SUPREME COURT OF NOVA SCOTIA

Citation: *Thorburne v. Sun Life Assurance Company of Canada*, 2020 NSSC 240

Date: 20200916
Docket: SBW 468266
Registry: Bridgewater

Between:

Jillian Rae Thorburne

Plaintiff

v.

Sun Life Assurance Company of Canada

Defendant

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	July 22, 2020, in Halifax, Nova Scotia
Counsel:	Farhan Raouf, for the Plaintiff Shelley A. Wood, for the Defendant

By the Court:

[1] This decision relates to a motion brought on July 22, 2020, by the Defendant, Sun Life Assurance Company of Canada ("Sun Life" or "the Applicant") pursuant to *Civil Procedure Rule* 83. Sun Life sought to amend its Statement of Defence, and to add a Counterclaim against the Plaintiff ("Ms. Thorburne"). The trial of this matter was scheduled to proceed before me on September 8-15, 2020. Ms. Thorburne opposed on a number of bases, including the proximity of the trial. Among other things, she maintained that she would sustain irremediable prejudice if the motion was granted.

[2] At the conclusion of the hearing, I granted Sun Life's motion with reasons to follow. These are my reasons.

Background

[3] Ms. Thorburne commenced an action against Sun Life on September 12, 2017. In her pleadings, she has alleged that she is totally disabled from her own occupation and "any occupation". As a consequence, Sun Life is alleged to have breached its contractual obligation to her when it decided to discontinue paying her long-term disability ("LTD") benefits, effective April 21, 2017.

[4] In its Statement of Defence, filed on March 27, 2018, Sun Life has denied that the Plaintiff is, or was, totally disabled from her own or "any occupation". It further denied that she is entitled to payment of LTD benefits in accordance with the policy.

[5] On April 13, 2018, Ms. Thorburne provided her Affidavit Disclosing Documents to Sun Life. At page 684 of that disclosure, one finds a 2016 income tax summary. On one of the lines in that summary, certain "gross commission income" for the 2016 tax year is indicated.

[6] On July 25, 2018, the Plaintiff's discovery examination was conducted. At Exhibit "C" to the affidavit of Daniel MacKenzie, dated July 6, 2020, which was filed in support of Sun Life's application, the excerpted portion of the transcript references additional documentation which Ms. Thorburne brought with her to that examination:

> Q: I notice as we're sitting here that you have some documents in front of you.
>
> A: Yes
>
> […]
>
> Q: I'm just wondering, have those documents been disclosed as part of the …
>
> A: This was what I was going to…
>
> Mr. Raouf: **No, that's…she just brought that today. That's a summary of some income she made from a shampoo selling business.**
>
> [Emphasis in original]

[7] When questioned further at discovery, the Plaintiff elaborated upon her shampoo selling business with a company called Monat Global Canada ("Monat"):

> Q. Have you taken any steps to look for other employment with another company that you might be able to do?
>
> A. The only that I felt that I could do, **I had tried this shampoo … selling shampoo from home which basically involved putting a … a post on Facebook and then you give someone a website where they go and they … they do it all**, so that's what I had tried to … to make a business for myself, but I did not look for any other jobs because I didn't feel I could do them.
>
> Q. So are you still doing the business?
>
> A. In a very sm- … **I'm not very successful right now**, but I am still a market partner with Monat, yes.
>
> [*Sun Life brief, pp 2-3*]
>
> [Emphasis in original]

[8] Both at the discovery, and in her counsel's submissions at this hearing, Ms. Thorburne had indicated that her duties were relatively minor, largely involving posting items for sale on Facebook.

[9] Sun Life requested supplementary disclosure insofar as it related to the Plaintiff's above-noted income and employment with Monat, and received the appropriate undertakings. At the Date Assignment Conference on November 1, 2018, the parties confirmed that the matter was ready to be set down for trial.

[10] It was not until November 18, 2019, however, that complete compliance with the Plaintiff's discovery undertakings was obtained by Sun Life. This included the production of some banking statements and summaries provided by the Plaintiff. These showed that she had earned (what Sun Life considers to be)

substantial income from her Monat employment after the date that she had alleged herself to be "totally disabled". In addition, it showed that she had earned some income from Monat while she had also been receiving LTD benefits from Sun Life.

[11] Subsequent to this disclosure, Sun Life has also alleged the following:

> 18. Independent from the document disclosure process, Sun Life has also since discovered additional evidence of Thorburne's employment activities by conducting social media searches. For example, Thorburne's publicly available "Events" pages reveals that she hosted numerous events throughout Atlantic Canada to sell Monat products as follows:
>
> (a) Meet Monat @ **Bridgewater** – August 29, 2016 (hosted by Thorburne);
>
> (b) Meet Monat @ **Yarmouth** – September 19, 2016 (hosted by Thorburne);
>
> (c) Meet Monat @ **Lunenburg** – March 20, 2017 (hosted by Thorburne);
>
> (d) Meet Monat @ **Berwick** - September 16, 2017 (hosted by Thorburne);
>
> (e) Meet Monat @ **Inkerman** (NB) – November 19, 2017 (hosted by Thorburne);
>
> (f) Meet Monat @ **Yarmouth** (part 2) – November 16, 2017 (hosted by Thorburne);
>
> (g) Meet Monat @ **Truro** – January 21, 2018 (hosted by Thorburne).
>
> [*Sun Life brief, pp 2-3*]

[12] Shortly after receipt of this disclosure, counsel for Sun Life wrote to the Plaintiff's lawyer requesting his consent to an amendment of the Defendant's pleadings, one which would both amend the Statement of Defence, and would also add a Counterclaim for recovery of LTD benefits paid by Sun Life.

[13] This request was repeated on February 13, 2020. A negative response on behalf of the Plaintiff was received. This was shortly before the Courts in Nova Scotia embarked upon an "essential services model" in response to the COVID-19 crisis. Rather than attempt to fight a preliminary battle as to whether this motion could be heard under the "emergency" protocols pursuant to this model, the Defendant says that it waited until July, 2020, with the present (more liberal) hearing criteria, including the more widespread use of alternatives to "in person" motions.

[14] Sun Life submits that the intervening period was not, however, "dead time". Rather, it points out that the parties did a number of things over that intervening period.

[15] For example, Sun Life sent to Ms. Thorburne's counsel a Request for Admissions, which asked her to admit that she received compensation from her Monat employment from June 2016 through at least April 2017, and also to admit that she received LTD benefits from Sun Life over that same period of time. A response was forthcoming on June 22, 2020, in which the Plaintiff admitted what had been requested of her.

[16] Earlier, toward the end of 2019, the parties had participated in a settlement conference which was not successful.

[17] Finally, before the end of June 2020, the parties attended mediation in an attempt to resolve their differences. This was not successful either. It was at this point that Sun Life approached the Court to schedule a hearing of this motion. As earlier stated, this was conducted on July 22, 2020 via videoconferencing.

The Parties' Positions

[18] Ms. Thorburne has expressed a number of concerns in relation to Sun Life's application. For example, she contends that the subject matter of the amendment to the Defence and/or Counterclaim sought by Sun Life is either statute barred, or barred by a limitation set forth in the contract itself. She raises a number of issues with respect to "discoverability" in that context.

[19] She also contends that Sun Life's policy provisions create an absurdity or, in any event, are too broad and ambiguous to sustain the amendment to the Defence or the Counterclaim being sought.

[20] Finally, Ms. Thorburne argues that the prejudice which she will sustain if this motion is granted is serious enough that the requested amendments to the Statement of Defence and the filing of the Counterclaim should not be allowed.

[21] On the other hand, Sun Life submits that the amendments being sought are being advanced in good faith and, because they relate to noncontroversial issues between the parties, create no prejudice, let alone “serious prejudice” to Ms. Thorburne that cannot be compensated in costs. Moreover, it argues that it ought not to be put to the expense of litigating these intimately connected matters twice.

[22] Sun Life stresses that it (too) has no desire to see the September trial dates jeopardized, and has undertaken to forthwith make a Sun Life representative available for discovery examination by the Plaintiff in the event that the requested amendments are granted by this Court.

Issues

[23] The issues resolve themselves into the following:

i) Is the relief specified in the amendments to the Defence and/or the addition of a Counterclaim being sought by Sun Life, in whole or in part, barred by the Limitation of Actions Act, or the contract itself?

ii) Are some of the provisions of the disability insurance policy issued by Sun Life to Ms. Thorburne absurd, overly broad or ambiguous enough such that any amendment to the Statement of Defence or Counterclaim should not be allowed?

iii) Is the request being made in good faith?

iv) Will the Plaintiff sustain serious prejudice, for which adequate compensation cannot be made in costs, in the event that an amendment to the Statement of Defence and/or the filing of a Counterclaim is allowed at this juncture?

***Rule* 83 - General**

[24] Before addressing any of the above, some brief comments upon the provisions of *Civil Procedure Rule* 83 is necessary. The relevant portions are as follows:

> 83.01(1) This Rule allows a party to amend certain documents the party files.
>
> (2) This Rule requires a party who wishes to amend a court document to obtain permission from the other parties or a judge, except documents may be amended without permission early in an action.
>
> (3) A party may amend a court document filed by the party, in accordance with this Rule.

> 83.02 (1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.
>
> (2) The amendment must be made no later than ten days after the day when all parties claimed against have filed a notice of defence or a demand of notice, unless the other parties agree or a judge permits otherwise.
>
> 83.11(1) A judge may give permission to amend a court document at any time.

[25] On January 1, 2009, what had been *Rule* 15 under the 1972 *Civil Procedure Rules* was supplanted by *Rule* 83. The previous test under *Rule* 15 had been well articulated in *Stacey v. Consolidated Fund Corp* (1986), 76 NSR (2d) 182 (CA):

> "... the amendment should have been granted unless it was shown to the Judge that the Applicant was acting in bad faith or that by allowing the amendment, the other party would suffer serious prejudice that could not be compensated by costs."

[26] Generally speaking, this test has not changed under *Rule* 83 (see for example *Oldford v. Canadian Broadcasting Corp.*, 2011 NSSC 49, at para. 4, and *M5 Marketing Communications Inc v. Ross*, 2011 NSSC 32, at para. 17).

[27] What has changed is that the current iteration of the *Civil Procedure Rules* (holistically) contains a whole host of provisions which did not exist in the heyday of the former *Rule* 15. For example, in civil proceedings, we now have Date Assignment Conferences, which prescribe finish dates (*CPR* 4.16(6)c), during which the commitment of counsel to participation in a Trial Readiness Conference at a future date is obtained, prior to the assignment of trial dates.

[28] To mention merely one more example, the extent of disclosure and discovery obligations owed by parties, as well as timetables respecting same, has received extensive updating and clarification under the present *Rule* 18. Current rules may, therefore, be considered to inform issues germane to motions of this type, when consideration is given to the prejudice to be sustained by Ms. Thorburne, if the requested amendments are granted.

Analysis

i) Is the relief specified in the amendments to the Defence and/or the addition of a Counterclaim being sought by Sun Life, in whole or in part, barred by the Limitation of Actions Act, or the contract itself?

a) Discoverability

[29] Both parties have referred to the *Limitation of Actions Act*, 2014, c. 35, s.8(1)a ("*LAA*"), specifically for the proposition that the subject matter of these amendments/proposed Counterclaim, is one to which a two-year limitation period has been prescribed. Both agree that, if the *Act* applies, then the period begins to run two years from the day on which the claim is discovered, or was discoverable.

[30] Indeed, s. 8 reads as follows:

> 8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed
>
> to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to
>
> warrant a proceeding.
>
> (3) For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is
>
> (a) in the case of a continuous act or omission, the day on which the act or omission ceases; and
>
> (b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.

[31] Ms. Thorburne argues that for the purposes of s. 8(2), the period expired on April 13, 2020. She points to the fact that it was upon April 13, 2018 that she filed her affidavit disclosing documents. This disclosure included information with respect to her 2016 Income Tax Return, specifically, that she had earned $10,091.00 in gross commission income that year. If the Defendant wished to amend its Defence or to pursue repayment with respect to these monies by way of

a Counterclaim in this proceeding (the argument continues) then it ought to have done so within the prescribed limitation period.

[32] Alternatively, and at the very latest, Ms. Thorburne argues that July 25, 2018 ought to be the date utilized for the purposes of the beginning of the limitation period, because that is the day upon which she attended discovery and brought additional materials with her in relation to her employment with Monat. Alternatively, and in such a case, the Plaintiff argues that the relevant limitation period is one year, arguing that this follows from the terms of the contract between Ms. Thorburne and Sun Life itself.

b) April 13, 2018

[33] Dealing first, then, with the argument that April 13, 2018, is the applicable discovery date, it is helpful to bear in mind some of the pertinent principles. In *Sweeney - Cunningham v. IBG Canada Limited*, 2013 NSSC 415, Bourgeois J., as she was then, explained:

> 45. At this juncture, a closer look at the "discoverability rule" may be of assistance. Our Court of Appeal has had occasion to consider the nature of the rule in the context of an appeal of a summary judgment motion, in *Nova Scotia Home for Coloured Children v. Milbury*, 2007 NSCA 52. In my view, the principles are equally applicable to the motion before me. Writing for the Court, Roscoe, J.A. generally describes the rule as follows:
>
> > [22] In *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, LeDain, J., for the Court, described the discoverability rule as follows (at pp. 151- 152):
> >
> > ... 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. ...
>
> 46 The Court writes further at paragraph 26:
>
> > [26] The comments on discoverability in the context of a summary judgment application in *Jack v. Canada*, [2004] O.J. No. 3294 (S.C.J.) are instructive:
> >
> > 81 Counsel have referred to legal authorities regarding the discoverability rule. Discoverability is a general rule applied to

avoid the injustice of precluding an action before the person is able to raise it or to sue. *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.) at paras. 36 and 44.

82 A cause of action arises for the purposes of a limitation period when the material facts on which the action is based have been discovered or ought reasonably to have been discovered, by the exercise of reasonable diligence. *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147 at p. 224; *Peixeiro v. Haberman* (1995), 25 O.R. (3d) 1 at p. 4 (Ont. C.A.).

83 The rule of reasonable discoverability is to ensure that the plaintiffs have sufficient awareness of the facts to be able to bring an action. The suggestion that a plaintiff requires a "thorough understanding" of such facts even after the action is brought, sets the bar too high. Similarly, to say that a plaintiff has to know the precise cause of her injuries before the limitation period started to run would also place the bar too high. *K.L.B. v. British Columbia* [2003] 2 S.C.R. 403 (S.C.C.) at para. 55-57; *McSween v. Louis* (2000), 187 D.L.R. (4th) 446 at p. 459 (Ont. C.A).

84 The exact extent of one's loss need not be known before a cause of action can be said to have accrued. Once a plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent nor the type of damage need be known. *Peixeiro v. Haberman*, supra, at p. 557.

...

87 The facts upon which any plaintiff relies to fall within the discoverability rule must have an objective basis. Objective facts supporting negligence that were discovered at a later point in time beyond a limitation period are an absolute pre-requisite to the extension of the limitation period. The extension of a limitation period is not driven by "wishes", "maybes", or "emotions" generated by a benevolent or well-intentioned source. *Lalani v. Woolford*, [1999] O.J. No. 3440 (Ont. Div. Ct.) at paras. 12, 16, 19; *Morellato v. Wood* (1999), 175 D.L.R. (4th) 753 (Ont. S.C.J.); affirmed at (1999) 187 D.L.R. (4th) 760 (Ont. C.A.).

[Emphasis Added]

[34] The law as to what constitutes “discovery” or discoverability has not changed even though changes to the *LAA* have ensued subsequent to the authorities cited in *Sweeney- Cunningham*.

[35] To come straight to the point: Ms. Thorburne's argument that April 13, 2018, is the appropriate discovery date has no merit. True, it was "possible" for the Defendant to have discovered that some commission income had been earned by the Plaintiff in 2016. However, nowhere is it suggested by anyone that the existence of this material was pointed out or otherwise brought to the attention of Sun Life before April 13, 2018. It has been further acknowledged that the page containing the information itself was part of an Affidavit Disclosing Documents, one which was approximately 800 pages in length.

[36] This “disclosure” came on the heels of the Plaintiff's pleadings, which were filed on September 12, 2017, which alleged, in part, that she was totally disabled from engaging in her employment obligations as a customer service technician with Bell Alliant. It was also alleged that she was totally disabled from "any occupation", and that Sun Life was, therefore, in breach of its contractual obligations to her. Sun Life's Notice of Defence had just been filed on March 27, 2018, approximately two weeks before the Plaintiff’s documents were provided.

[37] With respect, and to return to the seminal statement in *Central Trust*, the test is not whether the possibility of discovery existed, but whether the Defendant ought to have discovered the facts in issue ".. by the exercise of reasonable diligence...". In these circumstances, I am not prepared to conclude that Sun Life ought to have discovered the facts upon which the proposed amendments to its Defence and/or the addition of a Counterclaim are based, by April 13, 2018. They were (in effect) “buried” in the voluminous disclosure made that day.

[38] Even if I were wrong on this issue I would have concluded, alternatively, that section 22 of the *LAA* is applicable:

> 22. Notwithstanding the expiry of the relevant limitation period established by this *Act*, a claim may be added, through a new or amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim (a) is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;
>
> (b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within the limitation period

> applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits; or
>
> (c) adds or substitutes a claimant or changes the capacity in which a claimant sues, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and the addition of the claim is necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings. 2014, c. 35, s. 22.
>
> [Emphasis Added]

c*)* *July 25, 2018*

[39] I now consider the Plaintiff's alternative argument, that the "discovery date" ought to be July 25, 2018 (the date upon which she attended discovery examination and brought additional materials with her). Since this motion is being heard less than two years after this date, such a contention only avails the Plaintiff if I consider that her argument with respect to a shorter limitation period, one contained in the insurance contract ("the policy") itself, has some validity. It is dispositive to simply deal with the latter.

[40] Counsel for Ms. Thorburne argues in his brief:

> 56 Given this broad interpretation, the contract terms relating to filing of the legal actions – by individual claimants but the same should apply to the Defendant in this case according to the contra proferentem rule – as set out in the Defendant's Policy read as follows:
>
> Legal Actions
>
> Except where or when applicable legislation permits the use of a different limitation period, every action or proceeding against an insurer for the recovery of insurance money payable under this contract <u>is absolutely barred unless commenced within the time set out in the *Insurance Act*</u> or the time set out in such other legislation as may apply to a claim, action or proceeding for insurance money.
>
> Where or when applicable legislation permits the use of a different limitation period, no legal action or proceeding may be brought against Sun Life:
>
> - regarding any claims for which no payment has been made by Sun Life, <u>more than one year after</u> the end of the time period in which the initial submission of proof of claim is required by the terms of the contract, or

> - regarding claims for disability benefits that have been paid by Sun Life for some period of time, more than one year after the last date for which disability benefits have been pain (sic), or
> - regarding all other claims for which some payment has been made by Sun Life, more than one year after the last payment made by Sun Life with respect to the claim, or
> - regarding claims for Coverage during total disability which are initially approved, more than one year after the date the employee ceases to be covered or the employee's premiums cease to be waived.
>
> [Emphasis Added]

[41] I consider section 21 of the *LAA* in this context, which states:

> 21 (1) A limitation period established by this Act may be extended, but not shortened, by agreement.
>
> (2) Subsection (1) does not affect an agreement made before the coming into force of this *Act*.

[42] The Plaintiff began her employment with Bell Aliant on June 1, 2013, and at that time became subject to the terms of its group LTD policy (*affidavit of Farhan Raouf, July 17, 2020, para. 4*). This was obviously "before the coming into force of [the *LAA*]".

[43] As a consequence, if the policy (actually or by necessary implication) prescribes a shorter limitation period than the *LAA*, this argument could be considered (see for example, *Cameron v. Nova Scotia Assn. of Health Organizations Long Term Disability Plan*, 2018 NSSC 90, per Rosinski, J. aff'd 2019 NSCA 30).

[44] However, no authority has been provided to this Court supporting the reciprocity of limitation periods contained in an insurance policy. The policy presumably came about as a result of union bargaining on behalf of Bell Alliant employees. It has not been argued that any inequality of bargaining power existed, nor have any facts been alleged upon which to base such a contention. The contract provides a one year limitation with respect to certain claims that may be brought by an insured against Sun Life. There is no lack of clarity or ambiguity. The reciprocal does not apply with respect to claims brought by Sun Life against an insured.

[45] As a consequence, nothing in the amendments sought by the Defendant runs afoul of any limitation periods, whether specified in the *LLA* or elsewhere. Put differently, Sun Life is neither barred statutorily or contractually from seeking the relief that it does.

ii. Are some of the provisions of the disability insurance policy issued by Sun Life to Ms. Thorburne absurd, overly broad or ambiguous enough such that any amendments to the Statement of Defence or Counterclaim sought should not be allowed?

[46] Ms. Thorburne argues that the policy is subject to the usual interpretative rules, which pertain uniformly to all contracts of insurance. Her counsel cites *Ruffolo v. Sun Life Assurance Co. of Canada*, [2007] 0.J. No 4541 (Ont.S.C.), per Perell, J. as follows:

> 82. It is accepted that some special rules apply to the interpretation of insurance contracts. However, it is also accepted that the normal rules of contract interpretation apply to insurance contracts and that the normal rules are the starting place for interpreting insurance contracts: *Consolidated-Bathurst Export v. Mutual Boilers Ins*. [1980] 1 S.C.R. 888; *Reid Crowther & Partners v. Simcoe & Erie General Insurance* (1993), 99 D.L.R. (4th) 741 (S.C.C.); *Kingsway General Insurance Co. v. Loughheed Enterprises Ltd*. (2004), 32 B.C.L.R. (4th) 56 at p. 63 (C.A.).
>
> …
>
> 86. Where a contract is unambiguous, a court should give effect to the clear language, reading the contract as a whole: *Brissette Estate v. Westbury Life Insurance Co*., [1992] 3 S.C.R. 87; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551; However, if there are alternative interpretations, the court should reject an interpretation or a literal meaning that would make the provision or the agreement ineffective, superfluous, absurd, unjust, commercially unreasonable, or destructive of the commercial objective of the agreement: *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co*., *supra*; *Scanlon v. Castlepoint Dev. Corp*. (1993), 11 O.R. (3d) 744 (C.A.); *Aita v. Siverstone Towers Ltd*. (1978), 19 O.R. (2d) 681 (C.A.).

[47] Counsel for the Plaintiff then proceeds (in his brief) to discuss the role of his client in Monat, when it started, and how the business operates. He asserts that the Plaintiff never had a copy of the Defendant's policy which asked her to report the commission income, and that in any event "... this was an honest mistake and mere imperfect compliance with the term of the Defendant's policy which does not go to

the core of the contract to render her ineligible for the LTD benefits." (*brief, pp. 14-15*)

[48] He attempts to tie this to the terms of the policy, and seems to argue that the terms of the policy are ambiguous, and at the very least create an absurdity (within the context of his client's circumstances), which should preclude the relief to which the amendments sought by Sun Life pertain.

[49] With respect, the above is argument. It is to be made at trial after all of the evidence has been heard. It is not applicable to a motion to amend pleadings. Even if this were not the case, a great many of the "facts" asserted by counsel in the paragraphs referenced above are not asserted by his client in an affidavit. Counsel is, in effect, giving evidence.

[50] There is no merit to the second issue raised by the Plaintiff.

iii) Is Sun Life's request being made in good faith?

[51] In *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co*., 2001 NSSC 178, Wright, J. observed that for a pleadings amendment request to be in bad faith requires that it be "... motivated by an improper purpose such as delay or obstruction of the proceeding or to subvert the ends of justice."

[52] There is plenty of authority to the effect that a party making an allegation of bad faith must adduce strong and compelling evidence in support of it. For example, as noted in *M5 Marketing*:

> 35. ... The burden of establishing bad faith is on the party raising it. It is a serious allegation and there would have to be strong and compelling evidence in support of it. I'm not satisfied that sufficient evidence is been offered to raise anything more than a mere suspicion. Certainly, there is not enough to support a finding of bad faith.

[53] In this case, to suggest that Ms. Thorburne has raised even a "mere suspicion" of bad faith would be a considerable overstatement. When requested to do so by the Defendant she affirmed that she was receiving employment income while she was also in receipt of LTD benefits from the Defendant. Obviously, this is relevant both to whether she has been disabled from her "own occupation" and whether she is "totally disabled" from "any occupation" in the manner in which these phrases are used in the (LTD) policy.

[54] The Plaintiff asks: why did the Defendant wait so long to bring this motion, with the trial dates "right around the corner", so to speak? The answer is readily apparent.

[55] To begin with, July 25, 2018, the date of the Plaintiff's discovery examination, was when the Defendant found out about Ms. Thorburne's employment with Monat. As has been made clear earlier, it would be unreasonable to impute knowledge of this fact to the Defendant any earlier than that.

[56] It is also fair to observe that the full particulars of what was involved with that employment were not disclosed on that date. Responses to the undertakings provided by the Plaintiff at discovery in that respect were not fulfilled until November 18, 2019, and consent to the proposed amendments to the pleadings being sought was requested of the Plaintiff on January 2, 2020, and again on February 13, 2020. A negative response was received from the Plaintiff shortly before the courts were required to adopt the essential services model earlier discussed.

[57] Moreover, it is alleged by the Defendant that subsequent investigations have revealed an even larger body of work duties with Monat than those that the Plaintiff has disclosed.

[58] Notwithstanding the piecemeal and staggered disclosures received by Sun Life, it still participated in a settlement conference and mediation, both of which were unsuccessful.

[59] Neither "bad faith" or a lack of good will on the part of Sun Life has been demonstrated by the Plaintiff.

iv) Will the Plaintiff sustain serious prejudice (for which compensation cannot be made in costs) in the event that an amendment to the Statement of Defence and/or the filing of the Counterclaim is allowed at this juncture?

[60] What must be demonstrated in order to establish this type of prejudice has been stated in a variety of ways, but always to the same effect. For example, in *Morris v. Stuckless*, 1995 143 NSR (2d) 212, it was observed:

> 59. ... There is nothing in the material before me that indicates the Plaintiffs would have conducted the proceeding in any manner different than was done to

> date, nor is there any indication that it is necessary for either party to adduce any further evidence.

[61] In *Thornton v. RBC General Insurance Co.*, 2014 NSSC 215, Wood, J. (as he was then) pointed out:

> 33. ... [this] type of prejudice is typically evidentiary in nature, [and it] requires a consideration of whether documents and witnesses have been lost due to the passage of time.

[62] Plaintiff's counsel has been aware of the Defendant's intention to amend its pleadings and add a Counterclaim for the reasons advanced in this motion since at least January 2, 2020, when it first made the request for Ms. Thorburne's consent to same. Ms. Thorburne herself has admitted (as of June 22, 2020), the evidentiary bases which underpin the requested amendments and the Counterclaim.

[63] In a nutshell, the amendments to the Defence (and the addition of the Counterclaim) relate to facts within the knowledge of the Plaintiff, and their essentials have been admitted. The Defendant requires no additional discovery examination of her. Sun Life has undertaken to forthwith cooperate with any such examinations that Ms. Thorburne may require of Sun Life personnel. Even if this occasions the calling of additional evidence on Ms. Thorburne's part (at trial) or she is required to undertake pre-trial discovery of Sun Life personnel, this does not rise to the level of "serious prejudice" in these circumstances. It is, in any event, wholly compensable by a costs award, if need be.

[64] Finally, and notwithstanding the proximity of the trial dates, it would be unreasonable to require Sun Life to re-litigate these matters given their close interconnectedness.

[65] The Plaintiff's final basis of argument is without merit either.

Conclusion

[66] Most often, a request for a pleadings amendments and the addition of a Counterclaim, brought less than two months before the commencement of trial, will be ill-fated. However, under these (relatively unusual) circumstances, Sun Life's motion is granted.

[67] At the conclusion of the hearing, I directed that the pleadings be amended in accordance with the draft forwarded by the Defendant, and that counsel were at

liberty to contact me to forthwith arrange a conference on an expedited basis if any delays were encountered in arranging the necessary discovery of Sun Life personnel.

[68] Costs should follow the event. However, shortly after I rendered my "bottom line" decision, with (these) reasons to follow, I was advised by counsel that a comprehensive settlement of the entire matter had been achieved. Given this fact, I decline to make a costs award.

Gabriel, J.