IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Weldon v. Teck Metals Ltd.,*
2013 BCSC 345

Date: 20130304
Docket: S095159
Registry: Vancouver

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

Plaintiffs

And

Teck Metals Ltd., Cominco Pension Fund Coordinating Society, and Towers Perrin Inc.

Defendants

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Plaintiffs:	R. Mogerman J.D. Winstanley
Counsel for Defendant, Teck Metals Ltd:	G.B. Gomery, Q.C.
Counsel for Defendant, Towers Perrin Inc.:	H. Poulus, Q.C M.L. Bromm.
Place and Date of Trial/Hearing:	Vancouver, B.C. December 21, 2012
Place and Date of Judgment:	Vancouver, B.C. March 4, 2013

[1] The plaintiffs in this class action say that certain employees of what is now the defendant Teck Metals Ltd. (“Teck”) were given inadequate information when they agreed to transfer to a new pension plan in 1993. The result, they say, is that employees have been left with reduced pensions. The defendants say most of the claim is barred by operation of the *Limitation Act*, RSBC 1996, c. 266 (‘the *Act*’).

[2] The parties have consented to certification of this action as a class proceeding under the *Class Proceeding Act*, RSBC 1996, c. 50. They have agreed on 23 common issues to be decided and have submitted the first two of them for judgment on a special case pursuant to *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 9-3. Those issues are:

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

[3] Rule 9-3 includes the following:

> (1) The parties to a proceeding may concur in stating a question of law or fact, or partly of law and partly of fact, in the form of a special case for the opinion of the court.
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> ...
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> (5) With the consent of the parties, on any question in a special case being answered, the court may grant specific relief or order judgment to be entered.

Factual Background

[4] Teck was formerly known as Cominco Ltd. (‘Cominco’). In 1992, Cominco and related companies established a defined contribution pension plan (the ‘DC Plan') and offered non-union employees the option of transferring into it. Those employees had previously belonged to a defined benefit pension plan (the 'DB Plan').

[5] By letter dated August 19, 1992, Cominco formally notified employees of the intended date of implementation of the DC Plan and the election available to them. Cominco distributed a booklet and computer program describing the new plan.

[6] The deadline for affected employees to make the election was November 30, 1992, but some were given a brief extension into December, 1992. The plaintiffs and others elected to transfer to the DC Plan, which came into effect on January 1, 1993.

[7] The plaintiff Leonard Bleier took early retirement on September 28, 2006. The plaintiff David Weldon remains an employee of Teck and a member of the DC Plan.

[8] Mr. Weldon commenced his action on July 13, 2009. Mr. Bleier commenced his on October 17, 2011. The two actions have been consolidated into a single proceeding. Claims against some of the original defendants have been discontinued or dismissed. The only remaining defendants are Teck and Towers Perrin Inc. ('Towers'). Towers was an actuarial consultant retained by Teck in relation to the pension plans, but its client was Teck, not the pension plans.

[9] On December 21, 2012, the court, by consent, certified the consolidated action as a class proceeding 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 [DB Plan] to the [DC Plan] effective on or about January 1, 1993" (the 'Class Members').

[10] The plaintiffs say that Teck, with the assistance of Towers, structured and implemented the DC Plan in a way that favoured Teck's interests over those of its employees, transferring risks from Teck to the pension plan members. They say the defendants provided employees with incomplete, inaccurate or misleading information, and claim damages and other relief for breach of statutory and fiduciary duties, deceit and negligent misrepresentation.

Judicial History

[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.

Issue 1: When did the right to bring action arise?

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

> 3(5) 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.

[16] The defendants say that limitation expired long before this action was started because the right to bring action arose and the time began to run when the pension changes took effect on January 1, 1993. On that date, they say, the class members acquired a new bundle of rights which they now allege to be inferior to the rights they previously held. The defendants say that amounts to an allegation of immediate injury, completing the cause of action.

[17] The plaintiffs say a right of action does not arise and no limitation period can begin to run until the plaintiff suffers a loss. They say no class member suffered a

loss until a "payment event"--the date he or she retired or otherwise became eligible to receive money from the pension plan.

[18] The defendants rely primarily on *Burke v. Greenberg,* 2003 MBCA 104, and on statements made by the Court of Appeal when it dealt with the first application in this case.

[19] *Burke* was a negligence claim against a solicitor who had created limited partnership agreements under which the plaintiffs were to acquire and hold certain land. Another defendant fraudulently mortgaged the properties and the plaintiffs alleged that the agreements failed to protect them from that fraud.

[20] The solicitor's work was done between 1979 and 1981, and the alleged fraudulent mortgaging of the properties took place in 1984. As a result of foreclosure proceedings, title to the properties passed to the mortgagee in 1986. The action was started in 1988, more than six years after the allegedly negligent services were performed.

[21] Applying legislation similar to the *Limitations Act* in this province, the Manitoba Court of Appeal held that the claim was out of time because the damage occurred when the advice was given. The Court found, at para. 24:

> 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 not an issue of when the loss in fact occurred.

[22] Among the authorities referred to by the Court was the English case of *Knapp v. Ecclesiastical Insurance*, [1997] All E.R. (D) 44 (H.L.), where an insurance broker was alleged to have been negligent in advising the plaintiffs about their disclosure obligations. When a fire damaged some buildings on the plaintiffs' property, the

insurer denied coverage based on the plaintiff's failure to disclose the condition and use of the buildings. Hobhouse L.J. said:

> From these authorities it can be seen that the cause of action can accrue and the plaintiff have suffered damage once he has acted upon the relevant advice "to his detriment" 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. Applying this to the present case, the Plaintiffs paid their renewal premium without getting in return a binding contract of indemnity from the insurance company. They had acted to their detriment: they did not get that to which they were entitled. The fact that how serious the consequences of the negligence would be depended upon subsequent events and contingencies does not alter this; such considerations go to the quantification of the Plaintiffs' loss not to whether or not they have suffered loss. The risk of loss existed from the outset and in the absence of better evidence would have to be evaluated and assessed as a risk and damages awarded accordingly.

[23] In its judgment on the earlier motion in this case, the Court of Appeal said the same approach applies in British Columbia. Newbury J.A. said, at para. 24:

> 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.
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> 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.

[24] Newbury J.A. cited the above passages from *Burke* and *Knapp*, emphasizing the reference in *Knapp* to the plaintiff having suffered damage "once he has acted on the relevant advice 'to his detriment'." She then said, at para. 26:

> This remains the rule in British Columbia regardless of whether the loss or damage was discoverable.

[25] Newbury J.A. also stressed that the concept of postponement in s. 6 of the Act “involves a separate and fact based analysis” from consideration of the limitation period under s. 3.

[26] The plaintiffs argue that the only issue before the Court of Appeal was the question of whether the limitation issue should have been considered on its merits on the motion to set aside the extension of the time for service. They say the above statements by Newbury J.A. are *obiter dicta* that did not consider important authorities such as *Wardley Australia Ltd. v. Western Australia*, [1992] HCA 55, and *Law Society v. Sephton* & Co., [2006] UKHL 22.

[27] In *Wardley*, the plaintiff alleged that, based on false representation by a merchant bank, it had indemnified another bank against any loss that bank may suffer as a result of credit granted to a certain company. The alleged misrepresentations related to the financial position and assets of the company. The majority in the High Court of Australia held that no loss was suffered and time did not begin to run until the plaintiff was called upon to pay the indemnity. The Court said, at para. 10:

> The indemnity was not one of a kind which generates an immediate non-contingent liability to pay upon execution of the instrument. It was neither a promise to meet a liability of the promisee to make a payment nor a promise to pay a debt owing by a third party to the promisee.

[28] In reference to earlier English cases, the High Court said:

> 22. Be that as it may, the English decisions have proceeded according to the view that, where the plaintiff is induced by a negligent misrepresentation to enter into a contract and the contract, as a result of the negligence, yields property or contractual rights of lesser value, the plaintiff first suffers financial loss on entry into the contract, notwithstanding that the full extent of the plaintiff's financial loss may be incapable of ascertainment until some later date ((34) Melton v. Walker and Stanger (1981) 125 SJ 861; Baker v. Ollard and Bentley (A Firm) (1982) 126 SJ 593; D.W. Moore and Co. v. Ferrier (1988) 1 WLR 267; Islander Trucking Ltd. v. Hogg Robinson Ltd. (1990) 1 All ER 826; Bell v. Peter Browne and Co. (1990) 2 QB 495). ...
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> ...
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> 24. It has been contended that the principle underlying the English decisions extends to the point that a plaintiff sustains loss on entry into an agreement notwithstanding that the loss to which the plaintiff is subjected by the

> agreement is a loss upon a contingency. For our part, we doubt that the decisions travel so far. Rather, it seems to us, the decisions in cases which involve contingent loss were decisions which turned on the plaintiff sustaining measurable loss at an earlier time, quite apart from the contingent loss which threatened at a later date ((36) Forster v. Outred and Co. and D.W. Moore and Co. v. Ferrier illustrate the point.).
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> ...
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> 26. If, contrary to the view which we have just expressed, the English decisions properly understood support the proposition that where, as a result of the defendant's negligent misrepresentation, the plaintiff enters into a contract which exposes him or her to a contingent loss or liability, the plaintiff first suffers loss or damage on entry into the contract, we do not agree with them. In our opinion, in such a case, the plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual; until that happens the loss is prospective and may never be incurred.

[29] Those passages were referred to with approval by the House of Lords in *Sephton*. In that case, a solicitor had misappropriated large sums of money over a six-year period. During that period, an accounting firm had negligently certified the solicitor’s accounts for the purpose of his annual reports to the Law Society. The Law Society was eventually required to compensate the solicitor’s clients from its compensation fund and sued the accountants to recover what it had paid.

[30] The House of Lords held that the cause of action arose only when a claim was made against the fund. Lord Hoffman described the Law Society’s liability as “contingent on the misappropriation not being otherwise made good and a claim in proper form being made.” He said that until a claim was made, the fund suffered no loss or damage.

[31] Lord Walker reviewed and distinguished the authorities that held the cause of action to arise when negligent advice was given, at para. 48:

> In all these cases the claimant has as a result of professional negligence suffered a diminution (sometimes immediately quantifiable, often not yet quantifiable) in the value of an existing asset of his, or has been disappointed (as against what he was entitled to expect) in an asset which he acquires, whether it is a house, a business arrangement, an insurance policy, or a claim for damages. Your Lordships have not, I think, been shown any case in which the imposition on a claimant of a purely personal and wholly contingent liability, unsecured by a charge on any of the claimant's assets, has been treated as actual loss.

[32] The plaintiffs argue that the unique circumstances of this case require unique analysis, similar to what was undertaken in *Wardley* and *Sephton*, and that the diminished pensions received by the class members should be treated as a contingent loss that is only realized when pension benefits are collected.

[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 DC Plan 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 DC Plan 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.

Question 2: Postponement

[39] The effect of my ruling on Question One is that the six-year limitation period set out in s. 3 (5) of the *Act* expired on January 1, 1999--more than 10 years before the commencement of this action. The action is therefore statute barred unless and to the extent the plaintiffs can rely on the postponement provisions in s. 6 of the *Act*.

[40] Section 6 lists certain categories of action for which the limitation period does not begin to run until the plaintiff knows or ought to know of the facts giving rise to the action. The relevant portions of the section are:

> 6 (1) The running of time with respect to the limitation period set by this Act for an action
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> > (a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy, or
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> > (b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee or previously received by the trustee and converted to the trustee's own use,
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> > is postponed and does not begin to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.
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> (2) For the purposes of subsection (1), the burden of proving that time has begun to run so as to bar an action rests on the trustee.

(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).

(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.

(5) For the purpose of subsection (4),

(a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,

(b) "facts" include

(i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and

(ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,

(c) if a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person, and

(d) if a question arises about the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.

> (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

[41] The agreed upon common issues include 19 separate questions going to issues of liability. The plaintiffs say postponement is available on all issues under ss. 6(3)(b),(c),(d), (e) and (h).

[42] Teck concedes that two of the common issues arguably raise a claim in deceit and that postponement under s. 6(3)(d) is available to that extent. Those issues relate to allegations of knowing distribution of false or misleading information. Another common issue asks whether Teck administered the pension fund as a trustee. Teck concedes that an administrator of pension funds had certain trust duties under the *Pension Benefit Standards Act*, RSC 1985, chapter 32, and, to the extent the plaintiffs can bring their breach of trust claim within those duties, s. 6(3)(h) would apply. It does not concede that s. 6(3)(h) applies to broader claims for breach of fiduciary duty that the plaintiffs rely on.

Damage to Property: s.6(3)(b)

[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.

[45] *Armstrong* was a claim against the municipality for alleged negligence in the inspection of the foundations of a house while it was under construction. The claim

was dismissed on the basis of the ultimate 30-year limitation period in s. 8 of the *Act*, but the Court of Appeal said, at para. 15:

> While the 6 year limitation under s. 3(5) is more generous than the 2 years for injury, I do not think that the wording of the section supports an inference that the Legislature intended to exclude pure economic loss claims from the postponement provisions. Pure economic loss is often hidden and thus particularly suitable for postponement relief.

[46] As the Court of Appeal later pointed out in *410727 B.C. Ltd. v. Dayhu Investments Ltd.*, 2004 BCCA 379 , the legislature had not really intended to say anything about pure economic loss claims in tort because, at the time the *Limitation Act* was enacted, such claims had not yet been recognized by the common law. The *Act* has to be interpreted in light of more recent developments:

> [1] ...That statute was enacted as a comprehensive reform measure in 1975 (see S.B.C. 1975, c. 37), but is now being tested by developments in the law that were then unforeseen. In this case, the 'new' development is the lifting of the bar against recovery in tort for pure economic loss, famously exemplified by *Rivtow Marine Ltd. v. Washington Iron Works* [1974] S.C.R. 1189. As a result of the Supreme Court of Canada's decisions in *Kamloops (City) v. Nielsen* [1984] 2 S.C.R. 2, *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 1 S.C.R. 1021, and *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.* [1995] 1 S.C.R. 85, architects, engineers, contractors, builders and others who take part in the design, construction and inspection of buildings may now generally be sued in Canada — unlike the United Kingdom — for negligence by the owners and subsequent purchasers of such buildings, even in the absence of physical damage or personal injury.
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> [2] ... In cases of negligent construction or inspection, unlike most instances of physical injury, the deprivation or damage (i.e., the defect in construction) may remain concealed for many years. Yet at common law (at least as it existed prior to *Kamloops v. Nielsen*, *supra*), time would normally begin to toll for limitation purposes from the date of construction.
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> [3] 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.

[47] The defendants say that s. 6(3)(b) only allows postponement of claims for pure economic loss in a limited category of cases that arise from some physical damage or defect in real property. While it is true that postponement under s. 6(3)(b) for pure economic loss appears to have been successfully argued only in such cases, the question is whether it is necessarily limited to them.

[48] This case does not involve physical property, but what the defendants characterize as "a bundle of pension rights" that the class members received in replacement of another, different bundle of rights.

[49] The word "property" without more, includes both tangible and intangible possessions. The definition of "property" in the *Shorter Oxford English Dictionary* includes "that which one owns." *Black's Law Dictionary* defines "property" as "any external thing over which the rights of possession, use and enjoyment are exercised." Clearly, a pension plan comes within the definition of property. Dealing with pensions in the context of matrimonial litigation, the Supreme Court of Canada said in *Clarke v. Clarke*, [1990] 2 SCR 795 at 824:

> ... pensions are choses in action or incorporeal personal property. The named recipient of a pension is entitled to the benefits therefrom as of right. As stated by Dea J. in *McAlister* at p. 15, the receipt of the pension benefit is not "dependent upon arbitrary whim or the exercise of any discretion by any third party".

[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).

Professional Negligence: s. 6(3)(c)

[54] Because I have found that s. 6(3)(b) has potential application to all common issues, it is not necessary to consider whether they fall within any of the other categories in s. 6(3). However, I will address the question of whether s. 6(3)(c) applies because the defendant Towers has advanced a separate argument that applies only to it.

[55] Towers provided professional advice only to Teck. It argues that the term “professional negligence”, as used in the *Act*, must be given the meaning that would have been understood and intended by the legislature when the *Act* was enacted in 1975.

[56] At that time, Towers says, the term referred only to claims in contract brought against professionals by their own clients. Because the right to bring an action in contract arises at the date of breach, not the date of damage, there had been cases in which plaintiffs found claims against professional advisors to be statute-barred

before they became aware of the negligence and before any loss was suffered, *Schwebel v. Telekes*, [1967] 1 OR 541 (CA).

[57] Towers says s. 6(3)(c) was included in the *Act* for the sole purpose of remedying that problem, as had been recommended by the Law Reform Commission of British Columbia in its 1974 *Report on Limitations*. The report said at 73:

> It is not difficult to envisage situations in which relief ought to be available, but which do not involve a personal injury. A solicitor may negligently cause his client to acquire an imperfect title to land which only comes to light at some later date when the client attempts to resell the property. Should that solicitor be relived of the consequences of his conduct by the mere running of time? We think not. How far should the boundaries of this relief extend? ...
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> The most acceptable solution would seem to be that first propounded by the Alberta Uniformity Commissioners in their report to the 1968 Conference: that relief be restricted to actions involving personal injury, property damage, and professional negligence.

[58] The report of the Alberta Commissioners, referred to in that passage, had said at 70:

> The great difficulty arises where the claim is on the borderline of tort and contract. This can arise where the claim is for bodily injuries and also for property damage and indeed there may be a third category, financial loss, which is usually a claim for professional negligence, e.g., against a solicitor or architect. The reason for the difficulty is that a cause of action in contract arises on breach and in tort [with irrelevant exceptions] on damage.
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> [Square brackets in original.]

[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 SCR 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.

Wilful Concealment: s.6(3)(e) and Breach of Trust: s. 6(3)(h)

[64] As said above, I have found s. 6(3)(b) to be applicable and broad enough to make postponement arguable on all common issues. It is therefore not necessary for me to decide whether the plaintiffs can rely on alleged wilful concealment of facts under s. 6(3)(e) or whether s. 6(3)(h) might apply to a broader definition of "trust" than Teck has conceded.

Summary and Conclusion

[65] For purposes of the *Limitation Act*, the plaintiffs' right to bring action arose on January 1, 1993, but all claims giving rise to common liability issues are subject to the postponement provisions in ss. 6(3) and (4) of the *Act*.

[66] Of course, it will be for the plaintiffs and other class members, at a later stage in this proceeding, to prove the facts that they say entitle them to postponement. Some of those facts may be sufficiently applicable to all class members for consideration as additional common issues. I will leave it for the parties to consider that question and, if necessary, make further application.

"N. Smith, J."