CITATION: Saini v. Sun Life, 2012 ONSC4671

COURT FILE NO.: 09-CV-385413
MOTION HEARD: June 19, 2012

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **09-CV-385413**

Saini v. Sun Life

BEFORE: Master Joan Haberman

COUNSEL: Van Allen, J. for the plaintiff

McDuff, D. for Sun Life

REASONS

Master Haberman:

[1] This matter came before me on May 1, 2012 at a Status Hearing court, at which time I put it over to allow Sun Life to respond to a newly filed affidavit and to conduct cross-examinations of the deponent. The matter was then heard on June 19, 2012.

[2] The current Status Hearing regime is a relatively new one, established around the time that automatic assignment to Case Management in Toronto became history. As Wilson J. stated in *Clements v. Greenlaw*, [2009] OJ No. 2688 while sitting as part of the Divisional Court:

> *Status hearings are a* ***management tool to get cases on track****, and move a case forward in a reasonable fashion if it has been languishing.*

[3] In my view, this characterization is an important point to keep in mind when applying Rule 48.14(13). Though it is up to the plaintiff to show cause why the action should not be dismissed for delay, it is for the presiding master to decide if they are satisfied that the action should proceed notwithstanding apparent delay. Ultimately, it is a matter for the court's discretion, subject to application, in a contextual manner, of a two-part test.

[4] Having reviewed and considered the evidence, the legal test and all relevant factors, and after hearing submissions of counsel, I conclude that this action should be permitted to proceed.

The factual context – what this action is about and what it is not about

[5] On August 20, 2009, Saini issued a claim seeking a declaration of entitlement to benefits pursuant to her life insurance policy with Sun Life. The claim was based on the following facts:

- Saini was diagnosed with cancer of the thyroid in June 2007;
- As a result, she underwent a total thyroidectomy in September 2007;
- Saini applied to Sun Life for critical illness benefits; and
- her claim was rejected in September 2008, at which time premiums paid were returned.

[6] The statement of claim is a very bare-boned one, running less than 2 pages in length. It says little more than what I note above – Saini had a policy; she became ill; she made a claim; the insurer refused to pay.

[7] There is no suggestion by Saini that she misunderstood questions on the application or that she failed to appreciate the significance of ensuring all of her responses were accurate. She does not claim that a language barrier interfered with her understanding of what was asked of her or that the application was in any way misleading.

[8] As a result, Saini cannot claim *non es factum* or anything akin to that at this time, as facts of that kind must be pleaded in order for a party to rely on them.

[9] In their statement of defence, Sun Life explains why they refused coverage. They say that the policy was issued effective November 27, 2005 and that their agreement to provide coverage for Saini flowed from her written representations made on that date and on December 17, 2005.

[10] While it is not clear from the pleading how representations made after the policy was issued could have a bearing on this claim, Sun Life clarifies some of this in the evidence

they filed in response to this motion. Notwithstanding what they assert in their defence, the evidence states that a policy was not actually issued until February 10, 2006. Apparently, there were discussions about the availability of coverage in view of the fact that one of Saini's siblings had died of a heart attack. Ultimately, coverage was provided, but on the basis of a 25% increase in the premium.

[11] For the most part, Sun Life relies on representations/misrepresentations regarding Saini's mental health as the basis for their refusal to pay benefits. They say that she was specifically asked in her application if she had been treated for or prescribed medication for depression and that she failed to indicate that she had been treated and that medication had been prescribed. Sun Life states, however, that it was not until they were assessing this claim that they learned that the Saini had, in fact, been diagnosed with depression "commencing in or about 2005" for which she had been treated with prescription medication. This was the basis for their denial.

[12] Saini has filed no reply pleading nor sought to amend her claim. As a result, at the present time, this remains a one-issue case: assuming that Sun Life can establish that Saini had, in fact, been diagnosed with depression and that she had been treated for it before she applied for this policy as they allege, can they rely on her failure to disclose this information about her mental health as a basis to deny critical illness benefits following a diagnosis of thyroid cancer?

[13] Sun Life takes the position that the case **may become** about the conditions under which the application was made. Their counsel expressed concern that, notwithstanding her current pleading, Saini may, at some future time, claim she didn't know or understand the significance of responding accurately. He urged the court to consider the possibility that the case could undergo a metamorphosis if the plaintiff seeks to amend her claim and she is successful. If that occurs, the case **could** end up turning on events that took place in 2005, at the time the alleged misrepresentations were made. On that basis, Sun Life counsel urged me to consider possible prejudice to the insurer if the action were to be reinstated at this time.

[14] I am required to deal with the case before me as it stands when it comes before me. It is not appropriate for the court to dismiss an action on the basis of an amendment that a

party may or may not seek to make down the road, by way of motion that may or may not succeed. That, in my view, would be a wholly improper consideration. The fact that Saini's counsel refused to respond to questions about his client's understanding when she signed the policy put to him during his cross-examination does not change this. The position he took was a correct one –as matters stand, those questions were not relevant to any of the matters currently in issue.

[15] If and when Saini seeks to amend her claim to move in this direction that will be the time for the court to consider whether what she proposes amounts to prejudice that cannot be compensated for by way of costs and that submission could affect the possible success of a motion to amend. Possible prejudice that is contingent on a successful future motion that may never be brought should not, however, be a factor in the mix on this motion,

[16] Accordingly, this submission has no place here as it is founded on assertions the plaintiff has not made and may never make. This case is not about *non es factum* so submissions based on that doctrine are not helpful.

Chronology of events: how did we get here

Pre-litigation

[17] As noted above, Saini's claim was denied in September 2008. She retained counsel shortly thereafter and he wrote to Sun Life on November 3, 2008, seeking a copy of their complete file. The file was not received until mid-January 2009. Sun Life does not explain in their evidence why it took them over 2 months to get the file together and out to counsel.

[18] On the undisputed evidence, plaintiff's counsel then made efforts to resolve the matter without having to resort to litigation between February and June 2009, culminating in Mr. Holland's letter of June 9, 2009 to Sun Life, inviting Sun Life to discuss settlement with him.

[19] Sun Life did not respond for a full month. On July 20, 2009, they wrote to say that they stood by their denial. That delay, too, is not explained in Sun Life's evidence.

[20] Admittedly, these are very short delays – a little over two months to send out documents and a month to respond to an invitation to discuss settlement. I raise them only because of the very exacting standard which Sun Life has applied to Saini and her counsel and because they rely on the expiry of the limitation period as a basis for presumed prejudice.

[21] In the context of the position Sun Life takes on this motion, they should be held to account for any aspect of the delay to which they may have contributed, particularly as it pertains to the expiry of the applicable limitation period. On the basis of the foregoing, it appears that Sun Life is in part responsible for this aspect of the delay in getting this action off the ground.

Issuance of the claim in August 2009 – the fall 2010

[22] The statement of claim was issued soon after this exchange, in August 2009 and served shortly thereafter. Sun Life delivered a notice of intend to defend in early October 2009, served their statement of defence in November and filed it in December 2009.

[23] It appeared to Sun Life that nothing further was happening with the file at Saini's end. Mr. Holland, however, explains this apparent gap in part in his evidence. Sun Life served its affidavit of documents and copies of their schedule "A" documents on June 21, 2010. What was received at that time was more extensive than what Sun Life had initially produced, and also included underwriting documents.

[24] The plaintiff therefore had more material to review and to assess and had to consider whether the action should still go forward in view of the new materials. I note that Sun Life fails to explain why they didn't provide a complete copy of the entire file when first asked in November 2008. Had they done so, a lot of time could have been saved at this juncture.

[25] Upon receipt of these new materials, Saini's counsel turned the documents over to his law student who possessed a medical background, for review and a summary. The review was completed in mid-July and, thereafter, counsel had discussions with others, concluding in the fall 2010, on the basis of all he had reviewed and what he had discussed, that the action should proceed.

[26] Sun Life made much of this "investigation" time frame when their counsel cross-examined Mr. Holland, Saini's counsel, suggesting that no decision had been made to actually proceed with the action until the fall of 2010.

[27] That is not how I read Mr. Holland's evidence. It seems to me that the decision to proceed was made when the claim was issued, based on the documents that had been provided by Sun Life earlier. When Sun Life produced further documents after the parties exchanged pleadings, a further review and analysis was required to ensure that the new materials did not negatively impact on views already formed about the case.

[28] Mr. Holland ultimately stated that he undertook an investigation on his own and formed the view that the claim had a reasonable chance of success based on its facts and the law, so that it should therefore proceed. He stated further that he reached this conclusion sometime in the fall of 2010.

<u>The fall of 2010 – issuance of the Status Notice in the fall of 2011</u>

[29] Mr. Holland explains the delay from the fall of 2010 until January 20, 2011 is as follows:

> *In the normal course, I would then have given instructions to my assistant, Polly Chow, to schedule examinations and prepare an Affidavit of Documents. Due to inadvertence, I failed to do so until January 20, 2011.*

[30] Mr. Holland therefore attributes this delay to his own inadvertence. No detail as to how or why this matter appears to have fallen through the cracks is provided, however.

[31] Ms. Pourjhodayar's evidence is slightly at odds with what Mr. Holland says in terms of the date. She says these instructions were given to Polly Chow on January 11, 2011, not the 20th as he states, and she attaches Mr. Holland's memo to Polly on the subject as an exhibit to her affidavit. The memo is dated January 11, 2011. In my view, nothing turns on whether Mr. Holland passed along these instructions to Polly Chow on January 11 or on the 20th, but this discrepancy does raise the issue of a somewhat sloppy preparation of motion materials.

[32] That leaves one question: what happened between January 2011 and receipt of the status notice in early October 2011? Ms. Pourkhodayar, a lawyer at the firm at which Mr.

Holland practices, states that failure to contact defence counsel to schedule discoveries until October 2011 was also the result of inadvertence. Poll Chow says nothing on the subject.

October 2011 forward

[33] Ms. Pourkhodayar states that in October 2011, Ms. Chow tried to schedule discoveries. From Ms. Chow's notes, it appears she may have initially contacted James McGowan at Sun Life and she recalls thereafter speaking with an assistant named Diana. A number of potential dates for this event were identified and discussed and, according to Ms. Pourkhodayar, it was ultimately agreed that the examinations would proceed on March 23, 2012.

[34] Ms. Pourkhodayar provides this evidence on the basis of what she says she was told by Ms. Chow and she notes that she believes what she was told. Ms. Chow, however, does not confirm any of this in an affidavit she delivered later on.

[35] Later in her affidavit, Ms. Pourkhodayar again states that any delay in moving this matter forward was due to solicitor and administrative inadvertence, noting that the plaintiff had always intended to pursue the claim. There is no direct evidence from the plaintiff, herself, regarding her intentions. In that she attended both the status hearing and the hearing of this motion it appears that she is intent on having the matter proceed, or at least has been since the time of these events.

[36] As indicated, Ms. Chow also swore an affidavit, and though she does not expressly adopt what Ms. Pourkhodayar states, she confirms that the handwritten notes on Mr. Holland's memo to her regarding her conversations with Sun Life are, indeed, her own. She adds that the only reason she would have had to contact Mr. McDuff's office and speak with his assistant, Diane, would have been to schedule these examinations. Again, this is not the clearest way of putting this evidence forward.

[37] Neither of these deponents was cross-examined. Instead, both Mr. McGowen and Diane Wilmot swore their own affidavits. Ms. Wilmot is legal assistant to Mr. McDuff, Sun Life counsel on this file. She unequivocally denies that she agreed to schedule

discoveries, noting that in light of the status notice, Mr. McDuff had not approved that they be schedule. She refers to a letter he wrote in late November that speaks to that. That letter, however, post-dates when Ms. Chow was supposed to have contacted her. It therefore cannot confirm that Ms. Wilmot was aware of Mr. McDuff's position at the time she is alleged to have agreed to discovery dates if her comments are based on what he told her regarding this action.

[38] Ms. Wilmot does not state that it is Mr. McDuff's standard practice to refuse to schedule discoveries once a status notice has been received, however, that must be what she is saying here, as her evidence makes no sense in any other context. I will return to this later.

[39] Thereafter, Ms. Wilmot's evidence becomes rather vague and far less certain. Rather than denying that she spoke with Ms., Chow, she states that she has no recollection of having done so, adding that if she had, she would have made a note of it, yet she has no such note in her stenographer's notebook.

[40] Ms. Wilmot also says she was surprised to receive a letter confirming a discovery date because she had not agreed to one and there was no notation of the date purportedly agreed to in any of the places she would have put it.

[41] Mr. McGowen agrees that he did receive a telephone call from Saini's lawyers on October 13, 2011, but he made no note and has no recollection of what the call was about. If it was about scheduling discoveries, he says he would have referred the call to Diane Wilmot. It is curious that he recalls that he received the call though he made no note of it, and it is surprising that no note was made in that it made enough of an impression on him for him to now recall it. On the whole, his evidence is not terribly helpful.

[42] At the end of the day I am left, on the one hand, with Mr. Holland's memo to Ms. Chow on which she has written a bunch of dates, circled one, and then apparently advised all concerned that this was the date that had been agreed to for discoveries. It seems to me that Ms. Chow appears to have believed there had been agreement to discovery dates.

[43] On the other hand, I have Ms. Wilmot saying she did not agree to any dates for discoveries in view of not having authority due so upon receipt a status notice. She does not deny speaking with Ms. Chow but rather states that she has no recollection of having done so. Mr.McGowen does recall that they spoke but he cannot recall what they spoke about and Ms. Wilmot has no record that any date had been agreed to.

[44] None of these witnesses were cross-examined so I am left to try to reconcile their evidence. Assuming they are all being truthful, it is conceivable that Mr. McGowen advised Ms. Chow to contact Ms. Wilmot if she wished to arrange discovery dates after she contacted him and that Ms. Chow then did so. The two discussed dates and one date was identified by both as a potentially good one. Ms. Chow may have misunderstood or Ms. Wilmot may not have made it clear that she would have to check with Mr. McDuff before she could finalize the arrangement.

[45] Short of assuming one set of assistants or the other is being less than honest to protect the position of their employer, the variations in stories can easily be reconciled on the basis of miscommunication. That is the approach I believe is most appropriate here in view of how all witnesses appear to have conducted themselves. In that context, Saini and her counsel would have believed that steps had been taken to move the action forward, albeit after receipt of a status notice.

[46] In the interim, Saini served her affidavit of documents well after receipt of the status notice, on April 12, 2012.

The Law

[47] The highest and most recent authority on point is the Court of Appeal's decision in *Bolohan v. Hull* 2012 ONCA 121, where the master's decision to allow an action to proceed was reinstated.

[48] The status hearing there arose in the context of a wrongful dismissal case, and involved one lawyer suing another for a termination that occurred in 2006. The action in that case was initiated by notice of action, issued in September 2008 and the status notice was issued in November 2010.

[49] The Court of Appeal carefully reviewed the basis for the master's decision as well as that of the judge who overturned it, articulating some general principles, as follows:

> *At another point in her endorsement, however, the Master stated the proper test: the plaintiff bears the burden of demonstrating that there is an* ***acceptable explanation*** *for litigation delay and that, if the action is allowed to proceed, the defendant* ***will suffer no non-compensable prejudice.***

[50] The court ultimately found that the case represented a "very close call", noting that the plaintiff's failure to move the case forward in a timely manner was troubling.

[51] The court also examined the role of the defendant in the delay and pointed out that in part, the delay was caused by the defendant's insistence on a non-roster mediator. In that regard, the Court of Appeal held that the conduct of a defendant can have a bearing on the reason for the delay and on how the court should exercise its discretion under the Rule. While acknowledging that the defendant had a right to make this request, the court found that it had not been a wise move in the context of that case. They also made note of the defendant's failure to serve an affidavit of documents.

[52] The court found that some steps had, indeed, been taken to move the case forward, but that there had been resistance by the defendant along the way and that this was also a factor to be considered.

[53] The Court of Appeal spoke in terms of an "acceptable explanation." That term cannot be defined by the application of rigid criteria. What is acceptable in one case may not be in another – whether or not something is acceptable cannot be decided in a vacuum. The court must assess the situation in the context of all relevant facts and each case will ultimately turn on its own facts. The Court of Appeal spent time in *Bolohan* examining the particular facts of that case, including the defendant's role in the delay, in order to determine whether the explanation that had been provided was an "acceptable" one. On the basis of the facts in play, the court concluded that it was.

[54] It appears that the Court of Appeal has, once again, developed a legal test that ultimately turns on factual context, rather than the rigid application of test made up a series of factors. This approach provides the surest route to a just result in each case.

[55] I also note that the Court of Appeal looked at prejudice on the basis of certainty that none would result – *the defendant* ***will suffer no non-compensable prejudice*** if the action is allowed to proceed, is the phrase they used. This reinforces my view that the remote possibility of prejudice that might be caused if the plaintiff amends her pleading is not a proper consideration for the court here.

[56] In *Khakshoorian v. Nu Globe Developments*, 20122 ONSC 6159, Reid J. noted observations made by J.W. Quinn J. in *Sepher Industrial Mineral Exports Co. v. Alternative Marketing Bridge Enterprises Inc.* (2007), 86 OR (3d) 550, where he explains that there is a reason why Rule 48.14 is silent as to the criteria the court should consider when deciding if cause has been shown. As Reid J. states:

> *I consider this (the absence of criteria) to be no accident or inadvertent omission on the part of the rules committee. Rather,* ***it is an intentional invitation for judges to make a determination by balancing the competing principles referred to above in the context of the individual circumstances of each case and in the interests of achieving a just result.***

[57] *Koepcke v. Webster* 2012 ONSC 357 also has a bearing on these issues. There, Master Dash speaks of the need to take a contextual approach to motions of this kind, much as the Court of Appeal has instructed the court to do in regards to motions to set aside administrative dismissals on the basis of delay.

[58] While I am not certain that it is correct to say that the plaintiff need not meet both parts of the test in view of what the Court of Appeal has stated in *Bolohan,* (released only a few weeks after *Koepcke*) I agree with Master Dash when he states that this test cannot be applied rigidly and without regard to all relevant circumstances. As he noted, if we use a contextual approach when deciding whether an action that has been dismissed for delay should be permitted to proceed, why would we approach the matter on a different and stricter basis when dealing with an action before it has been dismissed? Surely, the court should not place a higher onus on a plaintiff at this stage of the proceeding. That would not be a principled approach.

[59] Further, despite the two-pronged test, even before *Bolohan,* the court has tended to look at other factors when dealing with this issue. Outstanding court orders were referred to

by Wilson J. in *Donskoy v. TTC*, [2008] OJ No. 3634, where she indicated dismissal of an action at a status hearing in the absence of any outstanding order may amount to a reversible error. There, she also took into account the fact that it was the "first time up" for the case as being a relevant factor for consideration.

[60] Though O'Connell J. rejected the notion that all cases should get one "get out of Status Hearing Court without a dismissal" card on their first time up, he remained of the view that this fact was a relevant though not necessarily determinative factor (see *Canadian Champion v. Auto Services Ltd. v. Petro-Canada* 2011 ONSC 6794).

[61] It bears noting that O'Connell J. added that the **court must be cautious before taking away a party's right to proceed.**

[62] Before I leave the law, I note that Sun Life filed a 30-page factum along with 23 cases, contained in three separate briefs, none of which was referred to at the hearing, and many aspects of which were completely tangential to the meat of this motion. I will return to this if and when asked to deal with costs. This mountain of material no doubt increased the time and cost of the plaintiff's preparations for this motion.

Analysis and conclusion

1) Is there an **acceptable explanation** for the delay?

Pre-litigation

[63] Sun Life was critical of Saini for having started the action in August 2009, though they denied the claim in September 2008. A close examination of the facts, however, shows that:

- Saini retained counsel very quickly;
- He wrote, seeking Sun Life's documents in November 2008;
- He did not receive those documents until late January 2009 and what he received was not complete;
- Thereafter, he tried to resolve the matter without resort to litigation until being told, in July 2009, that Sun Life was standing by their denial;

- The action was therefore commenced in August 2009.

[64] I have difficulty seeing how this can be viewed as tardiness on the part of Saini or her counsel by any standard.

[65] In its factum, but not in oral submissions, Sun Life tried to make an argument that the limitation period for the action began to run from the time Saini misrepresented the state of her health in her application for coverage. In support of that, Sun Life relied on a case dealing with loss transfer as between insurers (*Markel Insurance Company v. ING Insurance Company of Canada* 2012 ONCA 218). On its facts, it is clearly distinguishable as it dealt with the relationship of insurer to insurer, not insurer to insured.

[66] I assume counsel reached the same conclusion as he did not mention either the case or the proposition during the course of the hearing. But it remained in the factum and brief of authorities so had to be reviewed and considered by Saini. This is a good example of Sun Life's attempt to muddy the waters by importing issues that had no bearing on the merits of this motion, much as they did when dealing with potential prejudice.

[67] It is therefore appears that none of the delay following the denial of benefits can be said to be attributable to Siani. In fact, Saini moved with some dispatch to retain counsel and counsel moved quickly to gather the documents he needed to assess the case and to try to resolve it. He then issued process very soon after it appeared that a non-litigation resolution was not feasible.

[68] If anything, Sun Life took its time when it came to supplying the documents sought and in advising that they were not prepared to discuss settlement. This is not explained. As they denied the claim, one would expect that their documents had already been gathered together, and in a state where they could have easily been copied and bundled off to counsel. Yet, it took them two months to convey these materials, which were not even complete. The remainder did not come later, when the affidavit of documents was served.

[69] I note that Sun Life's failure to provide their complete file when asked to do so in November 2008 was never explained. Had Saini's counsel had the entire package in

hand from the outset, the delay caused by their production of further documents in late June 2012 may well have been avoided.

August 2009 – fall 2010

[70] Mr. Holland's evidence could certainly have been more detailed with respect to this time frame but I am not required to assess his explanation against a standard of perfection. I must only consider whether the explanation he provides for the delay for this period is acceptable and I must do so in the context of all of the relevant facts. This includes the nature of this action.

[71] Despite the brevity of the statement of claim, this is not a straightforward case. It raises questions or whether the plaintiff's alleged failure to disclose the status of her mental health can be viewed as relevant to the ultimate claim and whether relevance even matters. Can an insurer refuse to pay benefits on the basis of inaccuracies in an application form that do not relate to the ultimate basis for a claim for benefits? In other words, is the fact that Saini may have misrepresented the state of her mental health and medication regime a basis for Sun Life to claim that the policy is void in order to avoid paying benefits flowing relating to cancer?

[72] In my view, it was appropriate for Mr. Holland to issue the claim to protect the limitation period and to serve it, in order to get Sun Life thinking about the matter, in hopes of getting it resolved quickly. When that was not possible, it made good sense for counsel to carefully review the documents as well as the applicable law, to see if Saini had a hope of success if she went forward with her case.

[73] It is important to note that, though Mr. Holland had asked for all relevant documents before issuing the claim, what he received was then supplemented by Sun Life's disclosure in June 2010, almost a year and a half after the first package of Sun Life documents was provided. This delay, not explained by Sun Life, appears to have necessitated a further review.

[74] As Mr. Holland explained, he had a summary and review of the medical information in hand by July. He then considered the case, and after discussions with others, he formed the view in the fall of 2010 that it was worthwhile to forge ahead.

[75] Sun Life was critical of what was and was not undertaken by the plaintiff during this time frame. In their factum, they refer to "the plaintiff's deliberate decision to refrain from proceeding with the action" and they submit that Mr. Holland's evidence suggests that the plaintiff has not always demonstrated an intention to move forward as this review and assessment only took place after the claim was issued. Sun Life also takes issue with the time it took from issuance of the claim to the ultimate decision to forge ahead.

[76] Sun Life's position regarding this time frame is, in my view, a complete mischaracterization of the evidence. It also totally ignores their role in having failed to provide their complete file when asked to do so in November 2008.

[77] The plaintiff's intention to proceed is evidenced by her having issued process, and her service of the statement of claim. There is no indication that Sun Life was asked to hold their file in abeyance while the plaintiff considered her position. Instead, they were approached with a view to settlement discussions. None of this equates with "a deliberate decision to refrain from proceeding."

[78] The fact that there was a delay after Sun Life had served their affidavit of documents and copies of their scheduled "A" documents appears to have been the result of the insurer having omitted documents from their original package provided before the claim was issued. These new documents appear to have led to reconsideration, again an appropriate step for counsel to take before incurring costs for on his client's behalf.

[79] Though there is no specific detailed evidence as to who Mr. Holland spoke with or what he discussed, much of which would have been privileged in any event, the court can certainly take judicial notice of the fact that he would have had to carefully assess the factual matrix of the case and canvas the law before recommending to Saini that she take the financial risk of proceeding with the action in view of the newly received documents. That was the responsible thing to do and it is the sort of guidance that clients expect and are entitled to from their counsel.

[80] In the context of the nature of this claim – denial of insurance benefits – it was critical for the plaintiff to have access to all of the documents that were reviewed and relied on by the insurer when arriving at its position to deny coverage before investing further in the action. Saini believed she did have it all in hand at the outset, hence the claim was

issued. When that appeared not to have been the case, it is not surprising that time was needed to reassess and reconsider her position.

[81] In motions to set aside administrative dismissal orders, the court regularly states that a plaintiff must demonstrate an ongoing intention to proceed with the action. Though it is not at all clear that such a requirement applies in the context of a show cause arising at a Status Hearing, it is worth noting there are cases, such as this one where, in view of the nature of the claim, the need for full disclosure from other parties, and relatively short limitation periods, a claim must be issued before a plaintiff can be certain they should take the matter forward.

[82] This is a common problem and therefore the general practice, for example, in medical malpractice actions, for example, where the full array of documents may not be available until documentary disclosure has taken place, and where experts must then be retained to help the plaintiff make sense of it all. Because of the factual context of those actions, no one expects a plaintiff to form the intent to proceed to the bitter end at all costs at the outset.

[83] A plaintiff in such cases will generally not be able to say that they, at all times, intended to move forward with their action. The viability of some cases takes longer to assess than others, yet all are subject to the same two-year limitation period. It would be unfair to plaintiffs and unrealistic to insist they start their actions within such a short time frame and that they be ready from the start to say that they at all times after issuance intended to proceed.

[84] Doing justice between parties often requires a flexible approach. This highlights the need to view each case in context and rather than applying procedural rules in a rigid manner. If the court intends to do justice between the parties, each of these cases must turn on its own facts.

[85] In this case, I find that Saini appears to have decided to proceed with the case as she issued process and apparently instructed her counsel to serve the claim and to approach Sun Life to discuss possible settlement. Much of the delay that followed was caused by Sun Life's tardy production of new documents, which led to a need for reconsideration and the ultimate conclusion that Saini's action should remain on course.

[86] Even if the claim had been issued simply to protect the limitation period and no decision was made until the fall of 2010 to actually take it forward, I am of the view, based on the nature of the action, that it is not required in this case for Saini to demonstrate that she at all times had an intention to proceed with the action she had already commenced. It was appropriate here for her to have an opportunity to review the insurer's entire file before reaching that conclusion. I therefore have no difficulty with the plaintiff's alleged delay during this period.

Fall 2010- issuance of Status notice, fall 2011

[87] This claim was issued in August 2009, defended shortly thereafter and, according to Rule 48.14, ought to have been set down for trial by the fall of 2011.

[88] Having concluded in the fall of 2010 that it was appropriate to proceed, Mr. Holland then took no steps until January 2011.

[89] Mr. Holland is a personal injury lawyer practicing in Toronto at a firm that does predominantly personal injury and insurance-related work. In Toronto, this type of practice is referred to as a "volume practice". Counsel generally handle several hundred cases at a time, and rely, of necessity, on their clerks and assistants to keep them on track. That system does not always work as well as it ought to. Clearly, it didn't in this case.

[90] Mr. Holland candidly admits that though, in the normal course, having decided to move forward with the action, he would have asked his assistant to set up discoveries and prepare an affidavit of documents, he failed to do that in this case until January 2011. He states this omission on his part was inadvertent. Although relied on far too frequently by counsel as a basis for delay, it is, sadly, a fact of life in a busy law office. The delay here is a short one – all of about three months – and has been explained to my satisfaction.

[91] That leaves the period of January 2011 until the fall of 2011. Again, inadvertence is relied on as the basis for the delay.

[92] I am not impressed with the lack of detail here. In the end, a full year of delay is explained away by the single word "inadvertence", the first three months' worth on the part of Mr. Holland, the latter nine months caused by his assistant. Clearly, the case appears to have fallen through some very large cracks.

[93] There is no obligation on a defendant to remind a plaintiff that he has started an action and must proceed with it. Defendants are not expected to have to push and prod a plaintiff into action. Technically, all they have to do is deliver a statement of defence.

[94] However, where a defendant does take steps, by letter or phone, to remind the plaintiff that the claim has not moved and the plaintiff still does nothing to advance his claim, this is something the court takes into account when considering these motions, and the plaintiff's inaction is viewed in an even more negative light.

[95] Though there is no obligation to pester a plaintiff into action, where a defendant puts a plaintiff in the position of having to show cause, the fact that the defendant has taken no steps to kick start an action, though not determinative, should therefore also be among the factors the court considers in its deliberations.

[96] Though Sun Life served their affidavit of documents very early in the proceeding, they did nothing further. Instead, they sat in the bushes waiting to pounce as and when the court issued a Status Notice on October 6, 2011. Then, it was Sun Life who requested the Status Hearing on November 28, 2011 in which they advised that they would be requiring the plaintiff to show cause.

[97] Sun Life counsel went to some pains to assure the court that there was no need to worry about Mrs. Saini's claim, as she could still pursue her counsel for negligence. I do not view that as an appropriate or helpful submission on the facts of this case. Although inadvertence is certainly not the best explanation for what occurred here, in my view, these events are indicative of a slip rather than solicitor's negligence and Ms. Saini would be hard pressed to convince a court otherwise.

[98] In the end, although the evidence with respect to this time period is far from what the court should be entitled to expect, it is, albeit it barely, adequate.

<u>October 2011 forward</u>

[99] I have already explained how I have reconciled the discrepancy in the evidence filed by the two sides regarding whether or not discovery dates were agreed to. I am of the view that there must have been some miscommunication between the parties, such that dates

were discussed and while one side believed dates had been set, the other did not intend that result.

[100] I am particularly troubled, however, by a statement contained in the evidence of Ms. Wilmot. At paragraph 4 of her affidavit, she states:

> *I have not purported to agree to any schedule for examinations for discovery in this matter.* ***In light of the status notice issued in this matter on or about October 6, 2011 Mr. McDuff had not approved the scheduling of examinations for discovery in this matter.***

[101] I do not understand what Ms. Wilmot means by "not purported to agree." If she did not agree, why doesn't she say so?

[102] Of greater concern is the following: as I read this evidence, Ms. Wilmot can only be saying one thing – in light of the fact that a status notice was issued, she was not permitted to set up discoveries unless and until Mr. McDuff permitted her to do so.

[103] This suggests that either Sun Life or Mr. McDuff have a standing practice to agree to nothing once a Status Notice is received until they decide whether or not to put a plaintiff to the burden of showing cause.

[104] Forcing a plaintiff to show cause should be the exception rather than the rule. Lawyers are all human and work under considerable pressures. From time to time, a case is missed in the "bring forward" system or a file is buried under others. In a perfect world, this would not occur – but we do not live in a perfect world and mishaps of this kind occur from time to time. A slip or mishap is not negligence and a short time gap is not necessarily delay.

[105] These Rules (48.14 and 48.15) were never intended to operate a as hatchet, to weed cases out of the system without reference to their merits because a two-year time limit was missed. Rather, they were implemented as a form of case management, particularly important in Toronto following the demise of Trial Scheduling Court and termination of the automatic referral of all new cases to formal Case Management in this jurisdiction. These Rules have been effective in allowing the court to control its ever-growing inventory by ensuring that cases continue to move forward. Accordingly, these Rules

are simply management tools in the court's arsenal bag to help the court manage its inventory and to ensure that parties do not wait endlessly for resolution of their litigation disputes (see *Clements, supra*).

[106] There are, of course, cases that are obviously on the wrong side of the line – where the delay is extensive; where defence counsel has been badgering the plaintiff to get on with it; where nothing at all has been done, both "from all appearances" and internally; where the defendant will actually suffer prejudice as a result of the delay if the action is reinstated. What I have described is the extreme case – it is not the norm.

[107] For every Status Hearing court, the masters deal, on average with 25 consent timetables submitted in writing before the scheduled date, and a further 20 or more, again, proceeding on consent or without opposition, in court. Few of these cases exhibit a fact pattern that supports an order that would have the effect of curtailing the plaintiff's ability to proceed to adjudication on the merits. As a result, in all but the rare case, the defendant does not put the plaintiff in the position of having to show cause – nor should they.

[108] Toronto is a jurisdiction where most counsel are working hard to meet their overhead and to keep up with their practices. On that basis, one would expect that most counsel, aware of the exigencies of practice generally and particularly here, would approach a status hearing in a reasonable way and only challenge whether an action should proceed in cases where it really should be stopped in its tracks.

[109] It is therefore worrying that an insurer or their in-house counsel would start from the premise that putting the plaintiff – their own insured- to the proof of showing cause must be considered in all cases.

[110] It is also worrying when that party delayed making disclosure essential in allowing the plaintiff to evaluate her chances of success; failed to make full disclosure from the outset; is then critical of the plaintiff for delay in issuing the claim; filed 23 cases to support their position; relied on none of them orally; repeatedly mischaracterizes evidence ("the deliberate decision to refrain from proceeding"); set a standard of perfection for plaintiff's counsel; submitted that the court needn't worry about the plaintiff, herself, as

she could sue her counsel for negligence; and argued points of law that had no bearing on the facts at hand.

[111] According to the evidence filed by the plaintiff, the attempts to arrange discoveries took place in October – yet it was not until the end of November that Sun Life's counsel sought a Status Hearing. Until that time, Saini's counsel believed that discoveries had been scheduled and would be taking place in March 2012.

[112] At its worst, this case as "borderline". As they have in-house counsel, and in view of the nature of the relief sought, Sun Life's costs exposure on a motion of this kind is minimal. There is little down side for them to take a run at a case in Status Hearing court. In effect they have nothing to lose by taking this position when reasonable counsel would not have done so. But if and when they do so, they must be fair. The issues I set out in paragraph 110 above are very troubling as they suggest that Sun Life was less than fair here.

[113] I also note that Sun Life appears as the defendant in several of the cases that counsel have put before the court. The fact that they have had some level of success with this approach before the court in Hamilton appears to have spurred them on to challenge cases at Status Hearings cases that can best be described as "very iffy" winners for them.

[114] I have also pointed out the work that Sun Life put into this motion – and, as a result, what was then required for Saini to respond to it and for the court to have to hear it and deal with it. Mr. McDuff filed a 30 page factum and three volumes of cases, totalling 23 cases, none of which he referred to in argument. The factum is worthy of a case of high importance to be argued before the Supreme Court of Canada, broken down, issue by issue, with headings and a table of contents.

[115] This level of work – overkill in the context of this case and the fact that this was a show cause at a status hearing – suggests that this material has been developed over a period of time and that it may well be intended for future use.

[116] Sun Life has effectively sent an army to impede the path of an action that was only slightly more than two years old when the Status Notice was issued. They clearly do not understand what this rule is for or about – it is nothing more than a management tool. It is not intended to be a short-cut to an order to dismiss for delay. The fact that Sun Life

forced the plaintiff to show cause in this manner – and to have to respond to a 30-page factum and a myriad of red herring issues- has derailed the case by several more months.

[117] I trust that, in future, this insurer will be more selective about which cases it takes on at Status Hearing court.

[118] In the context of all of the above, I am satisfied, though not impressed with the explanation for the delay provided by Saini's counsel and find that it is acceptable.

2) Will the delay create **non-compensable prejudice** for the defendant if the matter is permitted to proceed

[119] There is no direct evidence from Sun Life regarding prejudice. Instead, they rely on a body of law that states they have no onus to demonstrate prejudice, but rather, the onus is on the plaintiff to disprove it.

[120] Without some indication as to the nature of the prejudice a defendant may suffer if the action proceeds, disproving prejudice is no different from having to prove any negative – extremely difficult.

[121] Sun Life turns to the expiry of the limitation period as a basis for presumed prejudice, relying largely on older cases.

[122] For the most part, the case law they refer to arose in a different context, when limitation periods in many cases ran for six years from the time the cause of action arose. In view of changes to that area of the law, the universal limitation period is now only two years, and in many cases, a claim is not issued until the eve of its expiry. In personal injury claims, for example, it often takes two years for the plaintiff's injuries to reach a plateau. it is therefore not uncommon to issue process near the expiry of the limitation period when counsel can get a better idea of what she is dealing with and assess if meeting threshold is feasible.

[123] Further, in the only recent case relied on, *Armstrong v. McCall et al.* [2006] CanLii 17248, the Court of Appeal actually overturned a lower court's decision dismissing a medical malpractice action for delay, under Rule 24.01(1)(c). In that case, the facts giving rise to the action arose in 1997 and the dismissal motion was heard and dealt with

in 2005, so the matter was outstanding for considerably longer than the matter which this court is charged with handling.

[124] The motions judge had determined that there was a presumption of prejudice in that case as a result of what she viewed as "the inordinate delay" which she felt had not been rebutted. She then accepted evidence from defendant physicians as actual evidence of prejudice.

[125] The Court of Appeal agreed that while this may not have been a document case, the defendant doctors had already been examined for discovery in August 1999 so that transcripts of their evidence would have been available to assist them in refreshing their allegedly fading memories. The transcripts would have added to a large body of medical documentation that would also remain available to assist. The Court found that the motions judge had failed to attribute appropriate weight to these factors.

[126] Finally, the Court of Appeal was a of the view that the evidence of actual prejudice was no more than hearsay, concluding that *a finding of actual prejudice based on untested hearsay evidence in* ***not enough to justify the Draconian measure of depriving the appellant of an opportunity to prove his case on the merits.***

[127] I am therefore hard pressed to see how this case, referred to and relied on by Sun Life, can be viewed as assisting their cause here. The excerpt they have selected for their factum in no way gives the true flavour of the case.

[128] Similarly, Sun Life cannot rely on presumed prejudice in the context of the facts of this case. This action will turn, for the most part, on the documents – the case is about the construction of a policy of insurance and the application form for coverage pursuant to it. Thus, the risk of faded memories does not present a real cause for concern here, as the story will be in the documents, rather than based on the recollection of witnesses.

[129] Further, to the extent that the memories of witnesses will be a factor, there should be notes reflecting what was reviewed and why this course of action was considered and then chosen.

[130] As a result, this is not a case where evidence should be required to show that the defendant's ability to put forward its position at trial will be impaired by faded memories.

The court can surely draw that inference based on the nature of the allegations in the claim along with the defence position. I do so here. Thus, any possible presumption of prejudice that Sun Life relies on is rebutted by the very nature of the claim.

[131] As noted earlier, I am not about to find that the defendant **will suffer** no non-compensable prejudice on the basis of Sun Life's assertion that Saini may decide to amend her claim at some future time and that she may succeed in that regard. This is simply speculative and can be dealt with as and when such an attempt is made. The approach proposed also conflicts with the clear wording of the test, as set out by the Court of Appeal in *Bolohan, supra* - ***will suffer no non-compensable prejudice).***

[132] I therefore conclude that, on the facts before me, I am satisfied that Sun Life will suffer no non- compensable prejudice if the action is permitted to proceed.

[133] This relief sought is therefore granted. Mr. Holland shall either submit a consent timetable to my attention before **the end of August 2012 or, if the parties are unable to agree, he shall write directly to me by fax (416-326-3216), copied to Mr. McDuff, seeking a telephone case conference for the purpose of establishing a timetable. In the interim, the registrar shall refrain from dismissing the action before September 14. 2012.**

[134] **Although the usual approach, in case of this kind with this result, is to make no order as to costs, I am prepared to entrain cost submissions, within thirty days, if the parties cannot agree.**

Master Joan M. Haberman

Released: August 15, 2012