COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Weldon v. Teck Metals Ltd.,*
2013 BCCA 358

Date: 20130806
Nos.: CA040713; CA040729

Docket: CA040713

Between:

JAMES WELDON and LEONARD BLEIER, suing on their own behalf and in a representative capacity on behalf of all former members of defined benefit pension plans sponsored, directed, administered or advised by the Defendants and their predecessors who were caused by the Defendants and their predecessors to cease to participate in those defined benefit pension plans and to participate only in defined contribution pension plans commencing on or about January 1, 1993, wherever they reside.

Respondents
(Appellants on Cross-Appeal)
(Plaintiffs)

And

Teck Metals Ltd.

Appellant
(Respondent on Cross-Appeal)
(Defendant)

Towers Perrin Inc.

Respondent
(Defendant)

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And

Towers Perrin Inc.

Appellant
(Respondent on Cross-Appeal)
(Defendant)

And

Teck Metals Ltd.

Respondent
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hinkson

On appeal from: A decision from the Supreme Court of British Columbia, dated March 4, 2013, (*Weldon v. Teck Metals Ltd.*, 2013 BCSC 345, Vancouver Docket S095159).

Counsel for the Appellant, Towers Perrin Inc.:	H. Poulus, Q.C. and M.L. Bromm
Counsel for the Appellant, Teck Metals Ltd.:	G.B. Gomery, Q.C.
Counsel for the Respondents:	R. Mogerman and J.D. Winstanley
Place and Date of Hearing:	Vancouver, British Columbia June 5, 2013
Place and Date of Judgment:	Vancouver, British Columbia August 6, 2013

Written Reasons by:
The Honourable Mr. Justice Hinkson

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman

Summary:

The plaintiffs were non-union employees of Cominco Ltd. and its predecessors. Teck was the successor of Cominco. The employees were participants in a defined benefit pension plan. They were offered the opportunity to transfer to a defined contribution pension plan by January 1, 1993. Towers Perrin was an actuarial firm retained to advise respecting the pension plans.

The plaintiffs assert that they were misled by Cominco and Towers Perrin as to the risks and benefits of the two plans. Mr. Weldon commenced his action in 2009 and Mr. Bleier in 2011. The chambers judge determined that the date upon which the plaintiffs rights to bring their actions was the date when the pension changes took effect, January 1, 1993, but found that the plaintiffs' claims were for damage to property, and thus the time for commencement was extended pursuant to ss. 6(3) and 6(4) of the Limitation Act.

The defendants appealed the finding that the limitation period was extended and the plaintiffs appealed the finding of the date upon which their right to bring their actions commenced.

Held: The defendant's appeal was allowed, and the plaintiffs' appeal dismissed.

The conclusion of the chambers judge that the plaintiffs' limitation period was extended by ss. 6(3) and 6(4) of the Limitation Act fails for two reasons. First, it is founded on the incorrect premise that the respondents' pension plans were "damaged". Second, although the general rule that a claim for damage to property is a claim for specific physical damage to or defects in tangible property has been extended to include certain claims for pure economic loss, the extension does not go so far as to apply to the claims made by the respondents.

The chambers judge was correct in his determination of the date upon which the plaintiffs' right to bring their actions commenced was correct. The deprivation that grounds the respondents' claims is the change from one type of pension plan to another. That change occurred on January 1, 1993. It is on that date that the respondents' cause of action arose.

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[1] The appellants, Teck Metals Ltd. ("Teck") and Towers Perrin Inc. ("Towers"), appeal the order a judge of the Supreme Court of British Columbia, in chambers, which determined that all claims giving rise to common liability issues in these proceedings are subject to the postponement provisions of ss. 6(3) and (4) of the *Limitation Act*, R.S.B.C. 1996, c. 266 [the *Act*].

[2] The respondents cross-appeal the decision of the chambers judge as to the date upon which their right to bring their actions arose.

Background

[3] Teck previously operated as Cominco Ltd. ("Cominco"). Its employees participated in a defined benefit pension plan ("DBP"). In 1992, Cominco and other related companies offered their non-union employees the option of transferring their pensions from the DBP to a newly-established defined contribution pension plan ("DCP"), effective January 1, 1993. Many employees chose to do so.

[4] In general terms, the DBP provides pension benefits based on a formula determined by an employee's salary and years of service. The DCP provides pension benefits to be determined by future economic conditions.

[5] Towers are actuarial consultants retained by Teck to advise it in relation to the pension plans.

[6] The respondent Leonard Bleier took early retirement on September 28, 2006. The respondent David Weldon remains an employee of Teck. Both elected to transfer from the DBP to the DCP before the 1992 transfer deadline.

[7] On July 13, 2009, Mr. Weldon commenced his action against the appellants and others. On October 17, 2011, Mr. Bleier commenced a similar action. Both men allege that Teck, with the assistance of Towers, structured and implemented the DCP in a way that favoured Teck's interests over those of its employees, transferring risks from Teck to the DCP members. They further contend that Teck provided them with incomplete, inaccurate or misleading information. Both actions claim damages and other relief for breach of statutory and fiduciary duties, deceit and negligent misrepresentation.

[8] On June 21, 2012, the two actions were consolidated into a single proceeding. The appellants are the only remaining defendants. On December 21, 2012, by consent of the parties, the Supreme Court of British Columbia certified the

consolidated action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, on behalf of both current and former “salaried, pension-eligible, non-union employees of Teck Metals Ltd., Teck Resources Limited, Cominco Resources International Limited, CESL Limited and Agrium Inc., who elected to move from the [DBP] to the [DCP] effective on or about January 1, 1993 (the ‘Class Members’)”.

[9] The parties agreed that the consolidated action has 23 common issues, including 19 separate questions going to issues of liability. The first two of the common issues were submitted to the chambers judge on a special case pursuant to Rule 9-3 of the *Supreme Court Civil Rules*. Those issues are:

> 1. When did the right to bring action arise pursuant to the [*Limitation*] *Act*?
>
> 2. If the basic limitation period has expired, to what extent, if at all, can the [respondents] rely on the postponement provisions in the [*Limitation*] *Act*?

[10] The reasons that underlie the order appealed from are indexed at 2013 BCSC 345. At paras. 11–14 of those reasons, the chambers judge summarized the judicial history of the class proceeding and the rule pursuant to which he was asked to determine the application of the *Act*:

> [11] This is the third application raising the limitation issue in this case. Each application has relied on a different procedure under the *Supreme Court Civil Rules*. Those procedures have differed in the extent to which the Court is permitted to consider the issue on its merits.
>
> [12] Mr. Weldon’s action was commenced by writ of summons under the former Rules of Court. The defendants first applied to set aside a master’s order that had extended the time for service of the writ. I held that such an application permits only very limited consideration of the merits and was not the appropriate procedure to consider the limitation question: *Weldon v. Teck Metals Ltd.*, 2011 BCSC 489. An appeal from that judgment was dismissed, but the Court of Appeal made clear that the defendants could apply to have the action struck at a later date: *Weldon v. Agrium Inc.*, 2012 BCCA 53.
>
> [13] The defendants next applied for summary judgment pursuant to Rule 9-6. That rule permits the court to give judgment only where it is clear that there is no “genuine issue for trial” and I held that the present remaining defendants had failed to meet that test: *Weldon v. Teck Metals Ltd.*, 2012 BCSC 1386.
>
> [14] The present application is brought by agreement under Rule 9-3, which does permit a conclusive determination of the issues raised.

[11] The respondents took the position before the chambers judge that a right of action does not arise and no limitation period can begin to run until a claimant suffers a loss. They argued that in this case, no Class Member suffered a loss until the occurrence of a "payment event" – that is, the date on which he or she retired or otherwise became eligible to receive money from the pension plan. Accordingly, they contend that their claims are not statute barred.

[12] The appellants took the position before the chambers judge that the respondents' right to bring action arose and the time began to run for the purposes of the *Act* when the pension changes took effect – that is, on January 1, 1993. Subject to postponement, the appellants contended that the respondents' claims are statute barred.

[13] At paras. 33–38 of his reasons, the chambers judge discussed the date upon which the respondents' right to bring their actions arose. He rejected the respondents' position for the following reasons:

> [33] There are four reasons why I cannot accept the plaintiffs' analysis of the law. First, and most important, is the decision of the Court of Appeal in this case. The comments made by Newbury J.A. on when a cause of action accrues may be *obiter* in the sense of not being strictly necessary to decide the narrow issue that was before the Court. But they represent a considered opinion, given in the context of this very proceeding, on an issue that the Court of Appeal expected to be the subject of further applications. I consider the Court's analysis to be binding upon me.
>
> [34] Second, the English and Australian authorities have recognized a distinction between immediate (but not yet quantifiable) losses and contingent losses that has not been recognized in this context in Canadian law. If it had been, cases like *Burke* would have been decided differently. I fail to see how the fraud that took place in *Burke* was any more likely or any less a contingency than the losses suffered by the plaintiffs in *Wardley* or *Sephton*.
>
> [35] Third, I find with respect that the distinction recognized by the English and Australian authorities is an exceedingly fine and uncertain one, highly dependent on how one chooses to characterize a given set of facts. A major part of the plaintiffs' claim in this case is that the [DCP] exposed class members to the risk that changes in the investment market would produce lower than anticipated returns. Did that create a pension plan that was less valuable at the outset, or did it merely expose class members to the contingency of a falling market? Either approach may be arguable, but the law should, as far as possible, attempt to avoid exposing litigants to such uncertainty.

> [36] Finally, even if I could consider the distinction set out in the English and Australian cases, I would hold the loss here to be immediate and not contingent. A pension plan creates entitlement to future benefits, but is also an asset that has a present value that can be calculated at any point before those benefits are paid. That is a concept with which this Court is very familiar in matrimonial litigation.
>
> [37] If one pension plan exposes beneficiaries to greater risk or uncertainty than does another, actuaries could presumably discount the present value of future benefits to reflect that risk. Indeed, if the plaintiffs are to eventually succeed in this action, they may have to rely on just such expert evidence to show that the defendants knew or ought to have known that the [DCP] was less valuable from the outset. On that analysis, the court must find that the alleged loss occurred when the class members obtained a less valuable pension plan.
>
> [38] Accordingly, I answer the first question by holding that the right to bring action arose on January 1, 1993.

[14] The chambers judge then turned to the second issue. He concluded that the respondents' claims were all for damage to property and answered the second issue by finding that all claims between the parties giving rise to common liability issues, with the exception of the claims against Teck based on fraud or deceit under s. 6(3)(d) and breach of trust under s. 6(3)(h) of the *Act*, are subject to the postponement provisions in ss. 6(3) and (4) of the *Act*.

[15] At paras. 59–63, the chambers judge considered the claims against Towers for professional negligence and concluded as follows:

> [59] While the position of a professional's own client was a matter of concern to the law reform commission and the legislature, I do not accept that the legislature intended to limit the reference to professional negligence to claims in contract. By 1975, it was well recognized that professionals and others who have special expertise could in some circumstances be liable in tort to plaintiffs who were not their clients. The landmark English case of *Hedley Byrne v. Heller*, [1964] AC 465, had been decided in 1964 and the 1972 edition of Allen Linden's *Canadian Negligence Law* (Toronto: Butterworths), had said, at 39:
>
>> The duty owed by a lawyer to his client has been founded on contract, not on tort, for well over a century. Since 1964, however, third persons, who may not be clients, may also sue lawyers in tort for negligence, in certain circumstances.
>
> [60] The real difficulty being addressed by the law reform commission in the passages relied upon by Towers was that, at the time, claims in tort were generally not available in circumstances where the relationship between the parties was governed by contract: *J. Nunes Diamonds Ltd. v. Dominion*

> *Electric Protection Co*., [1972] SCR 769. The legislature must have intended the postponement provisions to apply equally to plaintiffs who were clients of professional defendants and those to whom a duty arose on a different basis.
>
> [61] Even if Towers is correct in its assertion that the legislature, in 1975, understood the term "professional negligence" to be limited to claims by clients in contract, that is not necessarily how the term should now be interpreted. Whether a statute must be construed in accordance with its original meaning depends on the nature of the statutory provision at issue. In *R. v. Perka*, [1984] 2 S.C.R. 232, the Supreme Court of Canada said at 264:
>
>> The doctrine of *contemporanea expositio* is well established in our law. "The words of a statute must be construed as they would have been the day after the statute was passed ..." *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239, at p. 242 (per Lord Esher, M.R.). See also Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 163: "Since a statute must be considered in the light of all circumstances existing at the time of its enactment it follows logically that words must be given the meanings they had at the time of enactment, and the courts have so held"; Maxwell on the Interpretation of Statutes, supra, at p. 85: "The words of an Act will generally be understood in the sense which they bore when it was passed".
>>
>> This does not mean, of course, that all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted.
>
> [62] The types of actions referred to in s. 6(3) are broad categories and, in my view, *Dayhu* confirms that they have been and must be interpreted in light of subsequent developments in the law.
>
> [63] I therefore conclude that postponement is potentially available to the plaintiffs' claims of professional negligence.

Issues on Appeal

[16] I would describe the issues raised by Teck as follows:

a) whether the chambers judge erred in holding that the respondents' claims are for "damage to property", and thus subject to postponement pursuant to s. 6(3)(b) of the *Act*; and

b) whether the chambers judge erred by failing to find that postponement was available <u>only</u> for the claims against Teck based on fraud or deceit under s. 6(3)(d) and breach of trust under s. 6(3)(h) of the *Act* respectively.

[17] Towers adopts the issues raised by Teck. It adds further issues, which I would summarize as follows:

a) whether the chambers judge erred in interpreting the relevant provisions of the *Act* in light of the developments in the law since its enactment, rather than in a manner which gave effect to the original intention of the Legislature; and

b) whether the chambers judge erred in finding that the term "professional negligence" used in s. 6(3)(c) of the *Act* applies to both clients and non-clients of professional parties and could be postponed pursuant to s. 6(3)(c) of the *Act*.

Issue on Cross-Appeal

[18] The respondents contend that the chambers judge erred in holding that their right to bring their actions arose on January 1, 1993.

Discussion

[19] I will address the issue raised by the cross-appeal before turning to the issues raised by the appeals.

When did the Respondents' Cause of Action Arise?

[20] In *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, the Supreme Court of Canada recapitulated the general rule as to the common law principle of discoverability and the triggering of a limitation period. Mr. Justice Le Dain, for a unanimous Court, explained at 224:

> I am thus of the view that the judgment of the majority in *Kamloops* [(*City) v. Neilsen,* [1984] 2 S.C.R. 2] laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia *Statute of Limitations*, R.S.N.S. 1967, c. 168. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely

> financial loss caused by professional negligence, as was suggested in *Forster v. Outred* [*& Co.,* [1982] 2 All E.R. 753 (C.A.)] *supra*, at pp. 765-66. …

[21] The appellants took the position before the chambers judge that the respondents' right to bring an action arose and the time began to run when the pension changes took effect on January 1, 1993. The appellants take this position again before this Court.

[22] In this Court, the respondents reassert the position they took before the chambers judge: a right of action does not arise and no limitation period can begin to run until a claimant suffers a loss, and here, no Class Member suffered a loss until a "payment event" arose.

[23] The respondents contend that their position is supported by Canadian, Australian and English authorities. They argue that the chambers judge failed to recognize that when a negligent misrepresentation exposes a plaintiff to a loss or liability that is contingent, the cause of action does not accrue until the contingency is fulfilled.

[24] The respondents rely on the following Canadian jurisprudence: *Shayler v. Lee*, [1999] B.C.J. No. 2932, 1999 CanLII 7011 (S.C.); *Charlton v. Canada Post Corporation,* [2009] O.J. No. 233 (Sup. Ct. J.); *Spinks v. Canada*, [1996] 2 F.C. 563 (C.A.); and *Huang v. Drinkwater*, 2005 ABQB 40.

[25] These authorities were considered by this Court in a previous appeal in these proceedings: *Weldon v. Agrium Inc.*, 2012 BCCA 53. Speaking for the Court in that decision, Madam Justice Newbury said at paras. 24–26:

> [24] As mentioned, it does not appear that the courts in these pension cases were referred to the authorities cited by the Teck Defendants with respect to when an action for breach of a duty of care or fiduciary duty arises. They also, with respect, seem to have conflated the concept of a limitation period with that of postponement, which in British Columbia involves a separate and fact-based analysis. There can be no doubt that in this province, the point at which an action in negligence (which includes negligent misrepresentation) arises is the date on which "every fact [exists] which is material to be proved to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse" (per Brett J. in *Cooke v. Gill* (1873)

> L.R. 8 C.P. 107, quoted by this court in *Arishenkoff v. British Columbia* 2004 BCCA 299 at para. 68; and *Wyman and Moscrop Realty Ltd. v. Vancouver Real Estate Board* (1957) 8 D.L.R. (2d) 724 (B.C.C.A.) at 726; *Scarmar Constructions Ltd. v. Geddes Contracting Co.* (1989) 61 D.L.R. (4th) 328 (B.C.C.A.) at 334; *Inmet Mining Corp. v. Homestake Canada Inc*. 2003 BCCA 610 at para. 209.
>
> [25] As confirmed in *Kingu v. Walar Ventures Ltd.* (1986) 10 B.C.L.R. (2d) 15 at 23 (C.A.), the five elements of the tort of negligent misrepresentation are the existence of a duty; the making of a false or misleading statement; the fact the statement was made negligently, i.e., in breach of the applicable standard of care; the plaintiff's reasonable reliance on the statement; and the fact that such reliance resulted in loss or deprivation to the plaintiff. It is important not to confuse the final element with “damages” or the ability to quantify loss by means of financial compensation. As the Court stated in *Burke* in connection with allegedly fraudulent advice given by a mortgage broker:
>
>> The plaintiffs have focussed their argument on the concept of deprivation and that loss only occurs when deprivation arises. The plaintiffs argue that in this case the deprivation occurred when the fraud occurred and they were in fact deprived of their security. My view of this argument is that the plaintiffs are equating deprivation with quantum of loss and not the loss itself. The loss to the plaintiffs occurred when the defendant Greenberg negligently had them enter into the new agreement. Had Heaton never acted fraudulently, the amount of the plaintiffs’ loss could well have been nominal but that remains an issue of quantum and <u>not an issue of when the loss in fact occurred</u>. [At para. 24; emphasis added.]
>
> The Court also adopted the following passage from *Knapp*, supra:
>
>> From these authorities it can be seen that the cause of action can accrue and the plaintiff have suffered damage <u>once he has acted upon the relevant advice “to his detriment</u>” and failed to get that to which he was entitled. He is less well off than he would have been if the defendant had not been negligent. [At para. 28; emphasis added.]
>
> [26] This remains the rule in British Columbia regardless of whether the loss or damage was discoverable. …
>
> [Emphasis in original.]

[26] The Manitoba Court of Appeal reached a similar conclusion in *Burke v. Greenberg,* 2003 MBCA 104.

[27] The respondents also rely on jurisprudence from other jurisdictions, including a decision of the High Court of Australia (*Wardley Australia Ltd. v. Western Australia*, [1992] HCA 55), the House of Lords (*Law Society v. Sephton and Co.*,

[2006] UKHL 22), and the Supreme Court of Ireland (*Gallagher v. ACC Bank PLC Trading As ACC Bank*, [2012] IESC 35). The respondents submit *Wardley* and *Sephton* in particular stand for the proposition that situations of contingent loss or liability result in a claim only crystalizing at the point where damage is in fact sustained because of the occurrence of the contingency.

[28] These authorities were discussed by the chambers judge, and were properly distinguished by him for the reasons set out at paras. 34–37 of his reasons reproduced above. I adopt the reasoning set out in those paragraphs.

[29] Moreover, I am unable to agree with the respondents' contention that their "payment event" (the contingency, on their theory) is of any relevance insofar as the completion of their cause of action is concerned. As Newbury J.A. stated in *410727 B.C. Ltd. v. Dayhu Investments Ltd.*, 2004 BCCA 379, leave to appeal refused, [2004] S.C.C.A. No. 422:

> [22] … [T]he courts have made it clear that the *Limitation Act* as it was enacted in 1974 and continues today, did not purport to change the common law approach to determining when a cause of action arises or may be sued upon. The scheme was predicated on the common law principle that a cause of action in negligence accrues when three elements come into existence – a legal duty owed by the defendant to the plaintiff, a breach of that duty, and resulting loss or damage: see *Armstrong v. West Vancouver*, *supra*, at para. 9, and *Bera v. Marr*, *supra*, at 14, per Esson J.A.) Thus in cases of solicitor's negligence, for example, the client's cause of action accrues, and the applicable limitation begins running, from the date of the client's "deprivation", whether or not "quantum of loss" can be determined at that time: see the discussion in *Burke v. Heaton* (2003) 228 D.L.R. (4th) 257 (Man. C.A.), at paras. 22-30, and in *Central Trust Co. v. Rafuse* [1986] 2 S.C.R. 147, at 219-20.

[30] In my opinion, the chambers judge correctly relied upon both *Weldon* and *Burke* as the basis for his conclusion that the respondents' cause of action arose on January 1, 1993. The deprivation that grounds the respondents' claims is the change from one type of pension plan to another. That change occurred on January 1, 1993. It is on that date that the respondents' cause of action arose. I would therefore dismiss the cross-appeal.

Teck's Appeal

[31] The respondents' causes of action are more than a decade old. Unless their claims can be brought within the ambit of the *Act*'s postponement provisions, they are statute barred. I turn to the relevant provisions of the *Act*.

[32] It is common ground that the relevant limitation period is set out in s. 3(5) of the *Act*:

> Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

[33] Subsection 6(3) of the *Act* permits the postponement of a limitation period under the *Act* in certain circumstances:

> (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
>
> (a) for personal injury;
>
> (b) for damage to property;
>
> (c) for professional negligence;
>
> (d) based on fraud or deceit;
>
> (e) in which material facts relating to the cause of action have been wilfully concealed;
>
> (f) for relief from the consequences of a mistake;
>
> (g) brought under the *Family Compensation Act*;
>
> (h) for breach of trust not within subsection (1).

[34] Subsections 6(3)(a), (f), and (g) have no application in this case.

[35] If one of the other subsections applies, then s. 6(4) of the *Act* is engaged. It provides:

> (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that

> (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
>
> (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

a) Damage to Property

[36] In its 1974 *Report on Limitations*, the Law Reform Commission of British Columbia endorsed the view of the 1968 Alberta Uniformity Commissioners that relief from the hardship that can result from a limitation period running against a person who is not aware that he or she has a cause of action should "be restricted to actions involving personal injury, property damage and professional negligence."

[37] The recommendations of the Law Reform Commission of British Columbia were adopted in their entirety by the Legislature and enacted as the *Act.* This much was made clear by Mr. Justice Lambert in *Lui v. West Granville Manor Ltd.* (1987), 11 B.C.L.R. (2d) 273, [1987] 4 W.W.R. 49 (C.A.). Writing for a majority of a five-member division, Lambert J.A. stated at 294 (B.C.L.R.):

> In this case, the fact that the 1975 Act is identical to the bill prepared by the law reform commissioners is an indication that, to the extent that the recommendations and reasoning of the law reform commissioners are clear, they were carried into effect by the Act.

[38] At paras. 43–44 of his reasons for judgment, the chambers judge observed:

> [43] The plaintiffs say that s. 6(3)(b) applies to all issues because they are claiming economic loss flowing from damage to their pension plans, which are intangible property. The defendants say the claim does not arise in any way from damage to property.
>
> [44] Section 3(1)(a) of the *Act* creates a two-year limitation period for "injury to person or property, including economic loss arising from the injury." That refers to damage caused to property by an extrinsic act or external event. Section 6(3)(b) refers not to "injury" but to "damage to property", which has been held to include damage caused by an inherent defect in the property itself. That is characterized as "pure economic loss" subject to the six-year limitation in s. 3(5): *Armstrong v. West Vancouver (District)*, 2003 BCCA 73.
>
> [Emphasis in original.]

[39] The chambers judge acknowledged the absence of any physical property damage at para. 48 of his reasons. He went on to conclude, however, that a pension plan amounted to intangible property, which could sustain damage. The crux of his reasoning is at paras. 50–53:

> [50] In this case, the plaintiffs say they acquired a pension plan that was defective in that it lacked qualities or characteristics they expected or were led to believe it had. That is in some ways comparable to a complaint made by a purchaser of a building that turns out to have inadequate foundations, ineffective fire protection or other defects.
>
> [51] The difference, of course, is that a defect in intangible property is not hidden behind a wall or buried in foundations. It will arise from, or be in some way related to, the contractual or other legal documents that create and define the intangible property. In most cases, it would be extremely difficult for a plaintiff to meet the burden of proving that defects in intangible property were hidden or not discoverable. That probably explains the lack of decided cases on the issue. But the question now before me is not how these plaintiffs might prove postponement, but only whether it is open to them to try.
>
> [52] In *Armstrong*, the court agreed that it would be an "an anomaly contrary to the scheme of the *Act* if the postponement provisions did not apply to pure economic loss claims." In my view, it would equally be an anomaly if the postponement provisions applied to some pure economic losses and not others, with the distinction based solely on the type of property involved. The underlying policy concern--protection for the plaintiff whose cause of action would otherwise expire before the loss or damage became apparent--is the same.
>
> [53] I therefore find that all common issues are potentially subject to postponement of the applicable limitation period under s. 6(3)(b).

[40] In my opinion, the conclusion of the chambers judge fails for two reasons. First, it is founded on the incorrect premise that the respondents' pension plans were "damaged". Second, although the general rule that a claim for damage to property is a claim for specific physical damage to or defects in tangible property has been extended to include certain claims for pure economic loss, the extension does not go so far as to apply to the claims made by the respondents.

[41] The respondents' pension plans afford them contractual rights. If either or both of the plans were altered, that could have given rise to a contractual remedy. But insofar as the concept of damage in the *Act* is concerned I am, with respect, unable to accept the view of the chambers judge that the respondents suffered

"damage to their pension plans". This is not a case where modifications to any pension plan were introduced. While the chambers judge found that the respondents acquired a pension plan that might be defective, in that it lacked qualities or characteristics they contend they expected or were led to believe it had, the existing DBP remains as it was on January 1, 1993, when the respondents chose to transfer to the DCP. It has not been altered or "damaged".

[42] Nor has the DCP been altered or "damaged" in any way since the respondents transferred to it. It exists on the same terms as it did when the respondents chose to transfer to it.

[43] Such is apparent from the respondents' pleadings. At para. 60 of their consolidated and amended notice of civil claim, the respondents pleaded:

> As a result of Teck's breach of the duty of good faith, and Teck, the Society [the Cominco Pension Fund Coordinating Society, against whom the respondent's' action has been dismissed] and Towers' breach of their fiduciary duties and statutory duties and negligent misrepresentation, the plaintiffs and all other Class Members have suffered, or will suffer, damages in the amount of the difference between the value of their entitlement under the [DCP] and the value of the entitlements they would have accrued in the [DBP] but for their Elections.

[44] The general rule is that a claim for damage to property is a claim for physical damage to or defects in tangible property. No such damage can occur to intangible property. Although this general rule has been extended at common law to include certain claims for pure economic loss, the extension has no application to the respondents' claim.

[45] The evolution of the general rule in the common law was explained by Mr. Justice La Forest for the Supreme Court of Canada in *Winnipeg Condominium Corporation. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85:

> 22 … [T]he type of economic loss claimed by the Condominium Corporation is recoverable in tort is therefore based in large part upon what seem to me to be compelling policy considerations. I shall elaborate in more detail upon these later in my reasons. However, before doing so, I think it important to clarify why the *D & F Estates* [*Ltd. v. Church Commissioners for England*, [1988] 2 All E.R. 992 (H.L.)] case should not, in my view, be seen

> as having strong persuasive authority in Canadian tort law as that law is currently developing. My reasons for coming to this conclusion are twofold: first, to the extent that the decision of the House of Lords in *D & F Estates* rests upon the assumption that liability in tort for the cost of repair of defective houses represents an unjustifiable intrusion of tort into the contractual sphere, it is inconsistent with recent Canadian decisions recognizing the possibility of concurrent contractual and tortious duties; second, to the extent that the *D & F Estates* decision formed part of a line of English cases leading ultimately to the rejection of *Anns* [*v. Merton London Borough Council*, [1978] A.C. 728 (H.L.)], it is inconsistent with this Court's continued application of the principles established in *Anns*.

[46] La Forest J. concluded at para. 21 that where a party "is negligent in the planning and construction of a building, and where that building is found to contain defects resulting from that negligence which pose a real and substantial danger to the occupants of the building, the reasonable costs of repair" are recoverable in tort.

[47] I accept that *Winnipeg Condominium*, and authorities such as *Armstrong v. West Vancouver (District)*, 2003 BCCA 73 and *410727 B.C. Ltd. v. Dayhu*, referred to by the chambers judge, and the decision of Madam Justice Levine, as she then was, in *Strata Plan No. VR 2000 v. Shaw* (1998), 55 B.C.L.R. (3d) 103 (S.C.), permit certain claims for pure economic loss to be made as property damage claims. Nonetheless, I am unable to accept that the extension of property damage to include economic loss for dangerous physical defects can apply to the claims made by the respondents.

[48] In *Shaw*, Levine J. considered the distinction between damage to property and injury to property as it relates to the *Act* and concluded at para. 26 that:

> In light of the policy reasons enunciated by the Supreme Court of Canada in *Winnipeg Condominium* for allowing recovery for economic loss for dangerous defects, it would be anomalous if an action in respect of a defect which the plaintiff alleges is dangerous was statute-barred before the plaintiff had knowledge of it, on the grounds that the defect is not "damage to property".

[49] In *Armstrong*, Mr. Justice Mackenzie, for this Court, referred to *Shaw*, and stated:

> [16] The ultimate limitation period was not at issue in [*Shaw*] but as both s. 3 and s. 8 start the running of time from the date the cause of action arose, any exception to the general rule that time in a negligence action runs from

the date of damage, known or unknown, would apply equally to both sections. If time in a building damage case were to run from the moment the damage is discovered, this would duplicate the postponement relief provided in s. 6 and would be inconsistent with the scheme of the *Limitation Act*. Esson J.A. discussed this in *Bera* (at p. 27):

> There are strong policy reasons for not construing the date of which the right to bring action arose in a manner different from that which has heretofore been given to them in the *Limitation Act*. To do so would be destructive of a balanced legislative scheme. Sections 6 and 8 are obviously designed to work together with s. 3(1) to provide relief against the injustice which can be created by hidden facts and, on the other hand, to provide reasonable protection against stale claims. All of that is premised upon the "right to do so" meaning the date of accrual of the cause of action without reference to knowledge. If that premise is disturbed, s. 6 will be made more difficult of application and s. 8 will cease to provide any real protection against stale claims.

Esson J.A. [in *Bera*] alluded to the possibility of an exception for building damage cases, with reference to observations of *Wilson J. in Kamloops (City) v. Neilsen*, [1984] 2 S.C.R. 2. Wilson J. was commenting on the controversy in England over a common law discoverability rule in building economic loss cases. In *Sparham-Souter and others v. Town and Country Developments (Essex) Ltd. and another*, [1976] 2 All E.R. 65 (C.A.), the Court of Appeal decided that the cause of action arose and time ran from reasonable discoverability. *Sparham-Souter* was then overruled by the House of Lords in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners*, [1983] 1 All E.R. 65 (H.L.). Wilson J. rejected *Pirelli* in favour of the *Sparham-Souter* rule. She did so, however, in the context of the common law and a limitation in the *Municipal Act* that did not have a postponement provision. As Wallace J.A. noted in *Wittman v. Emmott et al* (1991), 53 B.C.L.R. (2d) 228 (C.A.) Wilson J. also commented:

> It seems to me that the purpose of ss. 3(1)(a) and 6(3) was to give legislative effect to the reasoning in *Sparham-Souter* by postponing the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action. The *Act* has also resolved the problem of stale claims which was the major criticism of the principle. Section 8(1) reads in relevant part:
>
>> 8.(1) Subject to section 3(3), but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6, 7, or 12, no action to which this *Act* applies shall be brought after the expiration of 30 years from the date on which the right to do so arose....

This passage implies that the postponement provision in s. 6 has supplanted the common law rule. Under the Act, the cause of action arises when the

> damage occurs. This applies to both s. 3 and s. 8, but only the running of s. 3 time can be postponed under s. 6. Postponement is explicitly excluded from the ultimate limitation period in s. 8(1), and the outer limit for hidden damage claims is 30 years from the date that damage occurs.
>
> [Emphasis added.]

[50] The analysis was further refined by this Court in *Dayhu*, where Newbury J.A. explained at paras. 23–25:

> [23] Following the Supreme Court of Canada's reversal of its previous stand against liability in tort for “pure economic loss”, the question of what limitation period would apply to claims against builders and municipal inspectors for defective construction naturally arose. That question has also been answered clearly by this court on a few occasions. The “gist” of an action in negligence for defective construction of a building or manufacture of a chattel is not regarded as “damage to property” within the meaning of s. 3(1)(a) of the Act. Such claims are therefore subject to the longer limitation provided by s. 3(4). Esson J.A. stated for the Court in *Alberni District Credit Union v. Cambridge Properties Ltd*. (1985) 65 B.C.L.R. 297:
>
>> Limitation periods must still be thought of in relation to the accrual of a cause of action. It is true that the present Act puts less emphasis than formerly on the traditional terminology of contract, tort, and other names of causes of action; but s. 3(1)(a) refers to the date on which the right to bring an action arose. Those are, perhaps, the most important words in the section. They are, of course, the words which relate to the accrual of the cause of action.
>>
>> Here, the right to bring an action arose, at the latest, when the building was completed and turned over to the plaintiff. That was not a right which depended on there being any injury to the building.
>>
>> Counsel on both sides have referred us to cases which equate injury to direct damage. Without holding that that necessarily is a precise equation, I agree that *injury imports something in the nature of physical injury or damage*. This building simply has not, in plain language, been injured. So the action is not one in respect of injury to property. It may be, as the defendants assert, that the defect has resulted in some physical damage or injury. But, in the old language, that is not something which is of the gist of the cause of action.
>>
>> None of the defendants, in my view, has succeeded in bringing the case against them within s. 3(1)(a). It is not suggested that any other specific limitation applies, so the applicable limitation period is that of six years provided for by s. 3(4). [at 299-300; emphasis added.]
>
> [24] A year later, in [*Workers' Compensation Bd. (British Columbia) v. Genstar Corp.* (1986), 24 B.C.L.R. (2d) 157 (C.A.)], *supra*, this court sat with

> five judges to consider whether a claim to recover the costs of remedial work necessitated by defects in concrete beams, constituted an action for "injury to property" for purposes of the Act. The Court again rejected that proposition, reasoning that "injury to property" refers to "the situation where property is damaged by an extrinsic act, and not to the situation where a claim is made for damage occasioned by defects in the property itself." (At 161-62; my emphasis.) McLachlin J.A. (now C.J.C.) for the Court thus affirmed *Alberni District Credit Union, supra*, and *B.C. Hydro & Power Authority v. Homco International Ltd.* (1980) 25 B.C.L.R. 181, another decision of this court. To similar effect, see *Strata Plan N.W. 3341 v. Delta Corp.* (2002) 5 B.C.L.R. (4th) 250 (B.C.C.A.).
>
> [Underline emphasis in original; italic emphasis added.]

[51] The DCP is not, in my opinion, comparable to a building that turns out to have inadequate foundations, ineffective fire protection or other defects. Such a building has the potential to cause serious physical damage to other persons and property in the community. Whatever inadequacies the DCP may have had were ascertainable from its inception; it created no potential for causing serious physical damage to other persons or property. The DCP was a different plan than the DBP. It had different qualities and risks, but it was not "damaged" in the sense of containing an inherent deficiency, by which it was doomed to failure, or even an inferior return.

[52] While there is an exception to the general rule that a claim for damage to property is a claim for physical damage to or defects in tangible property for certain claims for pure economic loss, that exception is more circumscribed than stated by the chambers judge. For the purposes of this appeal, in my opinion, the scope of the exception set out by the chambers judge is too broad to be compatible with the *Act*.

[53] In the view of the chambers judge, it would be anomalous if postponement were available to some pure economic claims, but not others, based simply on the type of property involved. But the type of property does matter, at least in the light of the purposes and scheme of the *Act*. In my view, the chambers judge's treatment of the postponement provisions as applying to all pure economic losses would do violence to the purposes of the postponement provisions and the meaning of "damage to property". If postponement were available for pure economic losses generally, the category of "damage to property" would be available whenever there

is a claim for any diminution of contractual, equitable or statutory rights. The statutory scheme created by the *Act* would be rendered meaningless with the result that the only effective limitation period for any such claims would be the ultimate limitation period discussed in *Armstrong* (which is 30 years). In my view, this was not the intention of the Legislature.

[54] The conclusion of the chambers judge at para. 50, set out above, conflated the concept of a limitation period with that of postponement in the same manner that this Court found inappropriate in the earlier judgment of Newbury J.A. involving these parties (see para. 24 above).

[55] I would therefore accede to this ground of appeal and set aside the order of the chambers judge that the respondents' claims against Teck relating to property damage are potentially postponed pursuant to s. 6(3)(b) of the *Act*.

b) The Claims Against Teck for Other than Property Damage

[56] Teck accepts that postponement of the applicable limitation period in respect of the claims against it in deceit and breach of trust duties imposed under s. 8(3) of the *Pension Benefits Standards Act*, R.S.C. 1985, c. 32, are available to the respondents under ss. 6(3)(d) and (h) of the *Act* respectively.

[57] Teck argues that although the chambers judge did not deal with the respondents' claims against it for professional negligence, wilful concealment and breach of trust, this Court can do so, as the essential primary facts are plain from the record, and the parties should be spared the further expense of having these matters referred back to the chambers judge: *Business Depot Ltd. v. Lehndorff Management Ltd.* (1996), 24 B.C.L.R. (3d) 322 at para. 60, 76 B.C.A.C. 241 (C.A.).

i) Professional Negligence

[58] Teck contends that the respondents' claims for professional negligence are against Towers only, and do not apply to it. The respondents assert that Teck is vicariously liable for the alleged professional negligence of Towers.

[59] Clearly, Towers had no formal professional relationship with the respondents. But I am not persuaded that the lack of such a formal relationship can foreclose any claim against Teck for vicarious liability. When Teck retained Towers for advice and assistance with the DCP, it either permitted the communication of Towers' advice to the respondents, or communicated that advice directly to the respondents.

[60] While such a claim will need to overcome significant challenges, I am unable to say that if the facts pleaded by the respondents are true, it is plain and obvious that their claims against Teck for professional negligence are bound to fail.

[61] I would not accede to the submission that the claims against Teck for professional negligence cannot proceed due to the provisions of the *Act*.

ii) Wilful Concealment

[62] To permit the postponement of a limitation period for wilful concealment, a party must show that material facts relating to the cause of action have been wilfully concealed. The meaning of the term "wilful concealment", as it is found in s. 6(3)(e) of the *Act,* was conveniently summarized by Madam Justice Holmes in *Cimolai v. Hall et al.*, 2005 BCSC 31, affirmed 2007 BCCA 225:

> [355] … "Wilful concealment" in s. 6(3)(e) thus refers to knowingly keeping secret material facts relating to the cause of action, such that it would be unconscionable to allow a limitation defence to defeat the plaintiff's claim. Such may occur even where the motive for concealment is not a dishonest one. The "fraud", in the equitable sense, is inherent in knowingly preventing the plaintiff from seeking legal redress.

[63] Insofar as the claim for wilful concealment in this case is concerned, it is apparent from the record provided to this Court that documentation containing facts material to the respondents' cause of action were made available to a retired Teck employee named Gerry LaRouche as early as 2001.

[64] Mr. LaRouche expressed complaints about the DCP in a letter dated July 17, 2000, to Jim Utley, the Vice President of Human Resources for Cominco. In his letter, Mr. LaRouche complained that Cominco did not disclose all of the advantages

of the [DBP] and the real and actual risks associated with the [DCP], or the ability to transfer vested pension credits upon changing employers. He also complained that Cominco neglected to report whether current interest rates were favourable or unfavourable to commute the [DBP] to the [DCP], or mention that [DCP] members are increasingly exposed to annuitization of risks as the time approaches to convert the pension assets to an annuity.

[65] Mr. LaRouche also raised the fact that Cominco did not mention the high cost of wealth managers that he would bear, before and after his retirement, or other features of the [DCP] which he considered unsatisfactory.

[66] In 2002, Mr. LaRouche endeavoured to form an association to represent Teck employees who joined the DCP. Preparatory thereto, he obtained access to extensive material that he requested from Teck. Teck says that if the respondents had requested similar access, they could have obtained the same information more than six years before the commencement of Mr. Weldon’s proceeding.

[67] Both Mr. Weldon and Mr. Bleier contend that Mr. LaRouche’s letter and his complaints were concealed. They assert that they only learned in 2005 that there was some sort of problem with the DCP benefits available to them, which would not have been an issue had they not converted from the DBP.

[68] These respondents are now aware of the material facts of which they contend they required disclosure, including when and where that factual information was obtained. Other than Mr. LaRouche’s letter of July 17, 2000, they have identified no information concerning any material facts that they contend Teck wilfully concealed.

[69] I am not persuaded that Mr. LaRouche’s letter is a document that ought to have been disclosed to members of the DCP. It is not a record created by Teck or any of its representatives. It is Mr. LaRouche’s view of the DCP, prepared six and a half years after the respondents converted from the DBP to the DCP. It is not a view shared by Teck. The respondents have offered no basis for their assertion that the

document ought to have been disclosed to them, and I am unable to see any basis for its disclosure.

[70] I would therefore resolve the question of the application of the *Act* to the claim against Teck for wilful concealment in Teck's favour. I find that the claim against Teck for wilful concealment is statute barred.

iii) Breach of Trust

[71] At paras. 49 and 51 of their consolidated and amended notice of civil claim, the respondents pleaded:

> 49. At all material times, Teck as the employer and administrator, and the Society as the trustee, administered and held the pension fund and administered the pension plan as a trust for the plaintiffs and all other Class Members and owed the plaintiffs and all other Class members a fiduciary duty, a duty to act honestly, in good faith and in the best interests of the members and former members of the plan, and a duty to avoid any conflicts of interest.
>
> …
>
> 51. Teck as the statutory administrator and the Society as the trustee of the plaintiffs' and all other Class Members' pension plan and [*sic*] owed the plaintiffs and all other Class Members the duties of care set out in the federal *Pension Benefits Standards Act,* R.S.C. 1985, c. 32, (the PBSA"). In preparing and providing the information Material to the plaintiffs and all other Class Members, Teck was acting in its capacity as administrator and owed the plaintiffs and all other Class members a fiduciary duty, a duty to exercise the degree of care that a person of ordinary prudence would exercise in dealing with the property of another person, a duty to employ their professional knowledge and skill in the administration of the pension plan or pension fund and a duty to avoid any conflicts of interest.

[72] To the extent that this aspect of the respondents' claim against Teck is based upon a claim for breach of a statutory duty to administer the pension fund as a trustee, Teck concedes that it is subject to the postponement provision of s. 6(3)(h) of the *Act*.

[73] To the extent that the respondents' claim against Teck is based on an allegation of the breach of a fiduciary duty, Teck contends that it cannot be seen as falling within the ambit of s. 6(3)(h) of the *Act*. Teck argues that while trust

obligations share common features with the duties of a fiduciary, the former concern the ownership of trust property and the trustee's dealings with such property, while the latter is concerned with circumstances where the fiduciary has the discretionary power to affect the legal or practical interests of the person to whom the duty is owed. It says that a breach of a fiduciary duty is not a breach of trust, although it may accompany a breach of trust.

[74] Teck's counsel referred us to the decision of this Court in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2008 BCCA 278, in support of Teck's contention that claims for breach of fiduciary duty do not fall within the parameters of s. 6(3)(h) of the *Act.* In that case, the Court considered the definition of "trust" under s. 1 of the *Act*, and the application of the limitation period in s. 3 of the *Act*. Section 6(3) of the *Act* was not considered.

[75] The principles that underlie a fiduciary duty are well established. They were discussed by Mr. Justice La Forest, for the majority, in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 405–407:

> From a conceptual standpoint, the fiduciary duty may properly be understood as but one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasize from the outset, then, that the concept of vulnerability is not the hallmark of fiduciary relationship though it is an important indicium of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the "golden thread" that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.
>
> … [W]hile both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.
>
> The concepts of unequal bargaining power and undue influence are also often linked to discussions of the fiduciary principle. Claims based on these causes of action, it is true, will often arise in the context of a professional relationship side by side with claims related to duty of care and fiduciary duty; …

> Thus, while the existence of a fiduciary relationship will often give rise to an opportunity for the fiduciary to gain an advantage through undue influence, it is possible for a fiduciary to gain an advantage for him- or herself without having to resort to coercion; see *Hospital Products* [*Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417 (Aust. H.C.)] *supra*; and *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592. Similarly, while the doctrine of unconscionability is triggered by abuse of a pre-existing inequality in bargaining power between the parties, such an inequality is no more a necessary element in a fiduciary relationship than factors such as trust and loyalty are necessary conditions for a claim of unconscionability; …
>
> [Emphasis added.]

[76] La Forest J. continued at 418–419:

> More importantly for present purposes, courts have consistently shown a willingness to enforce a fiduciary duty in the investment advice aspect of many kinds of financial service relationships; … In all of these cases, as here, the ultimate discretion or power in the disposition of funds remained with the beneficiary. In addition, where reliance on the investment advice is found, a fiduciary duty has been affirmed without regard to the level of sophistication of the client, or the client's ultimate discretion to accept or reject the professional's advice; ... Rather, the common thread that unites this body of law is the measure of the confidential and trust-like nature of the particular advisory relationship, and the ability of the plaintiff to establish reliance in fact.
>
> [Citations omitted.]

[77] As can be seen from these passages, the wide spectrum of factual situations that can give rise to a fiduciary duty and its breach do not permit generalizations as to whether any specific breach of a fiduciary duty could also be a breach of trust. Such a determination requires an examination of the factual basis for the alleged duty and its alleged breach.

[78] I am unable to resolve this issue based on the pleadings alone. Absent a proper factual foundation for its determination, I would not foreclose the respondents the opportunity to endeavour to establish that the breach of fiduciary duty they allege was also a breach of trust that could entitle them to the benefit of s. 6(3)(h) of the *Act*.

[79] I would not refer the question of the application of the *Act* to the claims against Teck for breach of fiduciary duty back to the chambers judge. I decline to

make any determination of the applicability of s. 6(3)(h) of the *Act* at this stage of the proceedings.

Towers' Appeal

[80] To the extent that the order of the chambers judge determined that the respondents' claims against Towers related to property damage, and the limitation period within which such claims must be commenced was postponed by s. 6(3)(b) of the *Act*, Towers is entitled to the same result. The order of the chambers judge that the respondents' claims relate to damage to property is set aside, and the postponement provisions of s. 6(3)(b) of the *Act* have no application to such claims.

a) The Interpretation of the *Act* and Developments in the Law since its Enactment

[81] In this Court, Towers maintains its contention that s. 6(3)(c) of the *Act*, when passed, was intended to apply only to claims against professionals in contract. It argues that in light of the mischief to which the provision was directed, effect must be given to the original intention of the Legislature in the interpretation of s. 6(3)(c) of the *Act*: *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, [2006] 1 S.C.R. 865 at para. 36.

[82] Towers contends that the chambers judge should instead have followed the approach articulated in *Bell ExpressVu Inc. v. City of Winnipeg*, 2010 MBQB 26 at paras. 62–64, where Madam Justice Greenberg commented:

> [62] … [W]hether the courts apply a static or dynamic approach to interpretation depends on whether the language of the Act has some flexibility. For example, where the language of the statutory provision is drafted in general terms or confers a broad discretion, it is more likely that the court will apply a dynamic interpretation ...
>
> [63] … [I]n cases where the legislature has chosen specific wording, courts have been less inclined to find that the wording can be adapted to new circumstances …
>
> [64] Courts will interpret legislation to adapt to new technologies where that is consistent with the intent of the legislature but judges must be careful about overstepping the proper role of the courts. If a statute is deficient, it is for the legislature to correct that deficiency. In the case at bar, it is clear that the only type of television service contemplated by the legislature when the

> legislation was enacted was cable television service and the wording chosen by the legislature is very specific to that type of technology. Reading s. 32(1) to apply to satellite television service would be straining the words of the provision and effectively making a policy decision as to whether satellite television providers should be subject to tax, a decision which should be made by the legislature.

[83] While I do not doubt the correctness of the comments of Greenberg J., the issue before this Court, in my opinion, turns upon whether Towers is correct in its assertion as to the mischief that the Legislature was attempting to address in enacting s. 6(3)(c) of the *Act*, and whether the language of the *Act* is flexible enough to support the interpretation given to its postponement provisions by the chambers judge (that is, that they apply equally to plaintiffs who were clients of professional defendants and those to whom a duty arose on a different basis).

[84] Towers argues that the intention of the Legislature was to alleviate the hardship caused to clients of professionals whose claims were subject to a contractual limitation period. It says that as a result of that intention, the postponement provisions of the *Act* in general, and s. 6(3)(c) in particular, do not warrant the broad interpretation of the chambers judge.

[85] In *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Company*, [1972] S.C.R. 769, referred to by the chambers judge, Mr. Justice Pigeon, for the majority, wrote at 777–778:

> Furthermore, the basis of tort liability considered in *Hedley Byrne* [*& Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.)] is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as "an independent tort" unconnected with the performance of that contract, as expressed in *Elder, Dempster & Co. Ltd. v. Paterson, Zochonis & Co., Ltd.* [[1924] A.C. 522 (H.L.)], at p. 548. This is specially important in the present case on account for the provisions of the contract with respect to the nature of the obligations assumed and the practical exclusion of responsibility for failure to perform them.

[86] Based on this passage, Towers contends that at the time that the *Act* was passed in 1975, non-clients of professionals could advance non-contractual claims against professionals, but clients who had a contractual relationship with a

professional were precluded from advancing professional negligence claims against the professionals on other than a contractual basis. I am unable to read the passage in the manner suggested by Towers in full. Even in 1975, clients could advance claims against professionals with whom they had a contractual relationship, so long as their cause of action could "properly be considered" as "an independent tort unconnected with the performance of that contract". But I accept that for those clients whose contractual relationship applied to the claim, they were, at that time, precluded from advancing their claim on other than a contractual basis.

[87] The respondents contend that the postponement provisions of the *Act* were passed to address the "acute hardship experienced by [any] plaintiff whose cause of action expires before the loss or damage even becomes apparent", relying on the reasons for judgment of Newbury J.A. in *Dayhu* at para. 3, where she explained:

> The "acute hardship" experienced by a plaintiff whose cause of action expires before the loss or damage even becomes apparent was one of the key concerns addressed by the new *Limitation Act* in 1975, although it is likely the Legislature was contemplating only cases of property damage or physical injury (such as the plaintiff's lung disease in *Cartledge v. E. Jopling & Sons* [1963] 1 All E.R. 341 (H.L.)), at the time. (See the 1974 *Report on Limitations (Part 2 General)* of the Law Reform Commission of British Columbia (No. 15), at 71-76.) The legislative solution was a set of rules regarding discoverability and disability, which postponed the running of time against a plaintiff until he or she could reasonably become aware or had reasonable means of knowledge of the facts giving rise to the right to sue, and be in a position to sue. These rules are codified in ss. 6 and 7 of the Act.

[88] As a plaintiff may bring claim against a professional through means other than contract, I can see no principled basis for exempting non-contractual claims from the application of postponement provisions of the *Act.* In *Armstrong*, this Court interpreted the *Act* in light of developments in the law, and applied the ultimate limitation period to a claim for pure economic loss, notwithstanding that such a claim was not recognized at common law at the time the legislation was enacted.

[89] In my opinion, the language of the *Act* is flexible enough to support the interpretation that its postponement provisions may apply equally to plaintiffs who

were clients of professional defendants and those to whom a duty arose on a different basis. I would not accede to this ground of appeal.

b) Are the provisions of the *Act* restricted to Contractual Claims by Clients against Professionals?

[90] The chambers judge held that the respondents' claims against Towers for professional negligence could be postponed pursuant to s. 6(3)(c) of the *Act*.

[91] Towers correctly points out that its professional services were retained by Teck, and not by the DBP or the DCP. It also correctly points out that it had no contractual relationship with the respondents.

[92] At paras. 23–26 of the consolidated and amended notice of civil claim, the respondents pleaded the following:

> 23. In or around September, 1992, Teck provided the plaintiffs and each of the other Class Members with a booklet entitled "introducing the [DCP] - Your New Pension Alternative" (the "Booklet") and a computer program called the "Interactive Decision Model Computer Program" (the "Computer Program") (collectively the "Information Material").
>
> 24. Towers assisted Teck in the preparation of the informational material and approved its contents.
>
> 25. Teck and Towers constructed, designed, wrote and programmed the Information Material with the intention of causing the plaintiffs and all other Class Members to transfer to the [DCP].
>
> 26. Teck and Towers knew, or ought to have known, that in making the Election to transfer to the [DCP] the plaintiffs and all other Class Members would rely on the Informational Material.

[93] The services that Towers provided respecting the DCP were professional services. Although they were provided to Teck, the respondents allege that Towers performed its professional services, at least in part, with the intention of causing the plaintiffs and all other Class Members to transfer to the DCP.

[94] Given my conclusion on the interpretation of the *Act* and developments in the law since its enactment, it follows that I find that the language of the *Act* is flexible enough to extend to both contractual and non-contractual claims against professional defendants, and I would not therefore accede to this ground of appeal.

Conclusion

[95] In sum, I would dismiss the respondents' cross appeal. The chambers judge correctly determined that the respondents' cause of action arose on January 1, 1993, and that their claims are therefore statute barred unless they can bring themselves within a postponement provision of the *Act*.

[96] I would allow Teck's appeal, in part. Subsection 6(3)(b) of the *Act* does not potentially apply to the respondents' claims and the chambers judge erred in holding that the respondents' claims were for "damage to property".

[97] I find that the respondents' claims against Teck for wilful concealment are statute barred.

[98] As I am unable to say that it is plain and obvious that the respondents' claims against Teck for professional negligence and breach of fiduciary duty are bound to fail, I would allow those claims to proceed.

[99] I would allow Towers' appeal to the extent that it mirrors that of Teck. I would dismiss Towers' other grounds of appeal. The language of the *Act* is sufficiently flexible to support the interpretation that its postponement provisions may apply equally to plaintiffs who were clients of professional defendants and to those to whom a duty arose on a different basis, and to extend to both contractual and non-contractual claims against professional defendants.

"The Honourable Mr. Justice Hinkson"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Groberman"