or equitable fraud that engages the issue of discoverability. There is no doubt that the conduct pleaded would, if established, give rise to a finding of fraudulent concealment but, in my view, the allegations go well beyond that. It is apparent from reading the pleadings that the allegations are intended to identify dishonest conduct that, if proven, would likely attract an award of punitive damages. It is accepted that class proceedings are, in many respects, different from other litigation and that the courts have been cautious in their approach to costs in such proceedings in order to avoid stifling the objectives of the CPA, but proceeding under the CPA should not confer immunity from costs sanctions designed to discourage unacceptable practices. Therefore, I can see no reason why I should not award substantial indemnity costs on the motions for judgment in the actions where the claims of the proposed representative plaintiffs fell outside the one year limitation period and those plaintiffs persisted with unsubstantiated allegations of fraud, dishonesty and deceit in an effort to establish fraudulent concealment in order to extend the limitation period to include their claims.
>
> In the end, it is my opinion that the costs on all of the motions in these actions should be payable to the successful party on a partial indemnity scale except for the Rule 20 motions where the defendants demonstrated there was no genuine issue for trial relating to the limitation period. On those motions, the defendants will be entitled to their costs on a substantial indemnity scale. Counsel should contact the trial co-ordinator at London to arrange for an appointment for me to fix those costs.

(Emphasis added)

[58] Based on a review of the four representative statements of claim, not every statement of claim that raises the discoverability issue is supported by allegations of fraud, dishonesty or deceit. However, the last sentence of the first paragraph of the above excerpt from the motions judge's reasons suggests that the motions judge intended to confine substantial indemnity costs to the those cases where the limitation period was in issue and the "plaintiffs persisted with unsubstantiated allegations of fraud, dishonesty and deceit in an effort to establish fraudulent concealment".

[59] While it is true that the second paragraph of the above excerpt from the motions judge's reasons, if read by itself, suggests that substantial indemnity costs apply to every case where the limitation defence succeeded, I do not believe that is what the motions judge intended. For example, as indicated above, [page381] Hayner would not be an appropriate case for substantial indemnity costs. In any event, determining which limitations claims involved allegations of fraud, dishonesty and deceit will be easily clarified when the motions judge proceeds to the assessment of the quantum in each of these cases.

[60] While the allegations of fraud and improper conduct solely in support of punitive damages appear to be extreme, and would probably not have succeeded had the actions proceeded to trial, I do not believe that they can support an award of substantial indemnity costs since the issue of punitive damages was never resolved.

(v) Did the motions judge err in awarding costs on a substantial indemnity scale in Japetco and Barash v. Allstate?

[61] For convenience, I restate the relevant facts of Japetco and Barash. In the first action commenced against Allstate, Mr. Giuliano was named as the representative plaintiff. It was later discovered that Mr. Giuliano had in fact been reimbursed for his deductible. Counsel for the plaintiffs moved to substitute Japetco Corporation and Cheryl Barash as representative plaintiffs. Before the return of that motion, counsel for the plaintiffs commenced a second action in the names of Japetco Corporation and Ms. Barash against Allstate. That action was eventually dismissed.

[62] Counsel for the appellants submits that the motions judge erred in awarding costs on a substantial indemnity scale in respect of the second action because that action was commenced out of an abundance of caution to protect the class in the event that the motion to substitute was denied.

[63] In para. 28 of his September 16, 2005 reasons for decision, the motions judge said:

> In my view, there was no justification for the commencement of the Japetco and Barash action. In doing so, the plaintiffs created a duplicate proceeding to which the defendant was forced to respond. In such circumstances, I consider such conduct scandalous and conclude that the defendant is entitled to recover its substantial indemnity costs in this action.

[64] I can find no reason to disagree with the motions judge.

Conclusion

[65] In my view, there are not strong grounds upon which to grant leave to appeal in this case. The motions judge was clearly entitled to exercise his discretion by awarding costs to the successful parties on the motions before him. I can find nothing in the CPA, the Courts of Justice Act, the Rules of Civil Procedure [page382] or the case law to suggest otherwise. Further, it was within the motions judge's discretion to award substantial indemnity costs in the cases he deemed appropriate. In respect of the alleged grounds of appeal, and the errors said to be made by the motions judge, I find that they are without merit.

[66] For the above reasons, I would dismiss the application for leave to appeal.

Costs of the Application

[67] In respect of the costs of the application, counsel for the insurers may make written submissions not to exceed ten pages (double-spaced) with bills of costs attached within 15 days of the release of these reasons. Counsel for the plaintiffs and the Law Foundation may make submissions in response not to exceed ten pages (double-spaced) within 30 days of the release of these reasons. Counsel for the insurers may reply in writing (double-spaced) not to exceed five pages within 35 days of the release of these reasons.

Action dismissed.

SCHEDULE "A"

MOTIONS FOR LEAVE TO APPEAL COSTS WHERE APPEAL AS OF RIGHT ALREADY PENDING

Court file number C-40376

1. McNaughton Automotive Limited, Appellant v. Co-operators General Insurance Company, Respondent

Court file number C-40426

2. Boyd Johnston, Appellant v. Federation Insurance Company of Canada, Respondent

Court file number C-40910

3. Boyd Johnston, Appellant v. Federated Insurance Company of Canada, Respondent

Court file number C-40416

4. Laurier Duclos, Appellant v. The Wawanesa Mutual Insurance Company, Respondent[page383]

Court file number C-40408

5. Anne Empke, Appellant v. Security National Insurance Company, Respondent

Court file number C-40894

6. Anne Empke, Appellant v. Security National Insurance Company, Respondent

Court file number C-40418

7. Sharon Farquhar, Appellant v. Liberty Mutual Insurance Company, Respondent

Court file number C-40911

8. Sharon Farquhar, Appellant v. Liberty Mutual Insurance Company, Respondent

Court file number C-40399

9. Giuseppe Giuliano, Appellant v. Allstate Insurance Company, Respondent

Court file number C-41947

10. Giuseppe Giuliano, Appellant v. Allstate Insurance Company, Respondent

Court file number C-40504

11. Leonard Gross and Ilene Gross, Appellants v. The Guarantee Company of North America, Respondent

Court file number C-40508

12. Kevin Hayner, Appellant v. Trafalgar Insurance Company of Canada, Respondent

Court file number C-40420

13. Lorri Hornick, Appellant v. TD General Insurance Company, Respondent

Court file number C-40409

14. Eveline James, Appellant v. AXA Insurance (Canada), Respondent [page384]

Court file number C-42480

15. Evelin James, Appellant v. AXA Insurance (Canada), Respondent

Court file number C-42478

16. Japetco Corporation and Cheryl Barash, Appellant v. Allstate Insurance Company of Canada, Respondent

Court file number C-40407

17. Gary Jory, Appellant v. Primmum Insurance Company, Formerly known as Canada Life Casualty Insurance Company, Respondent

Court file number C-40895

18. Gary Jory, Appellant v. Primmum Insurance Company, Formerly known as Canada Life Casualty Insurance Company, Respondent

Court file number C-40403

19. Mary Ann Lupsor, Estate Trustee without a Will of the Estate of Earnest Eugene Lupsor, Appellant v. Middlesex Mutual Insurance Co., Respondent

Court file number C-43715

20. Mary Ann Lupsor, Estate Trustee without a Will of the Estate of Earnest Eugene Lupsor, Appellant v. Middlesex Mutual Insurance Co., Respondent

Court file number C-40509

21. Joseph Marra, Appellant v. The Personal Insurance Company of Canada, Respondent

Court file number C-40510

22. Renalda Matthews, Appellant v. Belair Insurance Company Inc., Respondent

Court file number C-40419

23. William McAlister, Appellant v. Pilot Insurance Company, Respondent
[page385]

Court file number C-40423

24. Roger Moreel, Appellant v. York Fire & Casualty Insurance Company, Respondent

Court file number C-40412

25. Betty Mrozinski, Appellant v. Allianz Insurance Company of Canada, Respondent

Court file number C-42476

26. Betty Mrozinski, Appellant v. Allianz Insurance Company of Canada, Respondent

Court file number C-40404

27. Ryan O'Donnell, Appellant v. CAA Insurance Company (Ontario), Respondent

Court file number C-42477

28. Ryan O'Donnell, Appellant v. CAA Insurance Company (Ontario), Respondent

Court file number C-40424

29. David Polowin Real Estate Ltd., Appellant v. The Dominion of Canada General Insurance Company, Respondent

Court file number C-40506

30. John Ross, Appellant v. Coseco Insurance Company, Respondent

Court file number C-40414

31. Steven Johnson, Appellant v. State Farm Insurance Company of Canada, Respondent

Court file number C-40631

32. Steven Johnson, Appellant v. State Farm Insurance Company of Canada, Respondent

Court file number C-40425

33. Sandy Big Canoe, Appellant v. The Economical Insurance Group, Respondent [page386]

Court file number C-40413

34. Peter Segnitz, Appellant v. Royal & Sunalliance Insurance Company of Canada, Respondent

Court file number C-42146

35. Peter Segnitz, Appellant v. Royal & Sunalliance Insurance Company of Canada, Respondent

Court file number C-40417

36. A. Gordon Shaw, Appellant v. Zurich Canada, Respondent

Court file number C-42479

37. A. Gordon Shaw, Appellant v. Zurich Canada, Respondent

Court file number C-40402

38. Gordon Veley, Appellant v. CGU Insurance Company of Canada, Respondent

Court file number C-40428

39. Thomas White, Appellant v. The Citadel General Insurance Company, Respondent

Court file number C-40405

40. Robert Woods, Executor of the Estate of Wayne Robert Woods, Appellant v. ING Halifax, Respondent

Court file number C-40427

41. 927417 Ontario Inc., Appellant v. Old Republic Insurance Company of Canada, Respondent

MOTION FOR LEAVE TO APPEAL COSTS FOR WHICH THERE IS NO ACCOMPANYING APPEAL AS OF RIGHT

Court file number M-33003

42. Sharon Farquhar, Appellant v. Liberty Mutual Insurance Comapny, Respondent

Notes

1 In this case, although the motions judge dismissed the cross-motion to add Japetco Corporation as a plaintiff, he granted the motion to add Cheryl Barash as a plaintiff. However, in a later decision, he ultimately decided that Ms. Barash was not an appropriate substitute representative plaintiff.