Ross v. Coseco Insurance Company
Gross et al. v. The Guarantee Company of North America
[Indexed as: Ross v. Coseco Insurance Co.]

67 O.R. (3d) 463

[2003] O.J. No. 3848

Court File No. 02-CV-238158CP

Ontario Superior Court of Justice

Haines J.

October 2, 2003

Insurance -- Limitation periods -- Plaintiffs bringing action against insurers alleging that insurers breached statutory condition 6(7) under Insurance Act by subtracting deductibles upon settlement of their total [page464] loss claims -- Plaintiffs also raising issue of unjust enrichment -- Plaintiffs not permitted to prosecute action as claim for unjust enrichment where claim arose from breach of insurance contract in order to avoid applicable limitation period -- Statement of claim disclosing no cause of action in unjust enrichment -- One-year limitation period set out in statutory condition 9(4) applying -- Doctrine of fraudulent concealment not applying to postpone running of limitation period as there was no evidence that insurers had concealed material facts -- Cause of action was complete once plaintiffs knew insurers had subtracted deductible and taken title to salvage -- O. Reg. 777/93, Sched., stat. cons. 6(7), 9(4)

The plaintiffs brought actions against the defendant insurers alleging that the defendants breached statutory condition 6(7) under O. Reg. 777/93 of the Insurance Act, R.S.O. 1990, c. I.8 by subtracting the deductibles upon settlement of their total loss claims. The plaintiffs also raised issues of unjust enrichment and constructive trust. The defendants brought a motion pursuant to rule 21.01(1)(a) and (b) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 for a determination of the applicable limitation period and to strike certain portions of the statements of claim. They also moved to strike the plaintiffs' replies and for an order pursuant to Rule 20 dismissing the actions on the basis that the claims were barred by operation of the limitation period. They submitted that the applicable limitation period was one year as set out in statutory condition 9(4).

Held, the motion should be granted.

The plaintiffs made no claim for relief based on constructive trust in their statements of claim but made that claim in their replies. This was prohibited by rule 25.06(5), which provides that an allegation that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading. The replies raised allegations of a trust or fiduciary relationship between insured and insurer, which were not the same thing as the duty of utmost good faith that was addressed in the statements of claim. The applicable parts of the replies should be struck.

The doctrine of unjust enrichment was not developed to provide an alternative remedy to that offered by contract. Nor was it developed to allow litigants to avoid applicable limitation periods. Permitting an action to be prosecuted as a claim for unjust enrichment in circumstances where the claim arises from a breach of contract would be tantamount to eliminating any legislated limitation period for breach of contract. It was plain and obvious that the statements of claim disclosed no cause of action in unjust enrichment.

The applicable limitation period was the one-year period set out in statutory condition 9(4). The claims in this case were commenced well beyond one year from the date of the plaintiffs' losses. If the doctrine of fraudulent concealment were engaged on the pleadings, the running of the limitation period would be postponed until the plaintiffs discovered the fraud or with the exercise of reasonable diligence ought to have done so. However, there was no evidence that the defendants concealed any material facts in this case. Once the plaintiffs knew the defendants had subtracted a deductible and taken title to the salvage, the cause of action was complete. Both actions should be dismissed.

Luscar Ltd. v. Pembina Resources Ltd. (1994), 24 Alta. L.R. (3d) 305, [1995] 2 W.W.R. 153 (C.A.) [Leave to appeal to S.C.C. refused (1995), 193 N.R. 398n, [1995] S.C.C.A. No. 6], revg in part (1992), 85 Alta. L.R. (2d) 46 (Q.B.), supp. reasons (1991), 2 Alta. L.R. (3d) 157 (Q.B.); [page465] McNaughton Automotive Ltd. v. Co-operators General Insurance Co., [2003] I.L.R. ÂI-4217, [2003] O.J. No. 2914 (QL) (S.C.J.) (sub nom. Segnitz v. Royal & Sun Alliance Insurance Co. of Canada), apld

McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2001), 54 O.R. (3d) 704, 200 D.L.R. (4th) 449, [2001] I.L.R. ÂI-3997, 15 M.V.R. (4th) 179, 10 C.P.C. (5th) 1 (C.A.), revg (2000), 50 O.R. (3d) 300, 6 M.V.R. (4th) 297 (S.C.J.); Mueller v. Western Union Insurance Co., [1974] 5 W.W.R. 530, [1974] I.L.R. Â1-636 (Alta. Dist. Ct.); Pauli v. ACE Ina Insurance, [2003] 6 W.W.R. 51, [2003] I.L.R. ÂI-4220, 2003 ABQB 107, 12 Alta. L.R. (4th) 359, [2003] A.J. No. 175 (QL) (Q.B.), supp. reasons 2003 ABQB 354, 15 Alta. L.R. (4th) 282, [2003] A.J. No. 533 (QL) (Q.B.), supp. reasons 2003 ABQB 600, 15 Alta. L.R. (4th) 286, [2003] A.J. No. 893 (QL) (Q.B.), consd

Other 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.); Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1, 247 N.R. 97, 49 B.L.R. (2d) 68, [2000] I.L.R. ÂI-3741, 39 C.P.C. (4th) 100; Halloran v. Sargeant (2002), 217 D.L.R. (4th) 327, 23 C.P.C. (5th) 23 (Ont. C.A.); Hi-Tech Group Inc. v. Sears Canada Inc. (2001), 52 O.R. (3d) 97, 11 B.L.R. (3d) 197, 4 C.P.C. (5th) 35 (C.A.); McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2003), 66 O.R. (3d) 466, [2004] I.L.R. ÂI-4249, [2003] O.J. No. 3267 (QL) (S.C.J.); Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co. (1994), 18 O.R. (3d) 663, 115 D.L.R. (4th) 37, [1994] I.L.R. Â1-3067, 56 C.P.R. (3d) 46, 4 E.T.R. (2d) 69 (C.A.), revg (1990), 68 D.L.R. (4th) 586, [1990] I.L.R. Â1-2658 (Ont. H.C.J.) (sub nom. Plaza Fiberglass Manufacturing Ltd. v. New Hampshire Insurance Co.); Smyth v. Waterfall (2000), 50 O.R. (3d) 481, 4 C.P.C. (5th) 58, [2000] O.J. No. 3494 (QL) (C.A.)

Statutes referred to

Insurance Act, R.S.A. 1970, c. 187, s. 288(1)

Insurance Act, R.S.O. 1990, c. I.8, s. 234(1)

Rules and regulations referred to

O. Reg. 777/93 ("Insurance Act"), Sched., stat. cons. 6(7), 9(4)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 20, 20.04(1), 21, 21.01(1), 25.01, 25.06, Form 14A

Authorities referred to

Halsbury's Laws of England, 4th ed., Vol. 16 (London: Butterworths, 1992)

MOTION by the defendants to strike out portions of the statement of claim and plaintiffs' replies and to dismiss actions as statute-barred.

Kirk M. Baert, for plaintiffs.

Theodore P. Charney, for defendant [Coseco Insurance Co.].

Michael A. Eizenga, for defendant [The Guarantee Company of North America]. [page466]

HAINES J.: --

Introduction

[1] These actions are two of the many that rely on McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2001), 54 O.R. (3d) 704, 200 D.L.R. (4th) 449 (C.A.). The plaintiffs maintain that the defendants breached statutory condition 6(7), O. Reg. 777/93 made under the Insurance Act, R.S.O. 1990, c. I.8 as amended, when the defendants subtracted the deductibles upon settlement of their total loss claims. Statutory condition 6(7) provides:

> 6(7) There shall be no abandonment of the automobile to the insurer without the insurer's consent. If the insurer exercises the option to replace the automobile or pays the actual cash value of the automobile, the salvage, if any, shall vest in the insurer.

[2] In McNaughton, the Court of Appeal held that the insurer was required, pursuant to statutory condition 6(7), to pay the insured the actual cash value of the damaged vehicle, without any deduction if the insurer took title to the salvage. These actions are, however, somewhat different from many of the other proceedings that are based on McNaughton in that they raise the issues of unjust enrichment and constructive trust.

[3] The defendants move pursuant to rule 21.01(1)(a) and (b) [Rules of Civil Procedure, R.R.O. 1990, Reg. 194] for a determination of the applicable limitation period and to strike certain portions of the statements of claim as disclosing no cause of action. The defendants also move to strike the plaintiffs' replies and for an order pursuant to rule 20 dismissing the actions on the basis that the plaintiffs' claims are barred by operation of the limitation period.

[4] The defendants contend that the applicable limitation period is one year as set out in statutory condition 9(4) which provides:

> 9(4) Every action or proceeding against the insurer under this contract in respect of loss or damage to the automobile or its contents shall be commenced within one year next after the happening of the loss and not afterwards, and in respect of loss or damage to persons or other property shall be commenced within two years next after the cause of action arose and not afterwards.

[5] The plaintiffs submit that statutory condition 9(4) does not apply because their claims are not limited to the contract of insurance. They argue that their claims are also grounded in unjust enrichment and breach of the insurer's duty to act in good faith which are not claims under the contract or "in respect of loss [page467] or damage to the automobile or its contents". In any event, the plaintiffs contend the doctrines of discoverability, concealment and unconscionability apply to extend any applicable limitation period.

The Pleadings

[6] Paragraphs 13, 14, 15 and 17 of the statements of claim state:

> 13. The defendant has been unjustly enriched at the expense of the plaintiffs and other class members in circumstances where:
>
> (a) the defendant has been enriched to the corresponding detriment of the plaintiff and other class members; and
> (b) there was no valid juristic basis for the enrichment.
>
> 14. The plaintiff and other class members had no means of knowing that if the defendant took title to the salvage of their motor vehicles when those motor vehicles were classified as total losses then the plaintiff and other class members were entitled to the actual cash value of those motor vehicles. Accordingly, no limitation period has begun to run.
> 15. The plaintiff pleads and relies upon the doctrine of unconscionability with respect to the application of any limitation periods pleaded or relied upon by the defendant.
>
> . . . . .
>
> 17. The defendant breached the duty of good faith owed by the defendant, and its agents, servants and employees, to the class members, by:
>
> (a) advising the class members that the defendant was entitled to retain the damaged vehicles notwithstanding the class members' property rights in the salvage;
> (b) failing to advise the class members that they were entitled to retain their damaged vehicles unless the defendant paid the class members the actual cash value of their vehicles before same were damaged;
> (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;
> (e) charging to the class members a deductible contrary to the provisions of the statutory condition requiring the defendant to pay the class members the actual cash value of their damaged vehicles without charging a deductible;

(f) deliberately and actively concealing from the class members, their right to demand payment of the actual cash value of their vehicle, or their right to retain property of their vehicle and salvage rights once the deductible was applied; [page468]
(g) converting to its own use, the class members' damaged vehicles; and
(h) failing to account to the class members for the proceeds of the damaged vehicles.

[7] Paragraphs 4 and 7 of the statement of defence of The Guarantee Company of North America state:

4. The defendant states that the limitation period found in statutory condition 9(4) of O. Reg. 777/93 applies such that the claims of those class members who have brought their claim more than one year after they incurred the loss or damage with respect to their respective motor vehicles are absolutely barred.

. . . . .

7. The defendant states that at all times it has acted in the utmost good faith and denies that there is any conduct on its part which merits the imposition of punitive, exemplary or aggravated damages, or which has any bearing on the running of the limitation period in this matter.

[8] In para. 16 of the statement of defence of Coseco Insurance Company, the defendant maintains the plaintiff's claim is barred by operation of statutory condition 9(4), and at para. 18 states:

18. The defendant specifically denies the allegations contained in paras. 16, 17 and 20 of the statement of claim. At no time did the defendant act unlawfully, in bad faith or in a high-handed manner as alleged or at all.

[9] Paragraphs 7, 15 and 16 of the replies provide:

7. The plaintiff pleads that, both in law and in equity, the doctrine of concealment applies. If the plaintiff and the class members were unaware of their cause of action, it was owing to the wrongs of the defendant. In the result, whether the limitation period is imposed by statute, or under common law, or in equity, concealment, when applicable, tolls the limitation of either a common law or equitable claim until the plaintiffs could reasonably have discovered their cause of action.

. . . . .

15. The plaintiffs and the other class members trusted and relied upon the defendant because of their reputation in the insurance business and because of the duty of good faith owed to the insured by the insurer. The defendant profited from that trust. The plaintiffs plead that good conscience requires the defendant to hold in trust for the plaintiffs and the other class members all the revenue they received in Ontario with respect to deductibles that were improperly withheld and to disgorge this revenue.
16. The defendant is constituted as a constructive trustee in favour of the class members for all of the improperly withheld deductible revenue because, among other reasons:

    (a) The revenue was acquired in such circumstances that the defendant may not in good conscience retain it;
    (b) Justice and good conscience require the imposition of a constructive trust; [page469]
    (c) The integrity of the marketplace would be undermined if the court did not impose a constructive trust;
    (d) Class members have suffered a loss and the defendant has been unjustly enriched; and
    (e) The deductibles would not have been withheld absent the defendant's improper practices.

The Issues

[10] The following questions arise from the motions brought by the defendants:

1. Do the plaintiffs' replies raise new grounds of claim for relief not advanced in the statements of claim? (Rule 25.06)
2. Do the statements of claim disclose a reasonable cause of action in unjust enrichment? (Rule 21)
3. Does the limitation period in statutory condition 9(4) apply to the claims in unjust enrichment? (Rule 21)
4. Are the claims of the plaintiffs barred by operation of the one-year limitation period in statutory condition 9(4)? (Rule 20)
5. Can the deductible be properly applied to towing and storage charges incurred as a result of the vehicle being damaged but prior to the vehicle being deemed a "total loss"? (Rule 21)
6. Did the plaintiff, John Ross, release the defendant, Coseco Insurance Company, from any and all claims? (Rule 21)

The Facts

[11] The plaintiff, John Ross, was the owner of a 1992 Dodge Caravan that was involved in a collision on April 8, 2000. The plaintiff was, at that time, insured by the defendant Coseco Insurance Company pursuant to a standard form automobile owner's insurance policy that provided for a deductible of $300. Once it was determined the vehicle was damaged beyond economic repair, the plaintiff and defendant agreed to a settlement on the following basis:

Total amount of the loss (including taxes) $6,625

Less deductible $ 300

Amount paid $6,325

The plaintiff then transferred title of the vehicle to the defendant. [page470]

[12] The plaintiffs Leonard Gross and Ilene Gross were the owners of a 1982 Oldsmobile Delta and were insured by the defendant, The Guarantee Company of North America, pursuant to a standard form automobile owner's insurance policy that provided for a deductible of $250. The insured vehicle was involved in a collision on May 19, 1997 and was subsequently declared a total loss. The claim on the policy was resolved on the following basis:

Total amount of the loss (including taxes) $1,500

Less deductible $ 250

Amount paid $1,250

The defendant then took title to the salvage.

[13] The statements of claim in both of these intended class proceedings were issued on October 25, 2002, well beyond the one-year limitation period prescribed in statutory condition 9(4).

Do the plaintiffs' replies raise new grounds of claim for relief not advanced in the statements of claim?

[14] A plaintiff is required, pursuant to rule 25.01(1) and Form 14A, to state the "precise relief claimed" and, upon making a claim for relief, must specify the nature of the relief and the amount claimed for damages pursuant to rule 25.06(9). In these actions, the plaintiffs made no claim for relief based on constructive trust in their statements of claim but have made that claim in their replies. The defendants contend that this is prohibited by rule 25.06(5) which provides:

> 25.06(5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a

> subsequent pleading but by way of amendment to the previous pleading.

I agree with the defendants' submissions. The replies raise allegations of a trust or fiduciary relationship between insured and insurer, which are not the same as the duty of utmost good faith that is addressed in the statements of claim. If the plaintiffs wish to pursue such allegations, they should do so by way of amendment to the statements of claim in accordance with the rules.

[15] It should perhaps be observed at this time that the relationship between an insurer and an insured is not, in ordinary circumstances, fiduciary in nature. This is explained by Robins J.A. in Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co. (1994), 18 O.R. (3d) 663, 115 D.L.R. (4th) 37 (C.A.), at p. 669 O.R.: [page471]

> The fact that a contract is one of utmost good faith does not however mean that it gives rise to a general fiduciary relationship. The relationship between insured and insurer is not akin to the relationship between, say, guardian and ward, principal and agent, or trustee and beneficiary. In these latter instances, the inherent character of the relationship is such that the law has traditionally imported general fiduciary obligations. The insurer-insured relationship is contractual, the parties are parties to an arm's-length agreement. The principle of uberrima fides does not affect the arm's-length nature of the agreement, and, in my opinion, cannot be used to find a general fiduciary relationship. The insurance contract, as noted above, imposes certain specific obligations on its parties. These obligations, however, do not import general fiduciary duties into each and every insurance relationship. Before such fiduciary obligations can be imported there must be specific circumstances in the relationship that call for their imposition.

In the result, paras. 15 and 16 of the replies will be struck.

[16] Rules 25.06(1) and (2) provide:

> 25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.
>
> (2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

[17] The defendants submit that paras. 9 through 14 of the replies do not comply with rule 25.06(1) since they are not a concise statement of material facts on which the plaintiffs rely in response to issues raised in the statements of defence but simply argument as to why the defence of laches is not applicable. The defendants also contend that the plaintiffs have pleaded conclusions of

law without pleading the material facts to support them contrary to rule 25.06(2). They refer specifically to the conclusions of law relating to the application of laches and the absence of any material facts to support those conclusions. Again, I agree with these submissions and, therefore, order paras. 9 through 14 of the replies struck without prejudice to the plaintiffs to move for such amendments to their pleadings that they may consider appropriate.

Do the statements of claim disclose a reasonable cause of action in unjust enrichment?

[18] Since this issue is before the court as a rule 21 motion, it is necessary to determine whether it is plain and obvious that the statements of claim disclose no cause of action in unjust enrichment. The plaintiffs take the position that their claims are not limited to breach of contract but are also grounded in unjust enrichment. In order to establish unjust enrichment, it is necessary to establish (i) the enrichment of the defendants, (ii) the corresponding deprivation of the plaintiffs, and (iii) the absence of a juristic reason for the enrichment. [page472]

[19] By pleading unjust enrichment, the plaintiffs seek to avoid the application of the limitation period of one year prescribed by statutory condition 9(4). Their position is set out at paras. 18 and 19 of the plaintiff's factum filed in the Gross v. The Guarantee Company of North America matter which state:

> 18. The fact that the Legislature has chosen to include a limitation period in the Statutory Condition and the Policy should not deter the court from using the equitable doctrine of unjust enrichment to remedy the situation. It is precisely where an injustice arises without a legal remedy that equity finds a role.
> 19. If the defendant is right, then the plaintiff's claim was barred in 1997 before the Court of Appeal in McNaughton determined that they even had a claim. Such a result is clearly inequitable and unfair.

[20] Of course, the Court of Appeal in McNaughton did not determine that these plaintiffs had a claim against these defendants. The Court of Appeal determined McNaughton Automotive had a cause of action against Co-operators Insurance. That court did not create the cause of action, it simply interpreted statutory condition 6(7) and found that the insurer was in breach of that statutory condition because it had applied a deductible when it took title to the salvage. It was always open to the plaintiffs in these proceedings to commence action against their insurers on the same grounds and within the prescribed limitation period as did McNaughton Automotive.

[21] In Luscar Ltd. v. Pembina Resources Ltd. (1994), 24 Alta. L.R. (3d) 305, [1995] 2 W.W.R. 153 (C.A.), leave to appeal to S.C.C. dismissed, [1995] S.C.C.A. No. 6, the litigants were parties to an agreement relating to the development of freehold petroleum and natural gas leases. The agreement contained a clause requiring written notice of new acquisitions. A dispute arose over whether the defendant had breached this term of the contract. The plaintiffs sued, but not until the applicable limitation period for causes of action in breach of contract had expired. The plaintiffs

pled unjust enrichment and breach of fiduciary duty in order to resuscitate the claim and were successful at trial. On appeal, the Alberta Court of Appeal held as follows, at paras. 114, 115, 117, 119 and 120:

> A claim for unjust enrichment may lie in circumstances where the plaintiff has no recourse through contract law, or where there is some other reason for equity to intervene. The Canadian test of general application to found a claim in unjust enrichment is outlined in Rathwell, supra, at p. 455:
>
> > . . . the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason -- such as a contract or disposition of law -- for the enrichment.
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> . . . . . [page473]
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> Where there exists a contract under which parties are governed, and one party gains by a breach of the same, that party is not truly enriched, because the breaching party takes that gain subject to its liability for breach of contract. If the other party does not sue within the time set out in the Limitations Act, then, without more, there is a juristic reason for the gain because the breaching party is entitled to rely on the intended limitation.
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> . . . . .
>
> However, unjust enrichment was not developed simply to provide an alternative remedy to that offered by the contract, without more. Otherwise, the remedy would impact directly on the rights of all parties to rely on the normal limitation period for breach of contract. . . .
>
> Allowing the claim for unjust enrichment in this case would mean that every time a limitation period for breach of contract expires, a plaintiff can rely on unjust enrichment, since the very nature of time limitations results in a benefit to one party and deprivation to the other. As a result, not only would the statutory laws creating limitations of action be circumvented, but the whole area of contractual damages would be undermined. The contract was a juristic reason for any enrichment in the case at bar, given that notice was contemplated by it, and the limitation period for an action for the breach has expired.

[Emphasis in original omitted]

[22] There is no suggestion in the statements of claim in these cases that the insurance contract is

invalid. On the contrary, the plaintiff relies on the policy as the basis for liability. Statutory condition 6(7) is part of the contract and it is that statutory condition which the plaintiff alleges was breached by the defendants.

[23] In short, the doctrine of unjust enrichment was not developed to provide an alternative remedy to that offered by contract. Nor was it developed to allow litigants to avoid applicable limitation periods. As indicated in Luscar, permitting an action to be prosecuted as a claim for unjust enrichment in circumstances where the claim arises from a breach of a contract would be tantamount to eliminating any legislated limitation period for breach of contract. In my view, it is plain and obvious that the statement of claim discloses no cause of action in unjust enrichment.

Does statutory condition 9(4) apply to claims in unjust enrichment?

[24] Given my conclusion that the statements of claim disclose no cause of action for unjust enrichment, it is not necessary for me to address this question.

Are the claims of the plaintiffs barred by operation of the one-year limitation period in statutory condition 9(4)?

[25] In reasons released July 14, 2003 in McNaughton Automotive v. Co-operators, sub nom. Segnitz v. Royal & Sun Alliance Insurance Co. of Canada, [2003] O.J. No. 2914 (QL), [2003] I.L.R. ÂI-4217 (S.C.J.), [page474] that also applied to these cases, I determined the applicable limitation period was one year as provided for in statutory condition 9(4). I also decided that the doctrine of fraudulent concealment was engaged on the pleadings and, if established, would postpone the running of the limitation period until the plaintiffs discovered the fraud or with the exercise of reasonable diligence ought to have.

[26] The two intended class proceedings that I am addressing in these reasons were both commenced well beyond one year from the date of the proposed representative plaintiffs' respective losses. The defendants have, therefore, moved for summary judgment on the basis that the claims of the plaintiffs are barred by the applicable limitation period. The issue on these motions is whether there is a genuine issue for trial relating to fraudulent concealment, the operation of which is explained in Halsbury's Laws of England, 4th ed., Vol. 16 (London: Butterworths, 1992), para. 927:

> Where a plaintiff is kept in ignorance of his cause of action through the defendant's fraud, time begins to run only from the time when the plaintiff discovers the truth or ought reasonably to have.

"Fraud" is defined in Black's Law Dictionary (7th ed.) as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment". However, in Halloran v. Sargeant (2002), 217 D.L.R. (4th) 327, 23 C.P.C. (5th) 23 (Ont. C.A.), at paras. 31 and 33, Armstrong J.A. held that conduct amounting to legal fraud is not necessarily required. He found that, depending on the relationship between the parties conduct that was not "in accordance with

what is right or reasonable" could be sufficient to toll or suspend the operation of a limitation period.

[27] Although the legal or persuasive burden is on the defendants to demonstrate that there is no genuine issue for trial, rule 20.04(1) provides that a responding party "may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial": Hi-Tech Group Inc. v. Sears Canada Inc. (2001), 52 O.R. (3d) 97, 4 C.P.C. (5th) 35 (C.A.), at paras. 30-31.

[28] In Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1, at pp. 434-35 S.C.R., the court held:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of [page475] material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, at para. 15; Dawson v. Rexcraft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (Hercules, supra, at para. 15).

In Guarantee Co., at pp. 436-37 S.C.R., the court also indicated it was in agreement with other decisions that had held "that a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence".

[29] The defendants take the position that there is no evidence to support the allegation of fraudulent concealment or unconscionable conduct and, therefore, no genuine issue for trial with respect to the suspension or extension of the limitation period. The plaintiffs, in their respective affidavits, have stated the following:

> I am advised by Robyn Matlin of Koskie Minsky, and verily believe, that several writers of legal texts have criticized the practice of insurers such as the defendant of keeping the salvage in the circumstances. In particular, in Insurance Law in Canada, Craig Brown states at p. 262:
>
> > But this practice [of the insurer taking title to the salvage] is not, in general, consistent with legal principles. First there is the principle stated above that payment of the full loss is necessary. Second, an Alberta lower court, faced with the point directly, held that an insurer was entitled to the salvage only upon payment not just of the amount under the policy but also of an amount covering the deductible. The insurer had paid $800 after total loss of an automobile worth

> $900 (there being a $100 deductible) and retained the salvage. The customer sued for either the salvage or the extra $100. He was held entitled to the additional $100. This solution is appropriate and consistent with other principles of insurance law.
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> . . . . .
>
> Further in The Standard Automobile Policy Annotated, John Newcombe states at p. 164:
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> > In Mueller v. Western Union Insurance Company . . . the insurer paid the actual cash value, less the $100 deductible and retained the salvage. The insured sued the insurer for recovery of the deductible. The court ruled that the insurer was not entitled to retain the salvage unless the actual cash value was paid in full. This decision seems to be a correct interpretation of the wording, but insurers continue to follow the same procedure without being challenged. [Emphasis added by affiant].
>
> I therefore believe that the defendant knew or ought to have known that it has been flouting the law. I believe that the defendant deliberately took advantage of the fact that its insureds generally did not know about the existence of salvage, or their rights and the defendant's obligations regarding salvage. [page476]

[30] This, as I understand it, is the evidence the plaintiffs rely upon to support their contention that they were deceived by the defendants. The plaintiffs submit that the defendants were either aware of this legal authority and suppressed it or were reckless in failing to discover and follow it. Either way they committed a fraud or unconscionable act which, until discovered, suspended the running of any limitation period.

[31] There are, in my view, two problems with the plaintiffs' position. Firstly, these legal authorities are in the public domain and accessible to everyone and secondly, there is good reason to doubt these authorities are correct.

[32] I accept that it is more likely that the defendants, as insurers, would be aware of case law and academic commentary on a particular insurance issue than would the plaintiff insureds, but that concession cannot extend to the plaintiffs' legal representatives. It may be that most property damage claims get resolved without the intervention of lawyers, but the fact remains it is open to any insured to dispute the resolution of a claim and seek legal advice just as McNaughton Automotive did in its dispute with Co-operators Insurance. Mueller v. Western Union Insurance Co., [1974] 5 W.W.R. 530, [1974] I.L.R. Â1-636 (Alta. Dist. Ct.) appears to be the only reported case on the interpretation of the statutory condition that is the subject of these proceedings and is the

only authority relied upon by both Professor Brown and Mr. Newcombe. Of course, these authorities would have been just as accessible to any lawyer as they were to the defendants. It should also be remembered that in Ontario the subject statutory condition was formerly a provision in the Insurance Act and is now part of a regulation to that statute. The subject statutory condition is also, by legislative mandate, a part of the standard form automobile policy upon which the claim of each plaintiff is based. Therefore, any allegation that either the legal authorities or statutory condition were concealed is not tenable.

[33] The implication that arises from the plaintiffs' submission is that the defendants should have been resolving all total loss claims in accordance with the findings in Mueller since 1974 when that case was decided. However, as it turns out, a critical statutory provision was not considered by the trial judge in Mueller and Rooke J., addressing the same issue in Pauli v. ACE Ina Insurance (2003), 12 Alta. L.R. (4th) 359, [2003] A.J. No. 175 (QL) (Q.B.), refused to follow Mueller stating, at para. 23:

> As for Mueller, I find that, in concluding that an insurer taking title to salvage must pay to the insured the actual cash value of the motor vehicle without reduction for the policy deductible, Tavender D.C.J. failed to consider, or at least failed to accord any significance to, the crucial introductory language [page477] of s. 288(1) of the 1970 Alberta Act, namely, "[s]ubject to . . . s. 309, subsection (2)". Instead, after noting at [page] 532 that s. 288 "makes the statutory conditions part of every policy and prohibits any variation, omission or addition to them", he focused solely on the "very clear" wording of Statutory Condition 4(7). That, in itself, is sufficient to cause me to decline to follow Mueller.

[34] Section 288(1) referred to above made the statutory conditions in the Alberta Insurance Act, R.S.A. 1970, c. 187 "subject to" other provisions in the statute that permitted deductibles just as s. 234(1) of the Ontario Insurance Act did until its amendment on January 1, 1994. Rooke J., therefore, found in Pauli that insurers in Alberta are entitled to apply a deductible on total loss claims where the insurer takes title to the salvage.

[35] The plaintiffs submit that the insurers should be held to an obligation of good faith and fair dealing, which they contend, at a minimum, requires that, in the course of adjusting a claim, insurers ought to be candid, reasonable, honest and forthright and should refrain from being untruthful, misleading or unduly secretive. One cannot quarrel with these submissions. There is, however, no evidence offered to support them.

[36] The plaintiffs also submit that it is not in accordance with what is right or reasonable for the insurer to invoke the limitation period in order to deny an insured's claim when it is responsible for that person's delay in filing the claim. Again, the proposition is eminently reasonable. There is, however, no evidence to support it.

[37] I am aware that in ruling on a motion for summary judgment the court must not assess

credibility, weigh evidence or make findings of fact. The role of the court is limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial: Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161, 156 D.L.R. (4th) 222 (C.A.).

[38] The issue of concealment is a discoverability issue since the running of the limitation period is postponed until the plaintiff discovers the fraud, or with the exercise of reasonable diligence, ought to have discovered it. The application of the rule or doctrine requires the resolution of the issue of when the plaintiffs knew or ought to have known the fact or facts upon which the claim is based and whether their attainment of that knowledge was delayed because of concealment by the defendants. However, in these cases this inquiry is not engaged because there is no evidence of the concealment of any material facts. Once the plaintiffs knew the defendants had subtracted a deductible and taken title to the salvage, the cause of action was complete.

[39] As a general rule, the court should not resolve an issue relating to the application of the discoverability rule on a motion [page478] for summary judgment because such a determination will usually require a determination of fact: Aguonie, supra, at pp. 170 and 172 O.R. and Smyth v. Waterfall (2000), 50 O.R. (3d) 481, 4 C.P.C. (5th) 58 (C.A.), at pp. 485-86 O.R., p. 62 C.P.C. I do not, however, feel constrained by that admonition in this case since, in my view, there are no material facts in issue.

[40] In my opinion, the defendants have demonstrated that there is no genuine issue for trial. The plaintiffs sustained their losses more than one year before the commencement of these proceedings and there is no evidence that there is any genuine issue for trial with respect to the operation of the doctrine of fraudulent concealment. There will, therefore, be an order granting judgment to the defendants and dismissing both actions.

Can the deductible be properly applied to towing and storing charges?

[41] This issue was initially raised by Mr. Rachlin in McNaughton Automotive Limited v. Co-operators General Insurance Co. and was addressed by me as follows in my reasons ((2003), 66 O.R. (3d) 466, [2003] O.J. No. 3267 (QL), [2004] I.L.R. ÂI-4249 (S.C.J.)) relating to certification at paras. 28-30:

> (2) Towing and storage charges prior to settlement
>
> The defendants contend that although the Court of Appeal has held in McNaughton that statutory condition 6(7) requires the insurer to pay the actual cash value without reduction for the deductible, it did not say the deductible could not be applied to other aspects of the loss. The defendants, therefore, submit that since the total amount of the loss may be increased by the payment of towing and storage charges before the vehicle is deemed a total loss, the application of a deductible will not necessarily result in the insurer paying less than the actual cash value of the vehicle. They maintain that in the

> event the towing and storage charges equal or exceed the designated deductible, the payment received by the insured will equal or exceed the actual cash value of the damaged vehicle and the insurer will have complied with statutory condition 6(7).
>
> Statutory conditions 6(1)(b) and 6(2) of O. Reg. 777/93 provide:
>
> 6(1) Where loss of or damage to the automobile occurs, the insured shall, if the loss or damage is covered by this contract,
>
> . . . . .
>
> (b) at the expense of the insurer, and as far as reasonably possible, protect the automobile from further loss or damage;
>
> . . . . .
>
> (2) Any further loss or damage accruing to the automobile directly or indirectly from a failure to protect it as required under subsection (1) of this condition is not recoverable under this contract. [page479]
>
> In my view, the purpose of statutory conditions 6(1)(b) and 6(2) is to ensure reasonable steps are taken to preserve whatever value there may be in the damaged vehicle. Any expenses incurred in doing so are not part of the "loss of or damage to the automobile" for which the insurer is liable pursuant to statutory condition 6(5) and, therefore, not subject to the application of any deductible that "applies each time [the insured] make[s] a claim" as provided for in s. 7.3 of the standard form policy. These preservation costs are not the subject matter of the claim by the insured and constitute no loss to the insured because they are "at the expense of the insurer". For this reason, I do not find that the amount of the expenses attributable to the preservation of the salvage is relevant to determining the entitlement of the putative class members in these intended class proceedings.

It is noted that there is no reference to any such towing and storage charges in the proofs of loss in these proceedings. It is, therefore, not plain and obvious that the deductible can be applied to towing and storage charges incurred subsequent to the vehicle being damaged but prior to the vehicle being deemed a total loss.

Did the plaintiff, John Ross, release the defendant, Coseco Insurance Company?

[42] The proof of loss executed by Mr. Ross contained the following provision:

> Payment of this claim to John Ross and Trans Canada Credit is hereby authorized and in consideration of such payment, the insurer is discharged forever from all further claims by reason of the said loss or damage.

[43] In my view, this issue is addressed by Sharpe J.A. in McNaughton Automotive Limited v. Co-operators General Insurance Co., supra, at paras. 29-33:

> The respondent submits that by agreeing to terms that plainly took the deductible into account, the appellant released any claim. The argument rests on the terms of the proof of loss, signed by the appellant.
>
> In my view, the respondent's submission on this point must be rejected. I do not see how the respondent can overcome the protective language of the Insurance Act that alters the result that would follow at common law. Section 131(2) provides that neither the insured nor the insurer shall be deemed to have waived any term or condition by virtue of the adjustment of a claim. This provision allows both the insured and the insurer to engage in the adjustment process without risking the loss of their respective contractual rights. As the legislation specifically protects the contractual rights of the parties during the adjustment process, I fail to see how the appellant can be said to have waived or surrendered its contractual rights.
>
> Secondly, even if s. 131(2) did not have this protective effect, the wording of the proof of loss does not amount to a release of all claims. Indeed, the proof of loss form tracks the wording of statutory condition 6(7). The proof of loss states that title to the vehicle is transferred "only in the event that this claim is based upon the whole value of the said vehicle". On that wording, which in [page480] turn must be read in the light of statutory condition 6(7), it is difficult to see how the respondent could have obtained title to the damaged vehicle as the claim was not based on the whole value of the vehicle, but rather on the value of the vehicle, less the deductible.
>
> Thirdly, the terms of the proof of loss left the insurer with various options. After the appellant had completed the proof of loss, it remained open to the insurer to decide whether or not it wished to take title to the damaged vehicle. The cause of action asserted by the appellant arose later when the respondent elected to take the salvage. Accordingly, even if the terms of the proof of loss were sufficient to bar the claim now asserted, that claim did not exist at the time the appellant signed the proof of loss.
>
> Accordingly, I would dismiss the respondent's submission that the appellant is barred by the terms of the proof of loss from asserting the claim.

[44] The defendant maintains that this case is distinguishable from McNaughton because, prior to signing the release, the plaintiff knew that he would be transferring ownership of the vehicle to the defendant and knew that the defendant would be keeping any proceeds from the salvage. Therefore, unlike McNaughton, the cause of action in this case accrued before the release was signed. Assuming without accepting that this difference in the chronology of events is significant, I can see that it may have some impact on the tertiary reasoning of the Court of Appeal in McNaughton, but does not, in my opinion, affect the balance of that court's reasons for rejecting the release as a defence. The subject proof of loss provides that "all right, title and interest in the vehicle or any part or equipment thereof is hereby transferred to the insurer only in the event that this claim is based upon the whole value of the vehicle because it has been lost, destroyed or damaged beyond economical repair . . .". This language is identical to that found in the proof of loss in McNaughton and was referred to by the court at para. 31 in determining that the insured's claim was not barred by the terms of the release in that proof of loss.

[45] It follows that it is not plain and obvious that John Ross is barred from asserting his claim by the terms of the proof of loss he executed.

Disposition

[46] Orders to go accordingly. I will hear counsels' submissions with respect to costs in due course.

Motion granted. [page481]