

Date: 20010606
Docket: CA 170786

NOVA SCOTIA COURT OF APPEAL

Cite as: **Myers v. Maritime Life Assurance Company, 2001 NSCA 93**

Freeman, Cromwell and Saunders, JJ.A.

BETWEEN:

MARITIME LIFE ASSURANCE COMPANY

Appellant

- and -

CHARLENE MYERS

Respondent

AND BETWEEN:

CHARLENE MYERS

Appellant

- and -

MARITIME LIFE ASSURANCE COMPANY

Respondent

REASONS FOR JUDGMENT

Counsel: Scott C. Norton for Maritime Life Assurance Company
Brian Willcott and Jane McClure for Charlene Myers

Appeal Heard: June 6, 2001

Judgment Delivered: June 6, 2001

THE COURT: Leave to appeal is granted and the appeal is dismissed; and leave to cross-appeal is denied per oral reasons for judgment of Cromwell, J.A.; Freeman and Saunders, JJ.A. concurring.

CROMWELL, J.A.: (Orally)

- [1] Ms. Myers (the respondent on the appeal, appellant by way of cross-appeal and plaintiff in the main action) sued Maritime Life Assurance Company (the appellant, respondent by cross-appeal and defendant in the main action) for alleged breach of a disability insurance policy. The defendant moved to strike the statement of claim on the basis that the action was brought out of time. The plaintiff applied to strike Paragraph 7 of the defence which sets out the limitation defence.
- [2] Both applications were heard and dismissed by Cacchione, J. in chambers. Both the plaintiff and the defendant seek leave to appeal.
- [3] There is no disagreement before us that, on this application to strike the statement of claim on the basis of the limitation period, the question is whether, on the face of the statement of claim, the pleaded facts establish that the claim asserted is statute barred. In considering the question, it should be borne in mind that “[a]n order to strike out a statement of claim will not be granted unless on the facts as pleaded the action is ‘obviously unsustainable’. ... [I]t is not the court’s function to try the issues but rather to decide if there are issues to be tried.”: **Vladi Private Islands Ltd. v. Haase et al.** (1990), 96 N.S.R. (2d) 323 per Macdonald, J.A. at 325.
- [4] With respect to the appeal, leave to appeal should be granted but the appeal dismissed. The facts pleaded in the statement of claim do not make it clear that the limitation period with respect to the claim on the policy has expired. There are novel questions law and significant questions of fact with respect to when time begins to run against the plaintiff such that the claim is not ‘obviously unsustainable’. Moreover, it is far from clear that the breach of fiduciary duty claim is statute barred.
- [5] To turn to the cross-appeal, leave to appeal should be denied. The principle as set out in **Vladi, supra**, applies to the application to strike Paragraph 7 of the defence which reads as follows:

7. As to the whole of the Statement of Claim, the Defendant states that on or about March 31, 1995 it communicated to the Plaintiff its final decision denying benefits were available to the Plaintiff under the Policy. The Defendant refers to the terms of the Policy and the *Insurance Act*, R.S.N.S. 1989 c. 231, as amended, and states that the within proceeding was required to be filed within one year of the communication of denial of benefits and is barred by the passage of time. The Defendant will apply at or before trial to strike out the Statement of Claim.

The paragraph puts a time limitation defence in issue and should not be struck out.

- [6] The dismissal of the appeal is without prejudice to the defendant relying on the limitation defence at trial or to presenting the limitation issue for

decision in advance of trial on an appropriate record and by appropriate procedures.

- [7] As success is divided, there will be no order as to costs on the appeal or the cross-appeal.

Cromwell, J.A.

Concurred in:

Freeman, J.A.

Saunders, J.A.