COURT OF APPEAL FOR ONTARIO

CITATION: Fehr v. Sun Life Assurance Company of Canada, 2024 ONCA 847
DATE: 20241121
DOCKET: COA-23-CV-0618

van Rensburg, Roberts and Gomery JJ.A.

BETWEEN

Eldon Fehr, Gaetan Laurier, Leslie Michael Lucas, James Patrick O'Hara, Rebecca Jean Clark, and Lloyd Shaun Clark

Plaintiffs (Appellants)

and

Sun Life Assurance Company of Canada

Defendant (Respondent)

Proceeding under the *Class Proceedings Act, 1992*

Michael C. Spencer and Megan B. McPhee, for the appellants

F. Paul Morrison, Glynnis P. Burt and Jacqueline Cole, for the respondent

Heard: February 15, 2024

On appeal from the order of Justice Jasmine T. Akbarali of the Superior Court of Justice, dated April 27, 2023, with reasons reported at 2023 ONSC 2554.

van Rensburg J.A.:

A. OVERVIEW

[1] This is an appeal from an order dismissing the appellants' motion for leave to add a common issue to a certified class proceeding and to amend their

statement of claim to particularize the cause of action underlying the proposed new common issue.

[2] The class proceeding concerns the sale and administration of certain universal life insurance policies known as “Universal Plus”, “Universal Flexiplus” and “Universal OptiMet”, that were sold by Metropolitan Life Insurance Company (“MetLife”) in the 1980s and 1990s. It is a feature of such policies that premiums are paid by the policyholder in variable amounts on a flexible schedule into an accumulation fund from which the insurer deducts monthly charges including cost of insurance (“COI”) and administration fees. Policyholders have the option to accumulate excess cash in the accumulation fund, thereby generating savings on a tax-deferred basis. The policy terms provide for the insurer to adjust the overall monthly COI rates and administrative fees and to vary “from time to time” the interest rates credited to the accumulation funds, subject to prescribed floor rates.

[3] The action was commenced in 2010. The defendant to the action and respondent on appeal is Sun Life Assurance Company of Canada (“Sun Life”), the successor to MetLife in respect of the subject policies. The appellants are the representative plaintiffs in what is now a certified class proceeding.

[4] As originally pleaded the proposed class action included various claims in respect of the sale and administration of the subject policies, including claims for misrepresentation, rescission, breach of the duty of good faith and fair dealing, and

breach of contract. There have been numerous interlocutory proceedings both before and after certification, including two previous appeals to this court in 2013 and 2018.

[5] The class action was certified in 2020, with five common issues, all focused on breach of contract claims. The certified common issues that are relevant to this appeal involve the Flexiplus policies and are for breach of contract in respect of the COI and administrative fees charged against the policyholders' accumulation funds and whether the breaches were concealed.

[6] The appellants' motion to amend was brought in the course of preparing for Sun Life's summary judgment motion seeking determination of the common issues. The appellants sought to amend their pleading and to add a new common issue to address a claim referred to by the parties as the "Investment Spread Claim". This was the allegation that the insurer, in breach of implied terms of the Flexiplus policies and in breach of its duty of good faith and fair dealing, increased the investment spread in 2001 and 2014. The investment spread is the difference between the returns received by the insurer on the investments assigned to the policyholders' investment accounts available for their accumulation funds, and the interest credited by the insurer to those accounts in respect of those investments.

[7] The appellants appeal the refusal of the motion judge to permit the proposed amendments. They assert, among other things, that the motion judge erred in

concluding that the Investment Spread Claim was a new claim not captured by the existing pleadings, that the claim was discoverable because of documents that were disclosed by Sun Life in 2016, and that, because the limitation period for the new claim had expired pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "*Limitations Act*"), the amendment should be refused.

[8] For the reasons that follow, I would dismiss the appeal. As I will explain, I see no reversible error in the motion judge's refusal to permit the amendment of the pleading and common issues on the basis that the Investment Spread Claim was a new claim that was discoverable in 2016, and that the applicable limitation period had expired.

B. FACTS

(1) Background and Procedural History

[9] There are numerous reported decisions in these proceedings, which set out in detail the substance and evolution of the claims that have been advanced, and the procedural history both before and after certification of the action as a class proceeding. I will provide an abbreviated history of the proceedings that highlights what is relevant for the resolution of this appeal.

[10] Initially the action asserted claims in respect of misrepresentation in the marketing and sale of the subject policies as well as breaches of contract and the duty of good faith and fair dealing in their administration.

[11] Justice Perell case managed the action from its inception in 2010 until September 2021. In 2011 he granted a motion by Sun Life, striking out certain paragraphs in the then fresh as amended statement of claim for among other things, failing to disclose a cause of action.[1] This court allowed an appeal restoring certain claims that had been struck, including the breach of contract claim, which at that stage was in respect of the "Maximum Premium" charged solely with respect to the Universal Plus policy.[2]

[12] In May 2013, the proposed representative plaintiffs (the "plaintiffs") delivered a new Fresh as Amended Statement of Claim (the "FASOC"). The FASOC alleged wrongful conduct in respect of the sale and administration of four life insurance policies: (1) Universal Plus, (2) Universal Flexiplus, (3) Universal OptiMet, and (4) Interest Plus.[3] The allegations sounded primarily in misrepresentation, breach of contract, deceit and breach of the duty of good faith and fair dealing. The FASOC added certain claims, including for breach of contract in respect of the COI rates and administrative fees charged against the subject policies' accumulation funds. Sun Life delivered a Fresh as Amended Statement of Defence and the plaintiffs delivered a Reply to this pleading.

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[1] *Kang v. Sun Life Assurance Company of Canada*, 2011 ONSC 6335, 4 C.C.L.I. (5th) 86, rev'd 2013 ONCA 118, 303 O.A.C. 64.
[2] *Kang v. Sun Life Assurance Company of Canada*, 2013 ONCA 118, 303 O.A.C. 64.
[3] No common issues were ultimately certified in respect of the Interest Plus policies. This appeal concerns only common issues concerning the Flexiplus policies.

[13] In July 2013, the plaintiffs brought a motion seeking certification of 15 proposed common issues. In February 2014, Sun Life moved for summary judgment seeking to have each of the plaintiffs' individual claims dismissed as having been advanced beyond the applicable limitation period.[4] Perell J. directed that the two motions be heard together.

[14] In November 2015, Perell J. dismissed the certification motion in its entirety, except in respect of the claims for breach of contract in relation to COI rates and administrative fees.[5] He directed Sun Life to deliver an affidavit explaining how the COI rates and administrative fees were calculated for the policies at issue, and he adjourned the motion for certification in respect of these claims. Perell J. determined that some of the claims were statute-barred, while others were not. With respect to the COI and administrative fee breach of contract claims, although Perell J. agreed with Sun Life that the limitation period began to run in 2000 or 2001 (when the individual plaintiffs had received notice of the increase), and again in 2006 (when a second increase was announced and implemented), he concluded that these claims, if allowed to continue, could be treated as discrete claims with each monthly repetition of the overcharge triggering the running of the limitation

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[4] While some of the claims in respect of the individual plaintiffs were alleged to have been subject to the limitation periods applicable in other provinces, the COI and administrative fee breach of contract claims were subject to Ontario law. Depending on the timing, some of the claims were subject to a two-year limitation period while others were subject to a six-year limitation period.

[5] *Fehr v. Sun Life Assurance Company of Canada, 2015 ONSC 6931*, 56 C.C.L.I. (5th) 15, rev'd in part 2018 ONCA 718, 84 C.C.L.I. (5th) 124, leave to appeal refused, [2018] S.C.C.A. No. 489.

period. As such, the COI rate and administrative fee breaches alleged within two years prior to the commencement of the action in 2010 would not be statute-barred. Although not described as such, Perell J. effectively recognized that these breach of contract claims would be subject to a "rolling" limitation period.

[15] In accordance with Perell J.'s direction that Sun Life provide evidence of how it adjusted COI rates and administrative fees, in early 2016 Sun Life delivered the affidavit of Dean Chambers dated January 25, 2016 (the "First Chambers Affidavit"). At the time Mr. Chambers was Sun Life's Vice President, Individual Insurance, and a qualified actuary. The plaintiffs delivered an affidavit of their own expert consulting actuary, Paul Winokur, dated May 20, 2016 (the "First Winokur Affidavit"). Sun Life delivered a reply affidavit from Mr. Chambers dated July 29, 2016 (the "Chambers Reply Affidavit"), and the plaintiffs delivered a sur-reply affidavit from Mr. Winokur dated October 13, 2016 (the "Winokur Sur-Reply Affidavit"). Mr. Chambers and Mr. Winokur were cross-examined.

[16] The First Chambers Affidavit appended as an exhibit two pages from a 1999 document entitled "Flexiplus Re-pricing Recommendation Report" (the "Repricing Report"). This document contained the recommendations and analysis for repricing the Flexiplus policy by the Retail Insurance Council ("RIC"), a group of Sun Life managers and actuaries. A complete copy of the Repricing Report with appendices was attached as an exhibit to the Chambers Reply Affidavit. As I will explain, the production of the Repricing Report and its treatment in the proceedings

in 2016 are central to the issues in this appeal concerning the discoverability of the Investment Spread Claim.

[17] Following the exchange of affidavits and cross-examinations, the certification and summary judgment motions were resumed on the remaining issues. Ultimately Perell J. denied certification on the remaining proposed common issues, and he dismissed the certification motion in its entirety.[6] Among other things, he concluded that there was "no basis in fact" for certification of the claims respecting the COI and administrative fee overcharges.

[18] The plaintiffs appealed and Sun Life cross-appealed. While this court upheld the denial of certification of the proposed common issues alleging misrepresentation and breaches of the duty of good faith and fair dealing, it allowed the appeal with respect to the common issues alleging breach of contract and fraudulent concealment.[7] Among other things, this court concluded that the plaintiffs had provided "some basis in fact" to establish each of the certification requirements for the COI overcharge claim by asserting that the insurer had (admittedly) relied on declining market interest rates and policy lapse rates to justify the COI adjustments it imposed, and that those factors did not fall within the policy language allowing COI rate adjustments based on the insured's sex, issue

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[6] *Fehr v Sun Life Assurance Company of Canada,* 2016 ONSC 7659, 62 C.C.L.I. (5th) 96, rev'd in part 2018 ONCA 718, 84 C.C.L.I. (5th) 124, leave to appeal refused, [2018] S.C.C.A. No. 489.
[7] *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718, 84 C.C.L.I. (5th) 124, leave to appeal refused, [2018] S.C.C.A. No. 489.

age, underwriting class, policy year and the face amount of insurance (with similar logic for the claim in respect of administrative fees). With respect to the limitation period for these breach of contract claims, this court set aside Perell J.'s decision, finding that he had failed to consider whether Sun Life's communications to the plaintiffs representing that it was entitled to adjust COI rates and administrative fees, had potentially delayed their discovery of their breach of contract claims. This court determined that there was some basis in fact for a common issue with respect to concealment that would focus on the communications and conduct of Sun Life and its predecessors on a policy-wide or cohort-wide basis, as opposed to their conduct in relation to individual class members. This court also concluded that, since factual determinations on the common issues (including concealment) might impact the issue of discoverability, any limitations analysis with respect to the individual plaintiffs should take place following the completion of the common issues trial, and that Sun Life would be entitled to raise any applicable limitation period defences at that time. As Sun Life was free to raise a limitations defence to these claims in the future, the court did not find it necessary to consider Sun Life's appeal with respect to when the breach of contract claims were first properly pleaded, or the applicability of a rolling limitation period to such claims.

[19] This court remitted the action back to Perell J. for certification in accordance with its order and such further directions as might be necessary.

[20] Various procedural steps then followed, including an unsuccessful application for leave to appeal the 2018 decision of this court to the Supreme Court of Canada.[8] The certification order and litigation plan were settled by Perell J. in February 2020.[9]

[21] The following five common issues were certified:

1. Was it a term of the Flexiplus policy that the COI rate may be adjusted based on specified factors? If so, is Sun Life liable for breach of contract if increases were based in whole or in part on other factors?
2. Was it a term of the Flexiplus policy that Administrative Fees may be adjusted based on factors related to the cost of administering the policies? If so, is Sun Life liable for breach of contract if increases were based, in whole or in part, on other factors?
3. Was it a term of the OptiMet policies that the COI rate may be adjusted based on specified factors? If so, is Sun Life liable for breach of contract if increases were based, in whole or in part, on other factors?
4. Was it a term of the Universal Plus, Flexiplus and OptiMet policies that the "Maximum Premium" amount set out in the policies was the highest amount of premium that the policyholder would ever be required to pay for the policy

[8] *Sun Life Assurance Company of Canada v. Eldon Fehr, et al.*, [2018] S.C.C.A. No. 489.
[9] *Fehr v. Sun Life Assurance Company of Canada*, 2020 ONSC 1115, leave to appeal refused, 2020 ONSC 4476 (Div. Ct.).

in any year, in order to prevent lapse of the policy? If so, are the plaintiffs entitled to a declaration to that effect?

5. If the answer to any of [the first three questions] is that Sun Life breached the contract of insurance, did Sun Life administer the policies in a manner, including violating section 439 of the *Insurance Act*, S.O. 1990, c. I.8 (prohibiting unfair and deceptive practices) such that the breach of contract was concealed?

[22] The appellants are no longer pursuing the third common issue. Only issues 1, 2 and 5, which relate to the existing breach of contract claims in relation to the Flexiplus policies, are relevant to this appeal.

(2) The Motion Leading to this Appeal

[23] In 2021, approximately one year after the certification order was finalized, Sun Life moved for summary judgment, seeking to dismiss on their merits the appellants' claims in respect of the common issues. The motion was scheduled to be heard in February 2022.

[24] In July 2021, Sun Life delivered an affidavit of documents. The affidavit listed 1,340 Schedule "A" documents. Included in the list as SUN 733 was the Repricing Report that had been produced by Sun Life in 2016.[10]

[25] The appellants moved for a further and better affidavit of documents. That motion was heard by Akbarali J., who had taken over as case management judge in September 2021. In December 2021, she ordered the production of certain additional documents.[11] In March 2022, Sun Life delivered a supplementary affidavit of documents listing 69 documents in Schedule "A" (the "2022 Productions").

[26] In May 2022, in response to Sun Life's motion and in support of their own summary judgment cross-motion, the appellants delivered an affidavit sworn by Michael Kavanagh, an actuary retained by class counsel. The affidavit contained an expert report (the "Kavanagh Report"), in which Mr. Kavanagh provided his opinion on Sun Life's Flexiplus repricing practices and their appropriateness under general standards of actuarial practice. In addition to addressing COI rate and administrative fee changes, the Kavanagh Report referred to increases in the

[10] Although the appellants' factum repeatedly refers to this document as having been produced in 2021, there is no question that the same document was produced by Sun Life in 2016 as an exhibit to the Chambers Reply Affidavit.
[11] *Fehr et al. v. Sun Life Assurance Company of Canada*, 2021 ONSC 8368.

investment spread applied by Sun Life in crediting interest to the Flexiplus accumulation fund investments.

[27] Mr. Kavanagh explained that, effective March 2001, Sun Life had increased the investment spread that was applied to Flexiplus policyholders' accumulation fund investments from 1.25% to 1.75% – an increase of 40%, and that larger spreads were applied starting in 2014. He noted that increasing the investment spread allowed Sun Life to take a greater share of the investment profits, and that Sun Life had failed to advise policyholders of the investment spread increase when COI rates and administrative fees were increased. Mr. Kavanagh expressed the opinion that Sun Life's investment spread increase and its failure to advise policyholders of that increase were unfair.

[28] After Sun Life objected to the scope of Mr. Kavanagh's opinion, saying that it went beyond the certified common issues, the appellants brought the motion that is the subject of this appeal. Pursuant to r. 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, they sought leave to amend several paragraphs of the FASOC to refer to the Investment Spread Claim, and leave to amend the certification order to add the following new common issue, pursuant to the court's discretion under ss. 8(3) and 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*"):

> Under the terms of the Flexiplus policy and the insurer's duties of good faith and fair dealing, were there limits to

> increases in the Interest Spread rate the insurer could charge annually against policyholders' accumulation fund balances? If so, is Sun Life liable for any increases in excess of those limits?[12]

[29] The appellants asserted that the Investment Spread Claim was covered by a cause of action already pleaded in the FASOC and was therefore not a new claim. In the alternative, they argued that the Investment Spread Claim was not discoverable until after Sun Life delivered the 2022 Productions.

[30] Sun Life opposed the motion on the basis that the Investment Spread Claim was not already pleaded in the FASOC, and that it was statute-barred because it was discoverable in 2016. Sun Life also argued that the amendment and the addition of a new common issue should be denied at this late stage of the class proceeding, and that, even if the pleadings amendment were allowed, another certification hearing would be required to determine whether a new common issue should be certified.

[31] Sun Life also moved to strike portions of the Kavanagh Report that dealt with, among other things, the increase to the investment spread on Flexiplus policies, on the basis that they introduced "new matters that have never been

[12] The appellants also sought to adjust the wording of the fifth certified common issue to refer to the proposed new common issue – that is, if the answer to the proposed new common issue is that Sun Life breached the contract of insurance, did it administer the policies in a manner, including violating s. 439 of the *Insurance Act*, such that the breach of contract was concealed?

pleaded" and went "well beyond the narrow common issues" that already had been certified.

[32] The motions were heard together by the motion judge in April 2023.

(3) Reasons in the Court Below

[33] The motion judge dismissed the appellants' motion for leave to amend the FASOC and to certify a new common issue.

[34] First, the motion judge rejected the argument that the FASOC already pleaded the necessary facts in relation to the Investment Spread Claim at para. 66(f) which states:

> Sun Life and its predecessors breached their duties of good faith and fair dealing in administering the Policies by:
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> > (f) exercising any discretion the insurer is deemed to have under the policies to set cost of insurance rates, premium rates, administrative fees and policy charges, and rates for daily interest, term investment units, and equity-adjusted investment units, at levels that impaired policyholders' ability to obtain vanishing premium benefits and avoid policy depletion or lapse.

[35] The motion judge concluded that the reference in this paragraph to "rates for daily interest, term investment units, and equity-adjusted investment units" was not fairly descriptive of the interest spread issue the appellants had raised and could not be said to merely particularize the claim in para. 66(f). She noted that the

appellants had not demonstrated that interest rate spread (which is another term for “investment spread”) had anything to do with rates for daily interest, and that the appellants had not attempted to argue that the investment spread was set “at levels that impaired policyholders’ ability to obtain vanishing premium benefits and avoid policy depletion or lapse” (the wording contained in para. 66(f) of the FASOC).

[36] The motion judge then considered whether the Investment Spread Claim was, as the appellants asserted, only discoverable after they received the 2022 Productions. The motion judge concluded that the Investment Spread Claim was in fact discoverable six years earlier from information included in the Repricing Report which had been attached to the Chambers Reply Affidavit delivered by Sun Life in 2016, and subsequently listed in Sun Life’s affidavit of documents as SUN 733. The motion judge found that this information was “sufficient to have alerted the [appellants] to the investment spread issue”, and that portions of the Repricing Report provided the appellants with sufficient information to draw a plausible inference of liability.

[37] The motion judge referred to the argument that, because the Repricing Report spoke only of “recommended increases” to the investment spread, more information was required for the appellants to understand whether the proposed increases were in fact implemented and, if so, whether the increases gave rise to a valid cause of action against Sun Life. She reasoned that, even if this were true,

the Repricing Report provided the appellants with enough information to have made the Investment Spread Claim discoverable in 2016 with reasonable diligence. She concluded that the appellants had enough information to begin asking questions when they received the Repricing Report, but that no questions had been asked of Sun Life's affiant in cross-examination about the investment spread. Further, there was no affidavit to explain what the appellants did to investigate the investment spread issue.

[38] For these reasons, the motion judge concluded that the Investment Spread Claim was statute-barred. The motion judge accordingly denied the appellants leave to amend their FASOC, relying on this court's decision in *Polla v. Croatian (Toronto) Credit Union Limited*, 2020 ONCA 818, at para. 32, leave to appeal refused, [2021] S.C.C.A. No. 64, as authority that the expiry of a limitation period in respect of a proposed new claim is a form of non-compensable prejudice that warrants refusing leave to amend under r. 26.01.

[39] The motion judge added that, even if the Investment Spread Claim were not out of time, she would have declined to exercise her discretion pursuant to s. 12 of the *CPA* to add a new common issue to the certified class proceeding, "even assuming [that she] could do so without requiring a full certification motion".

[40] She concluded that permitting the appellants to add the Investment Spread Claim would result in a fundamental change to the nature of the action that had

been certified, and would work against at least two of the objectives of the *CPA*, as it (i) would not make efficient use of judicial resources, given the strong likelihood of further motions, and (ii) would not promote access to justice, because it would significantly delay the resolution of the class proceeding on its merits.

[41] Additionally, the motion judge found that prejudice to Sun Life must be presumed since, in her view, the appellants had "offered no real explanation" for the lengthy 12-year delay between the commencement of the class proceeding and their motion to add the Investment Spread Claim. All these factors warranted refusing the addition of a new certified common issue.

[42] Finally, the motion judge granted Sun Life's motion to strike portions of the Kavanagh Report on the basis that references to the Investment Spread Claim and the profitability of the Flexiplus policies were not relevant to the certified common issues.

C. ISSUES ON APPEAL

[43] The appellants raise a number of issues on this appeal. They contend that the motion judge erred by:

1. concluding that the Investment Spread Claim was not covered by a cause of action already pleaded in the FASOC;
2. determining that the Investment Spread Claim was discoverable in 2016 based on information in the Repricing Report;

3. applying the limitation period bar on a class-wide basis based on the claim's discoverability in 2016 even though the action had not been certified as a class proceeding at the time;
4. failing to apply a rolling limitation period to the Investment Spread Claim; and
5. deciding, in the alternative, that if the Investment Spread Claim were not statute-barred, the addition of this claim should be denied under s. 12 of the *CPA* because it would fundamentally change the nature of the class proceeding and undermine judicial efficiency and access to justice.

[44] The appellants also brought a motion in the Divisional Court seeking leave to appeal the portions of the motion judge's decision that struck parts of the Kavanagh Report dealing with the investment spread and the profitability of Flexiplus policies. The appellants asked to consolidate the appeals if leave to appeal was granted by the Divisional Court. As the Divisional Court has since denied leave to appeal,[13] the issue of consolidation is moot.

[13] *Fehr v. Sun Life Assurance Company of Canada*, 2023 ONSC 5622 (Div. Ct.).

D. DISCUSSION AND ANALYSIS

(1) Relevant Legal Principles

[45] The focus of the appeal is on whether the proposed amendments to the FASOC seek to add a new claim that is statute-barred. Sections 4 and 5 of the *Limitations Act* codify the two-year limitation period and the principle of discoverability.[14] They read as follows:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the date on which the claim was discovered.
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> 5(1). A claim is discovered on the earlier of,
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> (a) the day on which the person with the claim first knew,
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> (i) that the injury, loss or damage had occurred,
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> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
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> (iii) that the act or omission was that of the person against whom the claim is made, and
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> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
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> (b) the day on which a reasonable person with the abilities and in the circumstances of

[14] Although the proposed amendments deal with conduct that is alleged to have commenced in 2001, there is no question that the current *Limitations Act* that came into effect January 1, 2004 applies to the motion brought in 2022.

> the person with the claim first ought to have known of the matters referred to in clause (a).

[46] The jurisprudence of the Supreme Court and this court make it clear that a plaintiff discovers a claim when they have knowledge, whether actual or constructive, "of the material facts upon which a plausible inference of liability on the defendant's part can be drawn": *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, [2021] 2 S.C.R. 704, at para. 42. As Feldman J.A. observed in *Di Filippo v. Bank of Nova Scotia*, 2024 ONCA 33, at para. 38, leave to appeal refused, [2024] S.C.C.A. No. 88, "[t]he plausible inference standard means that the plaintiff does not have to be certain that the known facts will give rise to legal liability, but the plaintiff must have knowledge of the material facts that form the basis for the plausible inference of legal liability."

[47] With respect to amendments to pleadings, the point of departure is r. 26.01 of the *Rules of Civil Procedure*, which provides that a court "shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment." Typically, an amendment that proposes to add a new cause of action outside the applicable limitation period will be denied on the basis of non-compensable prejudice to the defendant. In this context, "a 'cause of action' is 'a factual situation the existence of which entitles one person to obtain from the court a remedy against another person' (as opposed to the other sense in which the term 'cause of action' is used

– as the form of action or legal label attached to a claim)": *Polla*, at para. 33, citing *1100997 Ontario Limited v. North Elgin Centre Inc.*, 2016 ONCA 848, 409 D.L.R. (4th) 382, at para. 19. An amendment will be refused when it seeks to advance, after the expiry of a limitation period, a "fundamentally different claim" based on facts not originally pleaded: *North Elgin*, at para. 23.

[48] A pleadings amendment that "simply provide[s] particulars of an allegation already pleaded" is not vulnerable to a limitations defence because it does not amount to asserting a new cause of action: *Klassen v. Beausoleil*, 2019 ONCA 407, 34 C.P.C. (8th) 180, at paras. 28-30. An amendment does not assert a new cause of action if the "original pleading … contains all the facts necessary to support the amendments … [such that] the amendments simply claim additional forms of relief, or clarify the relief sought, based on the same facts as originally pleaded": *Klassen*, at para. 28. In conducting its analysis, the court should read the pleadings generously in favour of the proposed amendment, considering whether the existing pleading already contains the factual matrix to support any claim to which the proposed amendment relates: *Polla*, at para. 37. It is the pleading of facts that is key: *Di Filippo*, at para. 40.

[49] A motion judge's finding that proposed amendments will add a new claim to the proceedings is a legal determination subject to review for correctness on appeal, while the determination that the new claim would be statute-barred due to the *Limitations Act*, and therefore gives rise to actual prejudice to the defendant in

the action, is a finding of mixed fact and law, and subject to reversal based on a palpable and overriding error, except if there is an extricable error in principle, which will be reviewed for correctness: *Di Filippo*, at paras. 21-22.

(2) The Investment Spread Claim Is a New Claim

[50] Although the appellants asserted in their factum that the motion judge erred in concluding that the Investment Spread Claim is a new claim not already covered by the FASOC, they did not address this point in oral argument on the appeal, and instead focused their submissions on the discoverability of the claim. I will address this ground of appeal relatively briefly in the paragraphs that follow.

[51] At first instance the appellants relied on para. 66(f) of the FASOC, asserting that the proposed amendments provide particulars of a claim already pleaded. On appeal the appellants also rely on para. 31. These paragraphs are as follows:

> 31. Increases were imposed in the cost of insurance on Flexiplus policies at various times based on factors other than those listed as permissible in the policy terms. Administrative fee increases have been imposed based on factors other than increased administration costs. Interest rates for accumulation funds have been set at levels that impair policyholders' ability to achieve vanishing premium benefits, to avoid accumulation fund declines, and ultimately to avoid policy lapse. For some policyholders, premium payments in excess of the Maximum Premium stated in the policy may be imposed to prevent lapse of the policy.
>
> …

> 66. Sun Life and its predecessors breached their duties of good faith and fair dealing in administering the Policies by:
>
> > f) exercising any discretion the insurer is deemed to have under the policies to set cost of insurance rates, premium rates, administrative fees and policy charges, and rates for daily interest, term investment units, and equity-adjusted investment units, at levels that impaired policyholders' ability to obtain vanishing premium benefits and avoid policy depletion or lapse.

[52] Sun Life contends that the motion judge correctly concluded that the Investment Spread Claim was not already pleaded. The claim is not referred to in the FASOC and "has nothing to do with" the matters described in paragraphs 31 and 66(f).

[53] I agree with Sun Life that the motion judge correctly concluded that the proposed amendments seek to add a new claim to the FASOC, and do not simply provide particulars of a claim that is already pleaded. It is apparent when one compares paras. 31 and 66(f) to the proposed amendments that, although the amendments build on language that is already in the pleading, paras. 31 and 66(f) do not contain the "factual matrix" to support the claim to which the proposed amendments relate, nor do they plead the "factual situation" that would give notice to the defendant that such a claim would be asserted.

[54] Unlike some of the amendments put forward in *Di Filippo*, the proposed amendments do not simply plead evidence or further details of facts already

pleaded or “an alternative theory of liability or an additional remedy based on facts already pleaded”: at para. 48. Instead, it is only in the proposed amendments that the necessary facts to support the Investment Spread Claim, as well as the claim itself, are asserted.

[55] It is important to focus on the specific amendments the appellants seek to make, and to compare these amendments to the existing pleading. The first three paragraphs of the proposed amendments would follow para. 31 in the FASOC, and contain new facts to support the Investment Spread Claim:

> 32. The Flexiplus policies provide that the insurer will set the interest rates to be credited to policyholders’ accumulation fund investments, subject to floor rates determined from certain market-based yield data. Although not expressly provided for in the Flexiplus policies, in practice the Defendant deducted and retained an “investment spread” percentage from the returns it received on the accumulation fund investments, before crediting interest to the funds. From inception of the policies until 2001, the Defendant took an investment spread of 1.25% annually. The existence of a fixed spread and its percentage rate were not set out in the policies or in the policy statements sent to policyholders.
>
> 33. In 2001, in addition to implementing a cost of insurance repricing and administrative fee increase, the Defendant increased the investment spread it charged on the DIA and GIA funds in the Flexiplus policies from 1.25% to 1.75% (a 40% increase). Increasing the spread by 0.25% had been recommended internally as a way to comply with management’s profit goals for the policies after further COI increases could not be justified. Ultimately a 0.50% spread increase was imposed without any apparent investment-related cost justification or other valid rationale. In fact, after the 1998 acquisition

> transaction, Mutual Life was receiving higher return rates from its accumulation fund investment activities than MetLife had been; also the insurer's investment income tax rate was declining.
>
> 34. The investment spread being charged was subsumed into the overall earning rates for accumulation fund investments, and hence any spread increase was not discoverable by policyholders. The Defendant's increase of the investment spread in 2001 was made unilaterally and without any notice or disclosure to Flexiplus policyholders. It appears that a further increase was imposed in 2014, again without cost justification or notice to policyholders.

[56] The appellants also propose to change the wording in para. 61 (which currently asserts a breach of contract claim in respect of the insurer's increase in administrative fees) and para. 66 (which alleges breach of the duty of good faith and fair dealing in the administration of the policies – an issue that was not certified as a common issue because it depends on facts relevant to individual policyholders). Proposed amendments to these paragraphs are shown in the underlined passages as follows:

> 64. ~~61~~. As described above, the Flexiplus ~~and Universal Plus~~ policies specify ~~the basis upon which the insurer is permitted to make~~ numerical limits for any increases ~~to~~ in the administrative fees and set floors for investment crediting rates. The policies imply that any increases in administrative fees and in the investment spreads reflected in investment crediting rates shall be based only on increases in the insurer's costs of providing administrative or investment services, respectively. The insurers in fact used factors different from ~~changes~~ increases in administrative or investment services costs in imposing ~~such~~ Flexiplus administrative fee and

> investment spread increases. Such increases were a breach of contract.
>
> 69. ~~66~~. Sun Life and its predecessors breached their duties of good faith and fair dealing in administering the Policies by:
>
> …
>
> f) exercising any discretion the insurer is deemed to have under the policies to adjust cost of insurance rates, premium rates, administrative fees and policy charges, and investment spreads as reflected in daily interest, term investment units, and equity-adjusted investment units, to levels that impaired policyholders' policy values and their ability to obtain vanishing premium benefits and avoid policy depletion or lapse; and
>
> g) increasing the investment spread on Flexiplus DIA and GIA accumulation funds without any investment-cost justification or other valid rationale; without notice or disclosure to Flexiplus policyholders; and in a way that was not discoverable by policyholders.

[57] Even on a generous interpretation of the FASOC, the existing pleadings do not capture what is now sought to be alleged. The proposed amendments assert specific facts in relation to the Investment Spread Claim: that the insurer deducted and retained an "investment spread" percentage from the returns it received on accumulation fund investments before crediting interest to the funds; that until 2001 it took an annual investment spread of 1.25%, without disclosing the spread and its rate to policyholders; that in 2001 (and again in 2014) the investment spread

increased without any apparent investment-related cost justification or other valid rationale; and that, because the investment spread was subsumed into the overall earning rates for accumulation fund investments, it was not discoverable by policyholders. The proposed amendments assert that such conduct was in breach of an implied term of the policies requiring investment spreads to be based only on increases in the insurer's costs of providing investment services and in breach of the duty of good faith and fair dealing in the administration of the policies.

[58] By contrast, para. 31 asserts a claim in relation to increases to COI rates and administrative fees. It also pleads that interest rates on the accumulation funds have been set at levels that impair policyholders' ability to achieve vanishing premium benefits, to avoid accumulation fund declines, and ultimately to avoid policy lapse. Paragraph 66(f) pleads that Sun Life and its predecessors breached their duty of good faith and fair dealing in administering the policies by "exercising any discretion the insurer is deemed to have under the policies to set…rates for daily interest, term investment units, and equity-adjusted investment units, at levels that impaired policyholders' ability to obtain vanishing premium benefits and avoid policy depletion or lapse". I agree with Sun Life that, in arguing that the paragraphs plead facts relevant to the Investment Spread Claim, the appellants conflate "daily interest rate" with Investment Spread. The investment spread is the difference between Sun Life's earnings on investments and the interest credited to a policy's accumulation fund. It is not about the discretionary setting of daily interest rates.

[59] Accordingly, the motion judge did not err when she concluded that the reference to “rates for daily interest, term investment units, and equity-adjusted investment units” in the existing pleading do not fairly describe the interest spread issue the appellants have raised, and that the proposed amendments could not be said to merely particularize the claim in para. 66(f). The same can be said of para. 31 of the FASOC which contains very similar wording. The Investment Spread Claim is not captured by the existing pleading; it is a new claim that is distinct from the administrative fee and COI rate breach of contract claims that are at the centre of this certified class proceeding.

[60] I would accordingly dismiss this ground of appeal.

(3) The Investment Spread Claim Is Statute-Barred

[61] The next issue concerns the motion judge’s determination that the Investment Spread Claim was statute-barred because the claim was discoverable more than two years before the appellants brought their motion to amend the common issues and the FASOC.

[62] The appellants raise three arguments. First, they submit that the motion judge made a palpable and overriding error in concluding that sufficient facts from which an imputation of liability could arise were available in 2016, when the Repricing Report contained a recommendation to increase the investment spread. They submit that it was only apparent in 2022 that the increase had been

implemented. Second, the appellants contend that the motion judge erred in imputing to all class members (and not just the named plaintiffs) the knowledge of class counsel based on information that had been disclosed in the proceedings before the class was certified. Essentially, they say that the question of the discoverability of the Investment Spread Claim remains open in respect of the claims of individual class members, and in a related argument they suggest that the proposed amendments should be made, with any limitation period issue deferred until after the common issues have been decided. Third, if they are not successful in respect of either of these arguments, the appellants submit that the motion judge erred in failing to address their submission that the Investment Spread Claim is subject to a rolling limitation period. They ask that this court determine the issue such that their Investment Spread Claim in respect of amounts credited to their accumulation funds starting two years before the motion to amend, would not be statute-barred. I will deal with each of these arguments in turn.

(i) The Motion Judge Did Not Err in Concluding that the New Claim Was Discoverable in 2016

[63] The appellants contend that investment spread increases were never disclosed and in fact were concealed from policyholders. Sun Life's position, that was accepted by the motion judge, is that the Investment Spread Claim was discoverable based on information disclosed in the course of the litigation in 2016.

[64] The appellants' main argument in this appeal is that the motion judge erred in concluding that the disclosure of the Repricing Report in 2016 made the Investment Spread Claim discoverable, when the document spoke of recommendations to "increase and maximize" the investment spread. The appellants assert that, absent details of a precise percentage increase or any indication of an implementation plan, there was no reason for their counsel to believe that Sun Life had in fact increased the investment spread.

[65] The appellants contend that the motion judge's failure to distinguish between recommendations and known facts was an extricable error. In this regard they rely on *Crombie Property Holdings Limited v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, leave to appeal refused, [2017] S.C.C.A. No. 85, where this court allowed an appeal from the dismissal of an action claiming damages for environmental contamination in part because the motion judge had equated the plaintiff's knowledge of <u>possible</u> contamination with knowledge of <u>actual</u> contamination, and because the fact that claims were "available and discoverable" set too low a threshold for discoverability.

[66] Sun Life submits that the motion judge did not err when she concluded that the Investment Spread Claim was discoverable, based on what was available to the appellants' counsel when the Repricing Report was first disclosed in the litigation. Sun Life contends that in 2016 it was clear that the investment spread

increase had been implemented in 2001, and that all the necessary information was available to the appellants to support this new claim.[15]

[67] The motion judge did not err in her conclusion respecting the discoverability of the Investment Spread Claim. The appellants are incorrect when they assert that the information available in 2016 indicated that changes to the investment spread were only recommended, and that it was not known until 2022 that Sun Life had increased the investment spread on the accumulation funds in the Flexiplus policies. This is not a case, like *Crombie*, where at its highest the evidence provided the basis for the plaintiff's suspicion of a claim. Here, by contrast, the information that was available in 2016 was sufficient for the appellants, through their counsel, to understand that they had a claim within the meaning of s. 5(1)(a) of the *Limitations Act*. As I will explain, the information available in 2016 provided sufficient facts for a reasonable inference of liability in respect of a new claim against Sun Life.

[68] While the passages from the Repricing Report that are highlighted by the motion judge at para. 21 of her reasons might suggest that this document revealed only recommended increases, including increases to the investment spread, in fact

[15] In oral argument on the appeal, in addition to their other arguments about the discoverability of the Investment Spread Claim, Sun Life's counsel submitted that the use of the past tense in the Repricing Report made clear that the interest rate spread had already occurred. As the appellants pointed out at footnote 81 of their factum, this is incorrect. The proposed adjustments were based on forward-looking assumptions, not past experience. The use of the past tense in referring to the assumptions that were made is not in itself indicative of the interest rate spread having already been implemented.

the document as a whole (that is, including its appendices), as well as the other information that was available to the appellants' counsel around the time that the Repricing Report was first produced in 2016, confirm that all of the recommended repricing measures, including the increase to the investment spread, were implemented in 2001.

[69] As mentioned earlier, the Repricing Report was produced in the context of Perell J.'s adjournment of part of the certification motion so that Sun Life could provide evidence of how it set COI rates and administrative fees. The First Chambers Affidavit attached only two pages of the Repricing Report. A complete copy of the Repricing Report, including its appendices, was attached to his Reply Affidavit, which was delivered in July 2016.

[70] The Repricing Report disclosed that an interest rate spread increase from 1.25% to 1.75% had been approved by the RIC. In my view, that document, combined with the evidence of Mr. Chambers, who stated in his cross-examination in 2016 that the changes addressed in the Repricing Report, including the specific investment spread increase, were implemented in 2001, disclosed the material facts upon which a plausible inference of liability in respect of the Investment Spread Claim could reasonably have been drawn.

[71] Section A of the Repricing Report sets out the "Recommendation" as follows: "Re-price Flexiplus as per option 2 described in the pre-readings

(Appendix A) of the [RIC] meeting held on August 19, 1999 and approved by all members of the RIC (minutes of the meeting are in Appendix B and C)".

[72] Section B of the Repricing Report contains a description of the methodology that was used and the pricing assumptions that were adopted. Part of the methodology in repricing the Flexiplus policy was to increase the interest rate spread. Section B states, in part:

> The COI increases were also based on how the past and current economic environment lowered the profitability of Flexiplus. Every in-force policy was issued with an expected return on equity determined when Flexiplus was first priced. To be equitable to our clients, the COI increases should not produce profits that exceed the original profit goals of the product. Therefore, **by changing all assumptions of the original pricing** pertinent to our current economic surroundings, we determined the COI increases, at several issue ages, that was necessary to re-establish the original profit goals of Flexiplus. For several issue ages, the percentage increase in COI rates were set as the maximum increase equitable to our clients. Following is a **list of assumptions that changed** since the original pricing of Flexiplus:
>
> …
>
> - **Interest Rate Spread: The spread increased from 1.25% to 1.75%.**
>
> [emphasis added]

[73] The RIC recommendation for repricing the Flexiplus policy was set out in Appendix A to the Repricing Report. In addition to increasing the administration fee, the recommendations included to "increase and maximize the investment

spread on investment units". Two options for the timing of the implementation of the increases were set out. According to Appendices B and C, the RIC approved "option 2" (to implement all changes with Ingenium).[16]

[74] While the Repricing Report itself does not confirm that an interest rate spread adjustment was made, Mr. Chambers stated at para. 42 of his first affidavit, that "[t]he recommendations in [the Repricing Report] were ultimately implemented in March 2001."

[75] The Repricing Report was addressed in the course of Mr. Chambers' cross-examination in October 2016. He confirmed that the 1999 repricing recommendation had been implemented in 2001 and that the interest rate spread had changed from 1.25% to 1.75%:

> Q. 174. So, let's do this chronologically. And I would ask you, please, Mr. Chambers, to look at tab I, which is the repricing recommendation for Flexiplus that is dated 1999. Do you have that?
>
> A. I do.
>
> Q. 175. It is your understanding that **this repricing resulted in what we have called the 2001 repricing that was, in fact, implemented?**
>
> A. **Yes**.
>
> Q. 176. So, what I would like to generally ask you, with respect to each of these three reports [referring to the

[16] Appendix "A" of the Repricing Report refers to "Ingenium" as an administration system that would soon replace insurer's old system, "Vantage". It was the insurer's intention to implement the changes with the new system.

1999, 2006 and 2014 re-pricing reports], Mr. Chambers, is to **identify which experience variables changed, as identified in the repricing**? For those, how did they change, and how much did they change, if you can answer that?

A. Change from what?

Q. 177. Change from the prior pricing. This is a repricing exercise from the pre-existing pricing, correct? That is your understanding?

A. That is my understanding, yes.

…

Q. 183. Okay. And then it goes on at the end of that paragraph, it says: "...Following is a list of assumptions that changed since the original pricing of Flexiplus...". Do you see that?

A. I do.

Q. 184. And then there are a pair of interest rate categories there: One pricing and one valuation.

A. M'hmm.

Q. 185. A pair of lapsed rate categories; again, one pricing and one valuation, and then four additional types of assumptions: **Interest rate spread**, tax reserve interest rate, tax reserve lapse rate, and tax method. So, what I would like to do, Mr. Chambers, is try to figure out which of the categories from your 2012 methodology report these fall into, first of all, and just identify what they are. So, is it fair to say that the descriptive terms, "pricing and valuation", refer respectively to the effect of the product pricing, and then its impact on the reserves? Is that a fair way of distinguishing between pricing and valuation?

A. I believe that...when an assumption is headlined by pricing, for instance, that first one, pricing interest rate, and then it goes on:

"...The original pricing was done at 10 percent. This assumption was changed to an initial rate of 5.61, to an ultimate rate, after 20 years, of 6.25..."

That is defining the change in the repricing exercise, the change that then resulted in whatever COI changes they recommended. And I would also offer that that change was by far the most significant of the deterioration in forward-looking interest rates. I believe, at some point later on, they do talk about that being the most significant.

Q. 186. All right. And what is the difference between that and the valuation interest rate category that follows?

A. The valuation interest rate is more an editorial or comment about where the valuation rate and its subsequent margin for adverse deviation, I should say, will be changing along with this repricing. But I don't believe that that had a consequence to the rates that were then set to the policyholder...

Q. 187. The repricing rates?

A. Correct, the repriced rate. So, the pricing interest rate is one that is called out as a change. The pricing lapse rate there that was set at 5, and a new ultimate...was set at 5 originally, and a new ultimate lapse rate of 4. We have the administration fee, so that is one of the expenses, changed from $66 to $78. **The interest rate spread increased from 1.25 to 1.75...**

Q. 188. That is 1.25 percent to 1.75...

A. Yes.

Q. 189. ...percent?

A. Yes, excuse me, sorry. In tax rates, I believe that has...would have some influence on the IIT, I think, but I don't believe that that was a material factor in repricing...

Q. 190. Investment income...

> A. Thank you, investment income tax. It was the pricing interest rate, and secondarily the lapse rate were material.
>
> Q. 191. Okay. So, whether or not they are...they were material in repricing, **those are the factors that were identified as having changed**, correct?
>
> **A. Identified in this report, yes.**
>
> [emphasis added]

[76] Mr. Winokur, the plaintiffs' actuarial expert at the time, also addressed the Repricing Report in his Sur-Reply Affidavit. While his affidavit focused on Sun Life's adjustment of the COI rate, he stated, at para. 41:

> 41. In reviewing the Flexiplus re-pricing materials, **Sun Life considered the following experience factors in adjusting COI rates: the insurer's investment earnings and returns**, expenses incurred by the insurer, mortality rates, persistency and policy lapse rates, taxes payable by the insurer, COI rates charged by the insurer's competitors, perceived policyholder tolerance of large COI increases, and **effects on shareholder income (that is, investment returns to Sun Life shareholders). For Flexiplus, in 1999, all assumptions except for mortality were changed**, but in later re-pricing, all major assumptions were changed. In the 1999 re-pricing, it is noteworthy that there was a very large reduction in the interest rate assumption, from 10% in the original pricing, to 5.61% (grading linearly to 6.25% after 20 years).
>
> [emphasis added]

[77] In my view, one could reasonably conclude from the above affidavit and cross-examination evidence that in 2016 both the plaintiffs' counsel and their actuarial expert, Mr. Winokur, were aware that Sun Life had in fact implemented

an investment spread increase as part of the approved Flexiplus repricing. They knew the specific percentage increase and that the increase had been implemented in March 2001.

[78] In the court below the appellants relied on the fact that their expert first identified the investment spread issue in 2022 in the Kavanagh Report where, in addition to addressing the common issues, Mr. Kavanagh noted that Sun Life had apparently increased the investment spread being charged against the interest earned on policyholders' accumulation fund balances, starting in 2001. The appellants pointed to the fact that Mr. Kavanagh referred to documents that were only disclosed by Sun Life in 2022. They asserted that the "piece of the puzzle" that provided essential context for understanding the Investment Spread Claim was SUN 1376, a briefing note relating to a June 25, 1999 meeting of the RIC that was only disclosed by Sun Life in March 2022.

[79] Attached to Sun Life's factum on appeal is a chart that compares statements in the Kavanagh Report that reference information from SUN 1376 with what was disclosed in the Repricing Report, produced in 2016. I agree with Sun Life that in substance all of the information attributed to SUN 1376 is also found in the Repricing Report.

[80] The Kavanagh Report also refers repeatedly to the Repricing Report, including in support of Mr. Kavanagh's statement that the investment spread of

1.25% was applied until it was increased to 1.75% as part of the 2001 repricing. Mr. Kavanagh also appears to have viewed the Repricing Report as more than simply a recommendation. Paragraph 64 of the Kavanagh Report refers to the signature of Larry Madge, VP, Insurance Products (on March 8, 2000) under the Recommendation in Section A of the Repricing Report as having approved the recommended changes to the investment spread rate "for later implementation". The Kavanagh Report does not distinguish between documents that were available to the appellants at an early stage in the litigation and those that were produced more recently.

[81] Sun Life delivered an affidavit from Mr. Chambers in response to the appellants' motion to amend the common issues. He described the Investment Spread Claim as a new claim in respect of which there were no certified common issues and he explained why, by virtue of the documents disclosed earlier in the proceedings, and in particular, the Repricing Report, the Investment Spread Claim was discoverable in 2016.

[82] The appellants did not deliver an affidavit on the motion responding to the assertion that the Investment Spread Claim was discoverable and out of time. Instead, as I have noted above, they relied on the fact that the Investment Spread Claim was first articulated in the Kavanagh Report after they had received the 2022 Productions. One might have expected the appellants to deliver an affidavit from Mr. Winokur, who had referred to the Repricing Report in 2016 and was the

plaintiffs' actuarial expert at that stage in the litigation, explaining why he had not identified the change in the insurer's investment spread as an issue at the time, or alternatively an affidavit from Mr. Kavanagh, whose expert report made extensive reference to the Repricing Report, addressing why the Investment Spread Claim would not have been apparent from the information that was available in 2016.

[83] Accordingly, on the evidence that was before the court on the motion, the motion judge did not err in concluding that the Investment Spread Claim was discoverable in 2016, more than two years before the motion to amend was made.

(ii) The Limitations Bar Was Properly Applied to the Claims of All Class Members

[84] The appellants assert that the motion judge ought not to have applied the limitations bar on a class-wide basis. Although they accept the general principle that the knowledge of counsel may be imputed to a client in the determination of a limitation period (see e.g., *Soper v. Southcott* (1998), 39 O.R. 737 (C.A.), at para. 22), they contend that any actual or constructive knowledge of the Investment Spread Claim that their counsel may have had in 2016 could have been imputed to only the seven individual plaintiffs for whom counsel was acting at the time, and not to all members of the yet-to-be-certified class. They assert that, in accordance with this court's decisions in *Levac v. James*, 2023 ONCA 73 and *Smith v. Inco Limited*, 2011 ONCA 628, 107 O.R. (3d) 321, the application of a

limitation period defence is an individual issue to be determined for each class member and it is therefore inappropriate to determine the issue on a class-wide basis. The appellants rely on the fact that this court in 2018 reversed Perell J.'s holding that a limitation bar applied to all of the COI and administrative fee breach of contract claims. In oral argument, the appellants submitted that the correct result would be to allow the proposed amendments with the determination of the limitation period defence deferred for determination after disposition of the common issues.

[85] Sun Life asserts that these submissions raise new issues that the appellants should not be permitted to raise for the first time on appeal. Sun Life adds that, in any event, the authorities relied on by the appellants are distinguishable, and the applicable case law in fact confirms that counsel's knowledge may be imputed to a client – including in the class proceedings context – where, as here, the solicitor-client relationship relates to the matters in issue.

[86] It is sufficient to deal only briefly with this argument.

[87] First, I agree with Sun Life that, having approached the limitations issue on a class-wide basis, and not having made the argument they make now in the court below, the appellants should not be permitted to raise what is essentially a new issue on appeal: see *R. v. Reid*, 2016 ONCA 524, 132 O.R. (3d) 26, at paras. 37-44, leave to appeal refused, [2016] S.C.C.A. No. 432; *Becker v. City of Toronto*,

2020 ONCA 607, 452 D.L.R. (4th) 679, at paras. 39-40. The motion was argued on the basis that the information that was known to counsel – that is counsel for the plaintiffs before the class proceeding was certified – was directly relevant to whether the Investment Spread Claim was statute-barred. It is too late for the appellants to assert for the first time on appeal that because the class had not yet been certified when counsel is said to have become aware of the claim, such knowledge would bar the claims only of the individually named plaintiffs, and not the entire class.

[88] Second, I see no merit in the appellants' attempt at this stage to cast the limitation period defence as an "individual" and not a class-wide issue.

[89] The appellants sought to add a new claim about increases to the investment spread in 2001 and 2014 to this certified class proceeding on a class-wide basis. Section 28 of the *CPA* would toll the running of the limitation period for class members, but only once the claim was added to the action. Before the claim could be added, however, it was appropriate to determine whether the applicable limitation period had already expired. Had the limitation period commenced when the alleged wrongful conduct occurred in 2001 and 2014, there would be no question that the Investment Spread Claim was statute-barred for all class members when the claim was first asserted. The appellants took the position that the investment spread increases were never disclosed to individual class members, and that the claim was discovered only after the 2022 Productions were

produced in the litigation and their expert, Mr. Kavanagh, prepared his report. In taking this position, they did not argue that the limitation period in respect of the Investment Spread Claim raised individual issues, nor could they have done so. Instead, they asked the court to amend the claim and common issues to include this claim for all class members. In response, they were confronted with evidence that, in the same litigation, albeit before the class was certified, information had been disclosed that made the claim discoverable.

[90] Having taken the position throughout the motion proceedings that the discoverability issue could be determined for the class, and that this depended on what was and was not known in the course of the litigation, the appellants seek to change course, pointing to this court's decision in *Levac*, where Sossin J.A. observed at para. 106 that, "[b]ecause discoverability involves an inquiry into the individual claimant's state of knowledge, courts have generally been hesitant to certify common limitations issues in class proceedings."

[91] The discoverability of the Investment Spread Claim as it has been advanced by the appellants is not an individual issue in this case: unlike the breach of contract claims in respect of COI and administrative fees, where the increases were disclosed at different times to policyholders, the allegation here is that the investment spread increase was never disclosed. The material facts that are relevant to the limitation period defence do not depend on the knowledge or behaviour of individual class members before (or after) the class proceeding was

commenced. Rather, the discoverability of the Investment Spread Claim depends on what was known to those who were pursuing the litigation on the policyholders' behalf – the representative plaintiffs and their counsel. In this case, just as the appellants seek to rely on the 2022 events to extend the limitation period in respect of the Investment Spread Claim on a class-wide basis, they cannot avoid the effect on the discoverability issue of the 2016 disclosure in the same litigation.

[92] Finally, I do not agree with the distinction the appellants seek to draw between the role of the representative plaintiffs before and after certification as being relevant to or determinative of the limitation period in this case. Again, the Investment Spread Claim became discoverable in the course of the litigation; there is no issue as to its discoverability by individual policyholders. Since the appellants accept that any knowledge of the claim in 2016 by their counsel would have been binding on the individual plaintiffs, they must also recognize that, after certification the class members would be fixed with such knowledge. For limitation period purposes, the action did not, upon certification, transform from an action by individual plaintiffs into a class proceeding: see *Logan v. Canada (Minister of Health)* (2003), 36 C.P.C. (5th) 176 (Ont. S.C.), at para. 16, aff'd 71 O.R. (3d) 451, at para. 23; *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 118 O.R. (3d) 641, at para. 32, aff'd 2015 SCC 60, [2015] 3 S.C.R. 801.

[93] I would therefore not give effect to this argument.

(iii) The Investment Spread Claim Does Not Engage a Rolling Limitation Period

[94] I begin by noting that in the court below the rolling limitation period argument does not appear to have figured largely in the appellants' submissions. It was raised only in two paragraphs of their reply factum, and without reference to any supporting case law. It is not surprising that the motion judge did not address this issue at all in her reasons. In this court, however, the appellants relied heavily on this argument as an alternative to their main point that the Investment Spread Claim as a whole was discoverable only in 2022.

[95] The appellants assert that rolling limitation periods apply in cases where the defendant has a contractual obligation that recurs over time. They contend that the motion judge should have applied a rolling limitation period because a discrete claim arose every time Sun Life deducted an excessive investment spread percentage from the interest credited to Flexiplus policyholders' investment accounts. The appellants say that this occurred weekly. They acknowledge that the Flexiplus policy terms gave Sun Life discretion over the interest rate credited to the accumulation fund but assert that any adjustments to the investment spread applied to the credited interest were constrained by duty of good faith and fair dealing. They contend that this case involves a series of periodic payments where the insurer committed a new breach of implied policy terms each time an excessive amount was deducted from the interest credited to a policyholder's accumulation

fund. Finally, the appellants submit that a rolling limitation period should apply to this breach of contract claim, just as Perell J. would have applied a rolling limitation period to the COI and administrative fee breach of contract claims.

[96] Sun Life asserts that the motion judge did not err by declining to apply a rolling limitation period. According to Sun Life, the appellants improperly seek to use the concept of a rolling limitation period as redress for what they view as continuing losses, when a rolling limitation period applies only if there is a breach of contract with respect to a specific periodic payment or obligation to which a plaintiff is entitled. Sun Life points out that the appellants have no contractual entitlement to a specific investment spread – rather, they simply have an entitlement to a minimum credited interest rate, which they do not allege that Sun Life breached.

[97] I would not give effect to this ground of appeal.

[98] I begin by rejecting the appellants' argument that this court should simply follow Perell J.'s approach in respect of the administrative fee and COI claims when he considered the limitation period defences in Sun Life's summary judgment motion in 2015. After concluding that the limitation periods ran from the time Sun Life notified policyholders of the increases, he held that the breach of contract claims were barred except in respect of the period commencing in 2008 on the basis that there was a discrete breach of contract each month that Sun Life

deducted administrative fees and COI from the accumulation funds. As noted earlier in these reasons, this court reversed Perell J.'s decision that the limitation period expired by virtue of Sun Life's communications, certified fraudulent concealment as a common issue, and directed, if necessary, that the issues relating to the applicable limitation periods for the administrative fee and COI breach of contract claims be tried after the common issues trial. Whether or not a rolling limitation period is even engaged and would apply to the COI and administrative fee claims remains an open issue in these proceedings. In any event, the potential application of a rolling limitation period to the COI and administrative fee claims does not mean that the same result would follow with respect to the Investment Spread Claim.

[99] First, the Investment Spread Claim as set out in the proposed amended pleading asserts breaches that occurred in 2001 and 2014, and not a breach of an obligation under the policy to make a contracted periodic payment. Second, applying the principles from this court's recent jurisprudence it is clear that a rolling limitation period would not apply to this proposed new claim.

[100] A rolling limitation period may apply to a claim for breach of contract where each failure to make a periodic payment can be said to give rise to a new cause of action or claim, and not simply fresh or continuing damage: *Karkhanechi v. Connor, Clark & Lunn Financial Group Ltd.*, 2022 ONCA 518, at para. 27, leave to appeal refused, [2022] S.C.C.A. No. 353*; Marvelous Mario's Inc. v. St. Paul Fire*

and Marine Insurance Co., 2019 ONCA 635, 147 O.R. (3d) 186 at para. 35, leave to appeal refused, [2019] S.C.C.A. No. 392; *Spina v. Shoppers Drug Mart Inc*., 2024 ONCA 642, at para. 125.

[101] In *Karkhanechi*, this court addressed the test for determining when a rolling limitation period applies. Paciocco J.A. noted that the obvious place to begin is to characterize the nature of the breach, since it is not possible to determine whether a plaintiff has discovered a breach until the relevant breach is identified: at para. 26. He noted that the material distinction is between cases where there is an allegation of a breach that gives rise to a continuing loss or damage, and cases where more than one breach is being alleged, leading to separate damage claims, and that this distinction is important because, "without a 'new breach', there is no justifiable basis for applying a rolling limitation period": at para. 27.

[102] At paras. 29 to 31 of *Karkhanechi*, Paciocco J.A. endorsed what he referred to as the "*Richards* distinction" in breach of contract claims – the distinction between cases where a plaintiff was entitled to periodic payments and cases where the issue is whether the plaintiff was entitled to the periodic payment in the first place. In the latter type of case, the material facts for discovery of the claim will have arisen at the time the plaintiff alleges they first became entitled to the periodic payments. It would be unfair to require the defendant to litigate those facts for a potentially unlimited period of time (citing *Richards v. Sun Life Assurance*

Company of Canada, 2016 ONSC 5492, [2016] I.L.R. I-5911, at para. 26, as affirmed by *Marvelous Mario's Inc.*, at para. 36).

[103] Applying these principles to the present case, it cannot be said that the Investment Spread Claim is a claim for periodic breaches of contract to which a rolling limitation period would apply.

[104] The appellants acknowledge that the policy terms provide for discretion on the part of the insurer: that the insurer will credit interest to the daily and government interest accounts (DIA and GIA) in the policyholder's accumulation fund at rates that "will be established by us from time to time", subject to specified floor interest rates. There is no alleged breach of a contractual entitlement to a particular rate of interest. Instead, the Investment Spread Claim alleges that the insurer took an investment spread of 1.25% annually from inception of the policies until 2001 and asserts that the policies imply that any increases in the investment spreads shall be based only on increases in the insurer's cost of providing investment services. To the extent that a breach of contract claim is asserted, the breach is alleged to have occurred when, in 2001 the insurer, unilaterally and without any notice or disclosure to Flexiplus policyholders, increased the investment spread from 1.25% to 1.75% and made a further increase in 2014.

[105] The Investment Spread Claim fits within the *Richards* distinction. The Investment Spread Claim engages the issue of whether, as an implied term of the

policies, the insurer was precluded from setting interest rates (which were admittedly within its discretion) at levels that exceeded increases in their costs of providing investment services. The first time that occurred was in 2001, and the limitation period began to run in 2016, when the Repricing Report was first produced and when it was clear that its recommendations had been implemented.

[106] The appellants have framed this breach of contract claim both as a breach of the duty of good faith and fair dealing, and a breach of an implied term of the policies. In either characterization, the focus of the Investment Spread Claim is on Sun Life's decision in 2001 and then later in 2014 to increase its profits from the Flexiplus policies, reducing the amounts in the policyholders' accumulation funds. This is a case of discrete breaches alleged to have occurred in 2001 and 2014, causing continuing loss or damage to policyholders, not of a series of periodic breaches. Sun Life's decision to alter the investment spread in 2001 (and again in 2014) was, like the decision made by the defendant in *Karkhanechi*, "a single decision that would cause ongoing loss to the appellants": see *Karkhanechi*, at para. 34.

[107] Accordingly, I would not give effect to this argument.

(4) The Motion Judge's Application of Section 12 of the *CPA*

[108] The motion judge concluded that, if the claim were not out of time, she would refuse the proposed amendment to the FASOC and the common issues pursuant

to her discretion under s. 12 of the *CPA* to make any order considered appropriate respecting the conduct of a class proceeding "to ensure its fair and expeditious determination".

[109] The appellants contend that the motion judge erred when she concluded that the proposed amendments would fundamentally change the nature of the class proceeding and that the addition of the Investment Spread Claim would undermine judicial efficiency and access to justice. The appellants observe that the increases to the COI rate, administrative fee, and investment spread on Flexiplus policies all occurred around the same time and were charged to the same policyholders. They assert that the addition of the Investment Spread Claim would result in only a "modest" expansion of the factual matrix, such that any potential "small additional delay" would be diminished by the increased efficiency and access to justice realized by the determination of all claims in a single proceeding. The appellants dispute the motion judge's suggestion that it was incumbent on them to offer a "real reason" for the "lengthy delay between the commencement of the proceeding and the proposed amendment", asserting that they have diligently prosecuted the action and that most of the delay was in fact caused by Sun Life's initial motion to strike and subsequent resistance to certification.

[110] Because of my conclusion that the motion judge did not err in dismissing the appellants' motion on the basis that the Investment Spread Claim was a new claim

in respect of which the limitation period had expired, it is unnecessary to consider this ground of appeal.

[111] I would only observe that the motion judge considered the same factors under s. 12 that she had considered in refusing to add the Investment Spread Claim under r. 26.02: that there were no new facts in the sense that the investment spread issue was discoverable in 2016, that amending the pleadings would fundamentally change the action by expanding the factual matrix, and that there would be presumed prejudice to Sun Life from the delay. The motion judge also appears to have faulted the appellants for the lengthy delay between the commencement of the proceeding and the proposed amendments. If, however the Investment Spread Claim was not a new claim, or had not been discovered in 2016, but in 2022, as the appellants alleged, the factors relevant to the s. 12 exercise of discretion might well have aligned differently. The appellants could not have been faulted for delaying the amendments if the Investment Spread Claim was not discoverable until 2022. The assertion of the existing claims in respect of the insurer’s administration of policies in such circumstances might well have outweighed Sun Life’s interest in avoiding further delay, especially where the overall delay in the proceedings could hardly be attributed to the appellants alone.

E. CONCLUSION AND DISPOSITION

[112] For these reasons, I would dismiss the appeal. I would award costs to the respondent in the agreed amount of $50,000.

Released: November 21, 2024 “K.M.v.R.”

“K. van Rensburg J.A.”
“I agree. L.B. Roberts J.A.”
“I agree. S. Gomery J.A.”