COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Finance) v. Traders General Insurance (Aviva Traders), 2018 ONCA 565
DATE: 20180621
DOCKET: C62983

Feldman, MacPherson and Huscroft JJ.A.

BETWEEN

Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance, Pursuant to the provisions of the *Motor Vehicle Claims Act*

Plaintiff (Respondent)

and

Traders General Insurance operating as Aviva Traders

Defendant (Appellant)

Eric K. Grossman, for the appellant

Harold W. Sterling and Todd M. Wasserman, for the respondent

Heard: November 9, 2017

On appeal from the judgment of Justice Mary A. Sanderson of the Superior Court of Justice, dated October 27, 2016, with reasons reported at 2016 ONSC 6663.

Feldman J.A.:

[1] This action arose out of a catastrophic car accident involving a 1991 Hyundai owned by Peter Leonard. The accident occurred a couple of weeks after the appellant insurer purported to terminate its policy of insurance on the vehicle. The driver, a friend of Peter Leonard's son, was killed. The passenger, another friend, was seriously injured, claimed statutory accident benefits, and also sued

Peter Leonard for damages. The appellant insurer did not defend the action on behalf of Peter Leonard, because it had cancelled the owner's policy insuring the Hyundai for non-payment of premiums before the accident occurred.

[2] After Peter Leonard settled the action for $234,574.33, the passenger assigned the judgment to the respondent, representing the Motor Vehicle Accident Claims Fund. The Fund paid the amount of the judgment to the passenger and began to obtain re-imbursement from Peter Leonard. The Fund also sued the appellant insurer in this action for restitution based on unjust enrichment, claiming that the appellant insurer had not effectively terminated its policy, that the policy remained in force at the date of the accident and that it should have responded to the passenger's claim.

[3] The termination issue arose because the owner's policy was obtained not by Peter Leonard, but by Anne Leonard, his wife, and it was Anne Leonard who was named as the insured on the policy, although she did not own the vehicle. The appellant sent the termination notice to the named insured, Anne Leonard, and not to Peter Leonard, the owner of the vehicle.

[4] The trial judge found that the *Insurance Act*, R.S.O. 1990, c. I.8, required that the notice of termination be sent to the insured, that "the insured" was the owner of the vehicle, and, therefore, by sending the notice only to Anne Leonard,

the appellant did not effectively terminate the policy, which remained in force at the date of the accident.

[5] The trial judge also found that the respondent was entitled to bring a claim for restitution. As a result, there was no limitation issue.

[6] I agree with the trial judge that the respondent Fund is entitled to obtain reimbursement in this action from the appellant insurer for the amount of the judgment it paid to the injured passenger. For the reasons that follow, I would dismiss the appeal.

Background Facts

[7] In 1999, Anne Leonard purchased automobile insurance from GAN Canada Insurance. In the Leonard family, she was the one who dealt with financial matters, and, as a school bus driver, she could obtain a group rate on automobile insurance. Anne Leonard contacted GAN by telephone, and spoke with a representative, Brian Down, who issued her an “Owner’s Policy” for two vehicles. However, Anne Leonard’s husband, Peter Leonard, was actually the registered owner of the two insured vehicles.

[8] Neither Anne Leonard nor Mr. Down had any specific recollection of the call. Mr. Down maintained that he would have asked Anne Leonard whether she was the owner of the vehicle, and that she must have said she was the owner, or

else he would not have issued the policy. His notes, taken contemporaneously to the call, do not suggest that he asked Anne Leonard about ownership. They indicate that she provided driver's licence numbers and driving histories for herself, her husband and their son, as well as the VIN numbers for the vehicles and information about who would be driving each vehicle. GAN did not obtain a written application, as required by ss. 232(1) and 232(2) of the *Insurance Act*, from Anne Leonard.

[9] A few weeks later, Anne Leonard called and spoke to someone else at GAN, and substituted the 1991 Hyundai that was later in the accident for one of the originally-insured vehicles.

[10] Anne Leonard testified that she knew her husband was the owner of the vehicles, but that Mr. Down did not ask who the owner was, and that, had she been asked, she would have answered truthfully. GAN was later acquired by the appellant. The appellant renewed the policy, with Anne Leonard as the sole named insured.

[11] When the appellant was unable to withdraw premium amounts from Anne Leonard's bank account in September 2001, it sent a notice of termination for failure to pay premiums dated September 21, 2001 by registered mail addressed to Anne Leonard. Anne Leonard did not tell her husband that the car insurance

on his vehicles had been cancelled. The appellant later sent her a small refund of $12.94 by cheque dated October 10, 2011, which she cashed.

[12] On November 10, 2001, the Leonards' son, John, was out with friends. He allowed his friend, Mark Apollinaro, to drive his father's 1991 Hyundai. Unfortunately, Mr. Apollinaro lost control of the vehicle, causing a serious accident. Mr. Apollinaro was killed, while another friend, Dragan Bogdanovic, was severely injured in the accident. Mr. Bogdanovic, then a first-year University of Toronto student, did not have his own automobile insurance or access to family coverage. The only possibility for him to recover accident benefits was through insurance taken out on the Hyundai, or, if there was no coverage, through the Fund.

[13] Mr. Bogdanovic applied to the Fund for statutory accident benefits in December, 2001 and eventually received $1,680,304.57. The appellant's liability to reimburse the Fund for that amount is not a direct issue in this action.

[14] On February 12, 2002, Mr. Bogdanovic's counsel wrote to the appellant notifying it that he intended to start an action against Peter Leonard as owner of the Hyundai. The appellant replied on February 25, 2002 that the policy was no longer in force because, on September 21, 2001, it had sent Anne Leonard a notice of termination of the policy due to non-payment, and on October 10, 2001,

it had issued a refund cheque in the sum of $12.94 to Anne Leonard, which she cashed.

[15] Around March 6, 2002, when the adjusters for the Fund commenced a priority dispute, the appellant was advised that Mr. Bogdanovic had made a claim to the Fund for accident benefits. Around March 25, 2002, the appellant wrote to the Fund to advise that it was unable to accept Mr. Bogdanovic's claim, asserting that the policy for the Hyundai had been cancelled effective October, 2001.

[16] On June 20, 2002, Mr. Bogdanovic brought an action against Mr. Apollinaro's estate and Peter Leonard as owner of the Hyundai. The action was eventually resolved by the Fund, without any involvement or input from the appellant, on the basis that Mr. Bogdanovic was entitled to recover from the Estate of Mr. Apollinaro and from Peter Leonard. On March 27, 2003, judgment in the amount of $234,574.33 was granted to Mr. Bogdanovic.

[17] On April 28, 2003, Mr. Bogdanovic assigned the judgment in favour of the Fund. The assignment was required under s. 9 of the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M.41. By letter dated April 29, 2003, Mr. Bogdanovic applied to the Fund for payment of the judgment under s. 7 of the *Motor Vehicle Accident Claims Act*, and on or about May 23, 2003, the Fund paid him $234,574.33, as it was required to do under the Act. As of the date of trial, the

Fund had collected $47,500.00 from Peter Leonard as the registered owner of the Hyundai and as a judgment debtor.

[18] The Fund issued the statement of claim in this action on December 11, 2008, some 5.5 years after Mr. Bogdanovic obtained the judgment against Peter Leonard and assigned the judgment to it.

[19] The appellant defended the action, mainly by arguing that GAN was justified in failing to include Peter Leonard as a named insured on the policy and not sending him a notice of termination, because the GAN representative had asked Anne Leonard about ownership of the vehicles to be insured and she advised erroneously that she was the owner. Therefore, when GAN issued the policy, it was not required to verify that incorrect information.

[20] During the trial, the appellant sought an adjournment to interview other insurance providers so that it could introduce similar fact evidence, including underwriting files from three other insurance companies and searches from Autoplus and the Ministry of Transportation.

[21] This evidence indicated that Anne Leonard was the named insured on other motor vehicle policies obtained after the policy in issue in this action, but was not the owner of the insured vehicles. The appellant sought to show that this evidence demonstrated a pattern of behaviour from which the trial judge should

infer that Anne Leonard must have advised the GAN representative that she was the owner of the vehicles she was seeking to insure.

Findings made by the trial judge

[22] The trial judge accepted Anne Leonard's evidence that had she been asked by GAN, she would have told the representative that her husband was the owner of the vehicles to be insured, and based on the notes and records produced from GAN's files, the representative did not ask about ownership. The trial judge therefore found that Anne Leonard did not misrepresent that she was the owner of the vehicles, and that it was GAN that made the error by issuing the policy naming Anne Leonard as the insured.

[23] Section 232 of the *Insurance Act* requires an insurer to provide an application form to a proposed insured for completion. That form requires the name of the owner of the car. The trial judge found that no such form was sent to Anne Leonard and no written application was completed and submitted by her. The appellant objected that it was not given sufficient notice to retain all of its records from that time, but the trial judge rejected that objection, finding that the appellant knew of the accident within a few months, and was put on early notice that the Fund would be looking to it for reimbursement, on the basis that the policy had not been effectively cancelled before the accident. The appellant was

therefore on notice that it should retain any relevant documentation, if it existed, and should have done so.

[24] Based on the record, the trial judge concluded that GAN never sent Anne Leonard an application and that "it failed in its statutory obligation to obtain written information from her regarding the ownership of the vehicle to be insured".

[25] Statutory condition 11(1) of O. Reg. 777/93 provides the method for an insurer to terminate a policy, while s. 12(1) of the *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25, lists the circumstances that allow an insurer to do so, including non-payment of premiums. Statutory condition 11(1) provides:

> Subject to section 12 of the *Compulsory Automobile Insurance Act* and sections 237 and 238 of the *Insurance Act*, this contract may be terminated by the insurer giving to the insured fifteen days' notice of termination by registered mail or five days' written notice of termination personally delivered.

[26] At trial, the appellant conceded that if GAN knew or should have known that Peter Leonard was the registered owner of the vehicles insured under the policy, then the appellant was required to give him notice of termination of the policy. Having found that GAN should have known that Peter Leonard was the registered owner of the Hyundai, the trial judge found that under statutory condition 11(1), the appellant could not validly cancel the policy unless it gave Peter Leonard, as the insured under an owner's policy, 15 days' notice, which it

did not do. Therefore, the policy remained in effect at the date of the accident and should have responded to the claim made against Peter Leonard.

[27] Finally, the trial judge rejected the argument that the Fund was precluded from bringing an action for restitution by the *Motor Vehicle Accident Claims Fund Act*. She found that no provision of that Act, either expressly or by implication, removed the right of the Fund, like any other litigant, to bring an action in restitution, in this case against the appellant for its failure to pay under the policy. Further, it was just and equitable for the appellant to repay to the Fund the full amount it paid to Mr. Bogdanovic in respect of his judgment against Peter Leonard, particularly as the Fund undertook to the court that it would reimburse Peter Leonard for the amounts he paid to the Fund in satisfaction of the Bogdanovic judgment.

[28] As a result, the trial judge granted judgment to the Fund in the amount of $234,574.33 plus prejudgment interest from March 23, 2003.

[29] In supplementary reasons, the trial judge explained why she did not admit the proposed similar fact evidence regarding Anne Leonard obtaining other insurance policies in her name for vehicles registered to her husband.

[30] The proposed evidence was that, after the accident, other insurers had issued policies to Anne Leonard as the named insured for vehicles owned by

Peter Leonard. Although the appellant conceded that this evidence did not show a misrepresentation by Anne Leonard, the appellant sought to use it to ask the court to infer that, because Anne Leonard had been named as insured in subsequent owner's policies, she must have misrepresented to those insurers that she was the owner of the vehicles.

[31] The trial judge found that the probative value and relevance of the proposed evidence was limited and was outweighed by its prejudicial effect. The evidence was not specific enough to draw the inferences or conclusions the appellant sought, particularly as it was unclear what questions other insurers had asked Anne Leonard regarding ownership and what answers she had given. Further, as the request to obtain this evidence was made mid-trial, the trial judge concluded that it did not warrant any further delay in the proceeding.

Issues on the Appeal

[32] This appeal engages the following four issues:

1. Did the trial judge err in law by finding that the notice of termination was ineffective because it was not sent to the actual owner of the insured vehicle, when it was sent to the "named insured"?
2. Did the trial judge err by refusing to admit the proposed similar fact evidence?

3. Was the Fund required to bring its action under s. 258(1) of the *Insurance Act*, and if so, is the action-statute barred because it was brought years after the expiry of the one-year limitation period in s. 258(2)?
4. Did the trial judge err in law by granting the Fund judgment based on unjust enrichment, rather than requiring it to bring its claim under s. 258(1) of the *Insurance Act*?

Analysis

Issue 1: Did the trial judge err in law by finding that the notice of termination was ineffective because it was not sent to the actual owner of the insured vehicle, when it was sent to the "named insured"?

[33] The appellant's theory of the case at trial was that Anne Leonard misrepresented herself as the owner of the insured vehicle and that the insurers, GAN and later Traders, were entitled to rely on her misrepresentations. That theory failed because the trial judge found that Anne Leonard made no such misrepresentation, and that the GAN representative, Brian Down, never asked who the owner of the vehicle was. Nor did GAN obtain a written application for insurance, which would have asked Anne Leonard to identify the registered owner of the vehicle to be insured.

[34] On appeal, the appellant frames the argument on the basis that the trial judge erred by requiring insurers to investigate representations made by an

applicant for an owner's policy – in this case, Anne Leonard – to verify information regarding the ownership of vehicles insured by the policy.

[35] The appellant conceded at trial that if GAN, and later Traders, knew or should have known that Peter Leonard was the registered owner of the insured vehicle, then it was required to send the notice of termination to him. Because the trial judge found that Anne Leonard made no misrepresentation, that GAN should have known that Peter Leonard was the owner and that it issued the policy naming Anne Leonard as the insured in error, therefore the appellant's concession was determinative of the ineffectiveness of the termination. It is therefore unclear on what basis the appellant now seeks to argue on the appeal that neither it nor GAN had a duty to inquire into the accuracy of any ownership information provided by Anne Leonard.

[36] Subsection 233(3) of the *Insurance Act* governs when an automobile insurer may rely on a representation by an applicant for insurance. It provides:

> No statement of the applicant shall be used in defence of a claim under the contract unless it is contained in the signed written application therefor or, where no signed written application is made, in the purported application, or part thereof, that is embodied in, endorsed upon or attached to the policy.

[37] In this case, there was no written application. Therefore, there was no written or oral misrepresentation by Anne Leonard. There is therefore no basis for the appellant to raise misrepresentation as a ground of appeal, subject only to

the challenge to the evidentiary ruling on similar fact evidence that I address below.

[38] The appellant also submits that it was entitled to cancel the policy by sending the termination notice to Anne Leonard as the "named insured" under the policy. For this submission, the appellant refers to s. 236 of the *Insurance Act*, which prescribes that where an insurer does not intend to renew a policy, it must give the named insured 30 days' notice.

[39] However, in this case, the appellant purported to cancel an existing policy for non-payment of premiums, relying on statutory condition 11(1), which requires the notice to be given to "the insured". O. Reg. 777/93 provides for the statutory conditions that must be in all policies of automobile insurance. In that regulation, "insured" is defined as follows:

> In these statutory conditions, unless the context otherwise requires, the word "insured" means a person insured by this contract, whether named or not.

[40] The policy that the appellant purported to terminate is an owner's policy, which is defined in s. 1 of the *Insurance Act* as:

> A motor vehicle liability policy insuring a person in respect of the ownership, use or occupation of an automobile owned by that person and within the description or definition thereof in the policy. [Emphasis added.]

[41] It was never an issue in this case that before the purported termination, the policy was valid insurance that insured Peter Leonard as the owner of the insured vehicle.

[42] Therefore, because the policy at issue was valid, and because it was an owner's policy, the "insured" under that policy was Peter Leonard, the owner of the vehicles insured by the policy.

[43] To summarize, the only issue was whether the notice of termination had the effect of terminating that policy. The notice was only sent to Anne Leonard, who was not the insured for the 1991 Hyundai vehicle because she did not own it. Because the notice of termination was not sent to the insured, as required by statutory condition 11(1), it was not effective to terminate the policy, and the trial judge made no error in so holding.

Issue 2: Did the trial judge err by refusing to admit the proposed similar fact evidence?

[44] Whether to admit similar fact evidence is based on an analysis of its relevance and a balancing of its probative value against its prejudicial effect and is a discretionary decision, which is owed significant deference on appeal: *R. v. Harvey*, 57 O.R. (3d) 296, at paras. 43-44, aff'd 2002 SCC 80, [2002] 4 S.C.R. 311.

[45] Relevance is the most basic and important criterion for the admission of potentially prejudicial evidence such as similar fact evidence. The trial judge found the proposed evidence, which suggested that after obtaining the policy in this case other policies were issued to Anne Leonard for non-owned vehicles, to be minimally relevant to the factual issue she was asked to determine: whether Anne Leonard misrepresented to Brian Down that she was the owner of the vehicles to be insured. The trial judge similarly found it not to be probative of the question to be decided. She explained that when she first granted the appellant an adjournment mid-trial to investigate the issue, she believed the proposed evidence related to insurance applications that pre-dated the one in issue. However, they all occurred after the policy in this case. Most significantly, there was again no evidence of any misrepresentation by Anne Leonard. It follows that even had the trial judge admitted the evidence, she would not have found it helpful.

[46] Finally, the trial judge also included in her reasoning the fact that a further delay was required by the appellant to continue to investigate, and she exercised her judicial role to manage the process as part of her reason to refuse any further adjournment that would have been required in order to receive the proposed evidence.

[47] I see no basis for interfering with the trial judge's exercise of her discretion.

Issue 3: Was the Fund required to bring its action under s. 258(1) of the *Insurance Act*, and if so, is the action statute-barred because it was brought years after the expiry of the one-year limitation period in s. 258(2)?

[48] In oral argument, the appellant appropriately abandoned its initial reliance on the limitation period contained in statutory condition 9(4) in O. Reg. 777/93, which applies to claims for damage to the automobile.

[49] The appellant submits, however, that having obtained an assignment of the passenger's judgment against the owner of the vehicle, Peter Leonard, the Fund was obliged to bring its action against his insurer, Traders, under s. 258(1) of the *Insurance Act*, and further that the one-year limitation period provided in s. 258(2) bars any such claim.

[50] Subsection 258(1) provides:

> Any person who has a claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, even if such person is not a party to the contract, may, upon recovering a judgment therefor in any province or territory of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of the person's judgment and of any other judgments or claims against the insured covered by the contract and may, on the person's own behalf and on behalf of all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

[51] Prior to its repeal in 2004, s. 258(2) provided:

> No action shall be brought against an insurer under subsection (1) after the expiration of one year from the final determination of the action against the insured, including appeals if any.

[52] The appellant argues that Mr. Bogdanovic could have sued the appellant insurer under s. 258(1) and would have been bound by the limitation in s. 258(2). Because the Fund took an assignment of the Bogdanovic judgment, the appellant argues that the Fund stood in the shoes of the assignor and had to bring its action within the same time limit. It argues further that the Fund was therefore precluded from bringing its claim as an action for unjust enrichment.

[53] The validity of this submission turns on whether it was mandatory for the Fund to make its claim under s. 258(1). That question turns on whether the Crown on behalf of the Fund was bound by the provisions of the *Insurance Act* at the relevant time, or whether it had Crown immunity.

[54] Section 11 of the *Interpretation Act*, R.S.O. 1990, c. I.11, which was in force until July 2007, provided that specific words were required for an act to bind the Crown:

> No Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

[55] Section 71 of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, which replaced the *Interpretation Act*, continues this provision:

> No Act or regulation binds Her Majesty or affects Her Majesty's rights or prerogatives unless it expressly states an intention to do so.

[56] These provisions constitute the codification of the common law principle of Crown immunity. In *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2

S.C.R. 184, the Supreme Court stated at para. 20, following *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, that the equivalent section in the federal *Interpretation Act*, R.S.C. 1985, c. I‑21, is treated as a starting point for the immunity analysis, so that where there are no express words in an Act making it applicable to the Crown, "it … remains to be decided whether the Crown is bound by necessary implication."

[57] There was no express provision in the *Insurance Act* that bound the Crown in 2003, when Mr. Bogdanovic obtained judgment against Peter Leonard and assigned that judgment to the Fund, or in 2008, when this action was commenced.

[58] Nor was the Crown bound by necessary implication. The only reference to the Crown in the 2003 Act was s. 101(5), which describes when certain returns of insurers become a debt owing to the Crown. The Act was also amended in May 2008 to include in s. 1 the definition of "entity" as including the Crown. However, the references to "entity" in the Act are discrete and involve provisions dealing with corporate law rules and investment rules for various entities operating in the insurance context.

[59] There were also a number of sections that refer to the Fund, specifically: ss. 268(2), 268.0.1(2), and 267.12(2)(b). These bind the Fund specifically in the particular circumstances described in those sections. Paragraph 267.12(2)(b)

sets out how to calculate the insurance coverage entitlements of lessors. Subsections 268(2) and 268.0.1(2) both allow for recovery of statutory accident benefits from the Fund in certain circumstances. None of these provisions relate or apply to s. 258.

[60] Traders nonetheless relies on *Allstate v. Motor Vehicle Accident Claims Fund*, 2007 ONCA 61, 84 O.R. (3d) 401, to argue that the Fund is deemed to be an "insurer" for the purposes of the whole of the *Insurance Act*, and that therefore the Fund was obliged to bring its claim by relying on s. 258.

[61] Trader's reliance on *Allstate* is misplaced. In *Allstate*, this court held at para. 37 that, "[l]iterally, of course, the Fund is not an insurer." However, because s. 6 of the *Motor Vehicle Accident Claims Act* deems any reference to "insurer" in the Statutory Accident Benefits Schedule to be a reference to the Fund, the court concluded that Fund is considered an insurer for "the purpose of resolving disputes over the payment of accident benefits." The court did not conclude that the Fund is considered an insurer for the whole of the *Insurance Act*.

[62] As there was nothing in the *Insurance Act* in 2003 or 2008 that either expressly or by necessary implication made the Act bind the Crown, except in specific provisions, the Crown enjoys immunity and was not bound to use s. 258 of the Act to bring its claim against Traders.

[63] Having said that, the Crown was not precluded from bringing a claim under s. 258(1), and had it chosen to do so, it would have been obliged to bring its claim within the one-year limitation provided in s. 258(2)[1]. As Ruth Sullivan explains in *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada, 2014), this is the "benefit/burden" exception to Crown immunity: if the Crown chooses to take the benefit of a statutory provision, it must also accept any conditions that are imposed.

[64] In this case, the Fund did not pursue an action using s. 258(1): it did not invoke that provision, and therefore was not caught by the corresponding burden imposed by s. 258(2). Instead, the Fund brought its claim as an action for unjust enrichment. It was entitled to do so, as it was not bound either expressly or by necessary implication to assert a cause of action under s. 258(1).

Issue 4: Did the trial judge err in law by granting the Fund judgment based on unjust enrichment, rather than requiring it to bring its claim under s. 258(1) of the *Insurance Act*?

[65] The trial judge found that the appellant was unjustly enriched because its policy was in force at the time of the accident and it should have responded to the claim against Peter Leonard, its insured, and the Fund was correspondingly deprived by paying the judgment. This finding is not challenged on appeal.

[1] See *Grenier v. Canadian General Insurance Co.* (1999), 43 O.R. (3d) 715 (C.A.), for a discussion of when the limitation period commences under that section.

Traders does not suggest that there was any juristic reason for it not to pay if its cancellation of the policy was ineffective; as the trial judge pointed out, Traders was contractually obligated to pay the Bogdanovic judgment under Peter Leonard's policy. Further, the finding of unjust enrichment is supported by the record. Therefore, there is no reason to interfere with the trial judge's conclusion that Traders was unjustly enriched at the expense of the Fund.

[66] However, the appellant argued at trial, and argues again on appeal, that the trial judge was not entitled to exercise discretion to award a restitutionary remedy when a statutory remedy was available, relying on *Royal Insurance Co. of Canada v. Aguiar* (1984), 48 OR (2d) 705 (C.A.). This argument is ill-conceived for three reasons.

[67] First, while the effect of making a finding of unjust enrichment was to grant the Fund restitution from the appellant, in so doing, the trial judge was not exercising discretion to award an equitable remedy instead of a legal remedy for a cause of action where alternative remedies were available. She was granting the ordinary form of relief for a claim in unjust enrichment: Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, loose-leaf ed. (Toronto: Thomson Reuters Canada Limited, 2017), at pp. 3-7, 3-8 and 4-10; and *Kerr v. Baranow,* 2011 SCC 10, [2011] 1 S.C.R. 269, at paras. 46-47. Paragraph 1 of the

judgment makes no reference to restitution – it merely grants judgment in the amount of $234,574.33.

[68] In *Apotex Inc. v. Eli Lilly and Company*, 2015 ONCA 305, 334 O.A.C. 99, at paras. 52-54, I addressed the difference between "substantive" and "remedial" restitution: the former recognizes unjust enrichment as a stand-alone cause of action, while the latter occurs where a party seeks a disgorgement of profit as a remedy for an independent legal wrong, such as a tort or breach of contract. Although remedial restitution for an independent legal wrong is an exceptional remedy that should not be invoked unless other available remedies are inadequate (see *Apotex*, at para. 56), here the Fund did not plead an independent legal wrong and seek a restitutionary remedy in relation to that legal wrong. Rather, it pleaded substantive restitution as a stand-alone cause of action and the trial judge found that the Fund's claim in unjust enrichment was made out. In these circumstances, the trial judge did not err in restoring to the Fund the monetary amount that it was deprived of by Traders' corresponding unjust enrichment.

[69] Second, the appellant's first argument was that the Crown was obliged to bring its action using s. 258. That argument failed because of Crown immunity in respect of the *Insurance Act* (except for the specific sections already discussed). If the Crown were to be precluded from bringing its claim in unjust enrichment

because of the availability of a claim under s. 258, the effect would be to undermine the Crown's immunity from having to bring a claim under s. 258.

[70] Third, in *Aguiar*, similar to this case, an insurer (not the Fund) paid its insured under the uninsured motorist provision, then sought reimbursement from the uninsured driver. As a subrogated claim, the insurer's action was out of time and statute barred. The insurer then argued that it could claim restitution from the uninsured driver not only as a subrogated claim, but on the basis that its payment discharged the liability of the uninsured driver. On that formulation, the action was not statute barred. The court held that that argument could not succeed because in fact, the payment did not discharge that liability. However, contrary to the submission of the appellant, this court did not suggest that the appellant would not be able to bring its claim on the alternative basis and avoid the limitation problem, had the facts been found in its favour.

Conclusion

[71] I agree with the trial judge that the Fund was entitled to claim unjust enrichment rather than bring its claim under s. 258 of the *Insurance Act*.

[72] I would therefore dismiss the appeal with costs fixed in the amount of $30,000 inclusive of disbursements and HST.

Released: "K.F." June 21, 2018

"K. Feldman J.A."
"I agree. J.C. MacPherson J.A."
"I agree. Grant Huscroft J.A."