

2016 ONSC 1132
Ontario Superior Court of Justice

1588444 Ontario v. State Farm

2016 CarswellOnt 21804, 2016 ONSC 1132, 284 A.C.W.S. (3d) 53

**1588444 Ontario Ltd dba Alfredo's and Vincenzo Spartaco (Plaintiffs /
Respondents on Motion) and State Farm Fire and Casualty Company
(Defendants / Applicants on Motion)**

H.K. O'Connell J.

Heard: May 22, 2015
Judgment: February 12, 2016
Docket: Newmarket CV 07 08431100

Counsel: Gordon Marsden, for Plaintiffs, Responding Parties on Motion
Thomas J. Donnelly, for Defendants, Applicants on Motion

Subject: Civil Practice and Procedure; Insurance

Related Abridgment Classifications

Civil practice and procedure

X Pleadings

X.8 Amendment

X.8.d Grounds for refusal

X.8.d.ii Prejudice or injustice

Headnote

Civil practice and procedure --- Pleadings — Amendment — Grounds for refusal — Prejudice or injustice
Fire at insureds' restaurant was caused by arson, and insurer made insureds aware they were suspects — More than one year later, insureds brought action against insurer for coverage under policy — Insurer defended on basis of lack of cooperation — Insurer did not make decision regarding coverage for about four more years because it was waiting for documents — Several years later, insurer wished to amend statement of defence to allege arson on part of or at direction of insureds and fraud in submitting claim — Insurer brought motion for leave to amend statement of defence — Motion dismissed — Proposed amendment was complete withdrawal of insurer's original position of lack of cooperation of insureds, which insurer had relied upon for some 7.5 years but which was completely unfounded — Insurer now sought amendment without relying on any new evidence, and only after insured attempted to bring motion for summary judgment — Proposed amendment not only fundamentally altered structure of action, but in addition, did so with prejudice to insureds that was not compensable by costs or adjournment — Nowhere prior to application to amend was there ever direct allegation that insureds authored or conspired in act of arson — While delay in itself was not reason to refuse amendment, there was time when delay was so significant that it equated to showing of at least some prejudice, and insurer had no reasonable excuse to explain delay.

Table of Authorities

Cases considered by H.K. O'Connell J.:

Family Delicatessen Ltd. v. London (City) (2006), 2006 CarswellOnt 1021 (Ont. C.A.) — considered

Mazzuca v. Silvercreek Pharmacy Ltd. (2001), 2001 CarswellOnt 4133, 207 D.L.R. (4th) 492, 56 O.R. (3d) 768, 152 O.A.C. 201, 15 C.P.C. (5th) 235, [2001] O.T.C. 360 (Ont. C.A.) — considered

Ontario (Securities Commission) v. McLaughlin (2009), 2009 CarswellOnt 2694 (Ont. Div. Ct.) — considered

Whiten v. Pilot Insurance Co. (2002), 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, [2002] I.L.R. I-4048, 20 B.L.R. (3d) 165, 209 D.L.R. (4th) 257, 283 N.R. 1, 35 C.C.L.I. (3d) 1, 156 O.A.C. 201, [2002] 1 S.C.R. 595, 58 O.R. (3d) 480 (note), 2002 CSC 18 (S.C.C.) — considered

1632097 Ontario Ltd. v. 1338025 Ontario Inc. (2011), 2011 ONSC 5909, 2011 CarswellOnt 11513 (Ont. S.C.J.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 26 — considered

R. 26.01 — considered

R. 26.02(c) — considered

MOTION by insurer for leave to amend statement of defence.

H.K. O'Connell J.:

Overview

1 State Farm brought a motion dated January 21, 2015 seeking to amend its statement of defence pursuant to Rules 26,01 and 26.02(c). The amended Statement of Defence as proposed is found at exhibit I to the affidavit of Mr. Ian Gold, counsel for State Farm, dated January 21, 2015.

2 The motion was argued on May 21, 2015. The court reserved its decision.

3 On October 16, 2015 the court advised the parties that the relief sought was denied. These are the reasons for so ruling.

Particularization of Proposed Amended Defence

4 In a nutshell, State Farm seeks to allege that the fire that occasioned the loss was caused by arson, and that the arson was set by or at the direction of the Plaintiffs. Given that the insurance policy only covers accidental direct physical loss, and since the loss was not accidental, coverage is not available to the Plaintiffs.

5 State Farm further seeks to now allege in the Amended Statement of Defence that the proof of loss submitted to State Farm was inaccurate. As a consequence State Farm seeks to plead fraud, and alleges that the Plaintiffs wilfully proffered a false statement as to the loss occasioned.

6 Furthermore, State Farm now seeks to plead that arson and fraud otherwise make the Plaintiffs' claim unrecoverable at common law.

7 Finally citing Section I of the policy, coverage is sought to be denied for dishonest or criminal conduct.

8 I have not reproduced the exact wording of the proposed additions to the claim, and deletions, but for succinctness have simply highlighted the basis of the relief sought.

Position of State Farm

9 Mr. Donnelly for the moving party argues that there is no prejudice attributable to the proposed amended pleadings. Within 5 days of the fire State Farm wrote the Plaintiffs to say that they were suspects in the arson. Mr. Spartaco acknowledged receipt of the form days after the fire, in June 2006.

10 Five years later in 2011 State Farm had not taken a position on coverage because it was waiting for documents.

11 There is no evidence of any witnesses now being unavailable or documents being lost, There is no prejudice shown and if there is any, it rests at the feet of the Plaintiffs.

12 On June 04, 2006 there was a fire at the restaurant. There is agreement between the parties that the fire was caused by arson.

13 The police report dated June 05, 2006 notes damage to the window of the premises and the presence of accelerants throughout the banquet hall, as well as a pail of gasoline with electrical wiring stuck inside of it.

14 In the supplementary occurrence report, dated June 07, 2007, accelerants are noted to be present throughout the hall, as well as jugs with wicks, The jugs contained combustible liquid.

15 An engineer identified the cause of the fire to be arson, in his report dated July 28, 2006.¹ In the Fire Investigation Report, authored by the office of the Fire Marshall, arson is attributed to be the cause.²

16 On June 09, 2006 a “reservation of rights letter” was sent to Mr. Spartaco. This is, counsel advised, a standard form letter where there are concerns about coverage.

17 On June 09, 2006 Mr. Spartaco signed the ‘Request for Claim Service and Non Waiver of Rights.’

18 Mr. Donnelly argues that these two documents within days of the fire, clearly put Mr. Spartaco on notice that he was a suspect.

19 Mr. Spartaco could have investigated the cause of the fire at that time, but he chose not to. Any decision not to investigate the cause and origin of the fire had nothing to do with the pleadings, argues Mr. Donnelly. Mr. Spartaco could have investigated when the scene was fresh, The fact that the Statement of Claim was issued a year later is of no moment to the now proposed amendment.

20 In April 2007 a proof of loss was submitted³. An examination under oath of Mr. Spartaco, pursuant to the policy, took place in May 2007, The statement of claim was issued on June 04, 2007. The claim was served on July 27, 2007.

21 The Statement of Defence was issued on September 14, 2007. Paragraph 9 of State Farm’s Defence pleads that the fire was intentional, incendiary, and a consequence of placements of accelerants, Paragraph 12 of the defence pleads that the Plaintiffs have not co-operated as to the cause of loss or quantification of damages.

22 Around December 2013 the Plaintiffs will argue that State Farm had all the required information necessary to move for an amendment. From the time of the pleading in 2007 State Farm made it clear it was investigating. It was not until December 2013 that the Plaintiffs say that they have provided all they now have, including answers to undertakings.

23 Mr. Donnelly concedes delay between December 2013 and January 2015. However during that time frame there was litigation activity.

24 In any event delay is not a ground to disallow a Rule 26 amendment but rather the test is whether any prejudice can be compensated by costs or an adjournment.

25 Referencing the affidavit of Mr. Gold, State Farm notes a letter sent by State Farm to the Plaintiffs on March 17, 2008 seeking documents and inspection of the property.

26 Furthermore requests to schedule discoveries were adjourned at the request of the Plaintiffs, Discoveries did occur in May 2011, after an administrative dismissal was set aside on consent

27 On March 21, 2013 the Plaintiffs brought a refusals motion. State Farm subsequently brought a motion compelling answers to undertakings. Justice Mullins heard the refusals motion.⁴

28 Subsequent to the discoveries, several letters were sent to Plaintiffs’ counsel, but went unanswered, in relation to the settling of an order of Mullins J.

- 29 A leave to appeal application was brought in relation to the decision of Mullins J., by State Farm.
- 30 Corkery J. presided at that application. He ordered a timetable for the hearing of the motion to amend the statement of defence, which was on consent.
- 31 Because the summary judgment motion was set down without notice to State Farm, according to State Farm, the date for the hearing of the summary judgment motion was adjourned, pending outcome of the motion to amend the defence pleadings. Justice Corkery adjourned the date for hearing of the summary judgment motion to the Central East trial sittings in May 2016.
- 32 Mr. Donnelly reminds that Rule 26 is mandatory unless prejudice results that is not compensable by costs or adjournment. The rule contemplates amendments at any stage of an action, including at trial, and even in some cases after trial.
- 33 Delay is simply irrelevant, argues counsel, Additionally any concern about bad faith is an issue that can be raised in the pleadings and is an issue for the trial judge.
- 34 Alleging arson against an insured is a precarious move, If done too early, bad faith becomes an issue. If after a full and careful investigation arson becomes an option in a pleading, then the insurer is subject to the argument of bad faith, by waiting so long to advance it, In any event that is a matter for trial.
- 35 In respect of prejudice the Defendant cites paragraph 62 and 63 of the Plaintiffs' factum. The allegation that the proposed amendment has prejudiced the Plaintiffs is simply an 'argument of convenience'. It is the Plaintiff that controls the issuance of its claim. The Plaintiff did not serve it until July 27, 2007, more than a year after the fire. Any prejudice occasioned by the Plaintiff rests therefore at the feet of the Plaintiff.
- 36 The fact that the Plaintiffs could not retain a private investigator is simply false. It has nothing to do with its proposed pleading. The Plaintiffs had the time to investigate the fire and were on notice that the Plaintiffs were considered suspects. September 2013 and October 2013.
- 37 There is simply no causal connection between the failure to investigate the arson and the pleading of the defence.
- 38 In addition the position of the Defendant as to the Plaintiff's culpability was re-iterated at the discovery, as is set out in the supplementary affidavit of Mr. Gold dated May 19, 2015.
- 39 Mr. Donnelly cited the decision in *Mazzuca v. Silvercreek Pharmacy Ltd.*, [2001 CarswellOnt 4133](#) (Ont. C.A.). The Defendant argues that *Silvercreek* applies to our case, given the lag in bringing the action until a year after the loss, There is simply no inability of the Plaintiffs in respect of their capacity to investigate the loss.
- 40 Finally there is no evidence of prejudice in any event. In the motion record of the Plaintiffs, in the affidavit of Mr. Romain, counsel notes the need to now locate possible witnesses who are listed by name. There is however no evidence of any of these witnesses being unavailable, and as such no evidence of prejudice.
- 41 The court should also consider public policy, State Farm reminds that this is a case of alleged insurance fraud and arson. If the insurer is denied its amendment, there is a significant risk that State Farm would have to pay out on a fraudulent claim. Absent. prejudice this is a case that should be decided by the court at trial, Failure to prove arson at trial, allows the Plaintiff to argue bad faith at trial.
- 42 In summary Mr. Donnelly reminds that Rule 26 is mandatory, unless prejudice cannot be compensable by costs or an adjournment. The remedy is available before or at trial, and even after trial.
- 43 Reference was made to a decision of Master Muir, [1632097 Ontario Ltd. v. 1338025 Ontario Inc.](#),⁵ to argue that the reasoning in that case applies to the case at bar.
- 44 In our case no trial has been scheduled yet, nor is there any evidence of tactical maneuvering by the Defendant, The Plaintiffs knew within days of the fire that they were suspects; they continued to know in 2011 that they were suspects yet took no steps to investigate; the claim was not served until 14 months after the fire; and prejudice has to relate to the proposed amendment.

Position of the Plaintiffs

45 The Plaintiffs' position starts with the assertion that the chronology of events is not quite what the Defendants paint it to be.

46 As of May 2015 we are now nearing 9 year mark since the loss. The original Statement of Defence pleads one defence, a lack of co-operation. State Farm pleads a damages and documents case. Now they want to assert an entirely new defence and want to change the complete structure of the action.

47 This prejudices the Plaintiff, There is in this case a duty of good faith, indeed an utmost duty of good faith.

48 The amendment is simply a tactical move which was conceived to defeat a summary judgment motion. State Farm is essentially conceding the summary judgment motion and this proposed amendment is meant to defeat that eventuality.

49 The letter to Mr. Spartaco on June 09, 2006 deals only with whether the loss was accidental in nature, There is nothing to put Mr. Spartaco on notice that he is an arsonist, a suspected arsonist or a collaborator with an arsonist.

50 On June 13, 2006 the Plaintiffs provided an expansive authorization to State Farm, a mere 7 days after the fire. The contents of that authorization were read out to the court and are found at Tab I of the Respondent's Motion Record. It effectively allowed State Farm to access anything that they wanted in their investigation.

51 The Plaintiffs were clearly on the understanding that State Farm was investigating the fire.

52 The Plaintiffs clearly believed State Farm was investigating. Mr. Spartaco also provided a 78 page statement to State Farm, which is found at Tab 10 of the Respondent's motion record. The statement was videotaped and transcribed. It is comprehensive as it relates to the cause of the fire and potential suspects, Mr. Spartaco also provided an Equifax report on his credit and cell phone records.

53 It is submitted that Mr. Spartaco fully co-operated with State Farm after receipt of the Reservation of Rights Letter.

54 On January 11, 2007 State Farm made a good faith payment as Mr. Spartaco was cooperating, State Farm noted in that letter that it required a duly commissioned proof of loss. They get it. They request his financial records. Mr. Spartaco had already consented to State Farm interviewing his accountant, Records that he had were destroyed in the fire. His computer was already with State Farm, having been salvaged from the fire scene. Simply put, Mr. Spartaco gave over what he had.

55 Mr. Spartaco then attended an examination under oath on May 25, 2007, His commitment to co-operate was continuing, The Statement of Claim was then issued a few months later, given the lack of satisfaction on his Claim, followed by the Statement of Defence, where State Farm did plead an intentional fire, but they do not allege complicity by Mr. Spartaco.

56 They do allege however that the Plaintiffs did fail to co-operate with cause of loss and quantification of damages.

57 This Statement of Defence informs the whole action. Examinations for discovery were limited to what was plead. Yet the Defendant brought motions to seek further examination on matters not plead, for which Justice Mullins ruled that questions related to what was not plead did not have to be answered.

58 At the examination for discovery, State Farm confirmed that it was not alleging that the Plaintiffs caused the fire.

59 In response to a question from the examination for discovery of Mr. Spartaco in May 2011, State Farm advised in a letter dated September 13, 2013 that it was not aware of any failure on behalf of the Plaintiffs to answer the question as to whether the insured failed to comply with any other terms of the policy. In addition State Farm advised it was not waiting for any further information at this time given the answer by the Plaintiff on discovery.⁶

60 Given no issue with co-operation with State Farm counsel for the Plaintiffs wrote a letter to State Farm on March 20, 2014 noting that they were bringing a motion for summary judgment.

61 State Farm responded on April 01, 2014 noting that they disagreed with the position of the Plaintiffs assessment of the case. State Farm suggested that the Plaintiffs bring their motion.

62 As a consequence the motion for summary judgment was brought. On December 19, 2014, for the first time, the nature of the proposed amendment sought by State Farm was revealed. There was an inkling of a possible amendment but the nature of the amendment was not known until the court date of December 19, 2014 which was a date for arguing of the summary judgment motion.

63 The amended Statement of Defence, issued on January 21, 2015 withdraws the assertion of a lack of co-operation with State Farm. The original pleading of lack of co-operation is not even pled in the alternative, notes Mr. Marsden.

64 Now State Farm wants to plead that the Plaintiffs set the fire. But, argue the Plaintiffs, nothing has changed. In Mr. Gold's affidavit he relies upon advice received from a colleague that the Plaintiffs have no further documentation regarding the loss, something that they have known for years, says Mr. Marsden.

65 There is nothing in the affidavit of Mr. Gold in support of the motion to amend the Statement of Defence that is new.

66 Mr. Marsden argues that this constitutes a "marked deficiency" as there is no new evidence of the basis of State Farm's attempted change in its defence.

67 Also State Farm does not set out any demonstration of why there is no prejudice that cannot be compensated by costs or an adjournment. There is simply nothing in the affidavit of Mr. Gold to meet this hurdle. The onus is on State Farm to meet this threshold.

68 Several of the possible witnesses were not interviewed by State Farm, although State Farm knew of them. Only some were.

69 State Farm has failed to set out why there is no prejudice. However the Plaintiffs maintain that there is actual prejudice, The Plaintiffs have lost the opportunity to fully investigate the loss, because they were co-operating with State Farm. Now with this proposed amendment, 8 years after the service of the original Statement of Defence, the Plaintiff cannot adequately meet the case.

70 Things have been lost. Reference is made to Paragraph 63 of the factum of the Plaintiffs as to why prejudice is clear.

71 There are now lacunas in the investigation, all not to be visited upon the Plaintiffs given the history of this litigation. With the passage of time the delay has compromised any real ability to piece together what the Defendant should have done.

72 Mr. Marsden cites the criminal context wherein the passage of time leads to a presumption of prejudice. In the case at bar, 8 years since the issuance of the claim is a significant delay.

73 Counsel referenced the decision in *Family Delicatessen Ltd. v. London (City)*, 2006 CarswellOnt 1021 (Ont. C.A.) and notes that delay can lead to presumed prejudice, when it is lengthy and unexplained. In the case at bar, the delay is long; the justification for it is absent; and there is no adequate explanation for it.

74 In *Ontario (Securities Commission) v. McLaughlin* [2009 CarswellOnt 2694 (Ont. Div. Ct.)], the court confirmed the principle that where there is a lengthy delay there must be some explanation for the delay⁷. In the case at bar there is no recently discovered evidence to explain the delay.

75 When the duty of utmost good faith is referenced, in the case at bar, the duty is clearly present. Eight years prior to seeking the amendment is simply not reasonable. This is a piece of mind insurance contract that provides for payment upon a loss such as this.

76 In addition to actual prejudice prejudice can be presumed. All procedural delays were really occasioned because of the failure to plead arson.

Reply of State Farm

77 There is no burden on his client to prove no prejudice, but rather that there is no prejudice arising from the pleading. His client could only plead once the statement of claim was issued.

78 Any prejudice is not attributable to the pleading but to the Plaintiff's own failure not to investigate.

79 The history of this case has led to delay, but it is unfortunate and inadvertent. There is no evidence of abuse of process. Indeed that is a matter for trial

Decision

80 Rule 26.01 states:

On motion at any stage of an action the 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.

81 The history of the claim for coverage and the litigation that ensued is a long one. I will set out some of that history now, as it informs my view on this matter.

82 On June 05, 2006, a fire, incendiary in nature demolished the business of the Plaintiff, There is no issue between the parties, based on the evidence, that the establishment was destroyed by the wilful act of arson. Indeed the 2 occurrence reports prepared by the police service that investigated the fire, dated June 05, 2006 and June 07, 2006 respectively make this obvious.

83 On June 09, 2006 State Farm wrote to the Plaintiff corporation, of which Mr. Spartaco was the directing mind, to advise that it was not waiving any of its rights under the policy, as there was a question at that time as to whether the cause of the fire was accidental in nature.

84 On the same date Mr. Spartaco gave his consent to State Farm to *investigate, negotiate, settle, deny, or defend any claim arising out of the reported event*, Mr. Spartaco agreed that the company was not by those possible actions, waiving any of its rights under the policy. There is no issue that the signature on the document is that of Mr. Spartaco.

85 On June 13, 2006 Mr. Spartaco signed an authorization releasing to State Farm a plethora of information that State Farm requested, The authorization appears to be a standard form document of State Farm.

86 State Farm interviewed the Plaintiff Mr. Spartaco and two other members of his family on June 13 and 22nd, 2006 respectively. State Farm also interviewed Mr. Spartaco's accountant on August 08, 2006, Mr. Spartaco's interview consumes 78 pages of transcript, single spaced.

87 On July 28, 2006, State Farm was provided with a report, that it commissioned, by Mr. Matthew Wood, an engineer, which attributed the cause of the fire to arson.

88 Finally the Office of the Fire Marshall provided its findings, to like effect The Fire Marshall's report is not dated, but was printed on July 18, 2007.

89 Clearly State Farm was aware that this fire was occasioned by a wilful act of arson within a few days of the fire. Clearly State Farm undertook an investigation. Clearly Mr. Spartaco co-operated.

90 On June 04, 2007 the Statement of Claim was issued by the Plaintiffs. It was served on the Defendant on July 27, 2007. The Statement of Claim was premised on State Farm's alleged wrongful and unreasonable denial of payments pursuant to the policy that it had with the Plaintiffs, The claim states that State Farm wrongfully failed to indemnify the Plaintiffs based on the contract of insurance.

91 On September 14, 2007 State Farm had its Statement of Defence issued. In that defence State Farm pleads that the fire was purposefully set, that the Defendant has been investigating the matter along with the police, the Fire Marshall's office, and the fire department.

92 State Farm alleges that the Plaintiffs failed to provide sufficient or any supporting damage documentation and that they have failed to co-operate in the Defendant's investigation as to the cause of the loss and the quantum of damages.⁸

93 State Farm also interviewed three other persons between June 12 and August 16, 2007.

94 State Farm requested Mr. Spartaco's proof of loss claim in letters dated July 03, 2006; January 03, 2007; February 06, 2007 and March 05, 2007.

95 On January 11, 2007 State Farm noted 3 items that they still required, inclusive of a commissioned or notarized proof of loss, a copy of Mr. Spartaco's business financial records for the 12 months prior to the loss; and particulars of the alarm company that serviced his business. State Farm also noted it was continuing to handle Mr. Spartaco's claim under the terms of the Non Waiver of Rights Agreement dated June 06, 2006.

96 In the same letter State Farm notes that it is providing another \$10,000.00 to the Plaintiffs, bringing the total to \$35,000.00 that it has provided "in good faith pending the completion of *our investigation*." (italics added by court)

97 On March 06, 2007 counsel for State Farm, wrote to counsel for the Plaintiffs requesting the Statement of loss and noting that as the examination of Mr. Spartaco was set to proceed on March 12, 2007, failure to produce the proof of loss would mean that the examination would have to be re scheduled.

98 On March 17, 2007 counsel for State Farm requested the further opportunity to inspect the location of the loss and the contents that were said to have been damaged. State Farm also requested various pieces of disclosure from the Plaintiffs.

99 The statement of loss was provided to State Farm and is dated March 28, 2007. The examination of Mr. Spartaco was held on May 25, 2007.

100 Between the issuance of the statement and service of the Statement of Defence in September 2007, there was to be a lengthy passage of time before the proposed Amended Statement of Defence met its date of service on the Plaintiffs. The motion was filed at Newmarket on January 27, 2015.

101 In the interval between late 2007 and December 2015 when the motion seeking to amend the claim was served the litigation proceeded with examination for discovery of Mr. Spartaco on May 18, 2011, and a subsequent motion before Mullins J. to deal with refusals and undertakings. Justice Mullins crafted two endorsements dated September 20, 2011 and October 20, 2011.⁹

102 The examination of State Farm's representative Ms. Debbie Wong was conducted on May 17, 2011. The examinations were conducted within the time frame agreed to by counsel.

103 On March 20, 2014 Mr. Will wrote to Mr. Gold, advising that he was retained as trial counsel and would be co-counsel with Mr. Romain for the Plaintiffs. In that letter, Mr. Will noted his surprise that the matter had not been dealt with given that the fire occurred in June 2006.

104 More importantly, Mr. Will advised that his client would be bringing a motion for summary judgment and articulated in a comprehensive manner, his reasons why. The letter is to say the least, thorough, pointed, and a complete recitation of his client's position with reference to the leading case and why his client meets the standard for summary judgment.

105 Counsel noted the delay in the action, and cited case law in his letter where the courts were critical of an insurer's delay in dealing with the claim of an insured.

106 On April 01, 2014 counsel Mr. Gold for State Farm responded to say that he disagreed with the Plaintiff's assessment of the matter, He noted that as Mr. Romain had indicated his first available dates to deal with the Defendant's motion for leave to appeal the decision of Justice Mullins, were in December 2014, that he would await dates for the hearing of the Plaintiff's summary judgment motion.

107 The Plaintiffs had their summary judgment motion returnable on December 19, 2014.

108 On December 12, 2014 Mr. Gold wrote to Mr. Will to advise that all parties agreed that the summary judgment motion would not proceed on December 19, 2014. The setting of a new date for that motion would be discussed on December 19, 2014, when the matter was otherwise before the court.

109 Both the application for leave to appeal the order of Mullins J. and the summary judgment motion were before Corkery J. on December 19, 2014.

110 Corkery J. adjourned the summary judgment motion to the May 2015 trial sittings, and noted an estimate of one day for the hearing of that motion, In relation to the application for leave to appeal from the decision of Mullins J. of September 2013, that issue was dealt with on consent, in a timetable which noted that the Defendant was to serve its proposed amended Statement of Defence by January 21, 2015, and a response time for reply was agreed to.

111 In the event the motion to amend the Statement of Defence was not brought or failed, then a time table was set for action to be taken on the summary judgment motion.

112 As noted I heard the motion to amend the Statement of Defence on May 15, 2015, From the service of the Statement of Defence issued on September 14, 2007 until January 21, 2015 when the Amended Statement of Defence was issued, 7 years and 4 months had passed.

113 Counsel for the Defendant first put counsel for the Plaintiffs on notice of a pending motion seeking leave to amend the originating Statement of Defence on December 19, 2014, the very same date that the summary judgment motion had been scheduled for.¹⁰

114 I find that the proposed amendment is a complete withdrawal of the Defendant's original position, which was a lack of co-operation of the Plaintiffs. That defence was relied upon by State Farm for some 7.5 years.

115 State Farm now seeks an amendment without relying upon, I find, any new evidence, I agree with the Plaintiffs that this not only fundamentally alters "the structure of the action" but in addition does so with prejudice to the Plaintiffs that is not compensable by costs or an adjournment I am cognizant that the action has not yet been set down for trial.

116 I find that State Farm's original position, now so fundamentally sought to be changed, that the Plaintiffs did not co-operate with the investigation, to be completely unfounded.

117 The Plaintiffs did co-operate to the extent that they could be expected to. Mr. Spartaco the directing mind of the Corporate Defendant, submitted to a lengthy interview, duly recorded. His family members involved in the business likewise were interviewed. Indeed State Farm interviewed three other persons, but did not seek out to interview other persons whose names were provided.

118 By State Farm's own admission it was *investigating* the fire. All parties knew from the 'get go' that the business that was insured was intentionally destroyed by an act or acts of arson. Nowhere, prior to the application to amend the Statement of Defence, was there ever a direct allegation that Mr. Spartaco authored, or conspired in an act of arson.

119 Mr. Spartaco was lead to believe that State Farm was investigating the fire. Indeed as the evidence on the motion reveals, State Farm *was investigating* the fire. This is manifest in its letter to Mr. Spartaco dated June 09, 2006 where it stated it was investigating the cause of the loss etc.

120 Mr. Spartaco acknowledged State Farm's position on the same date where he signed the Request for Claim Service and Non Waiver of Rights form, which notes that State Farm is reserving its right to investigate the loss.

121 This understanding was re-iterated in State Farm's letter of January 11, 2007 where it extended a good faith payment and noted that it was *investigating* the fire.

122 Clearly that is what State Farm was doing, Clearly Mr. Spartaco on the evidence was co-operating with State Farm, Nothing new arose to suggest that Mr. Spartaco was complicit in the arson, save and except the decision to seek the amendment which came after the notice to seek summary judgment on behalf of the Plaintiffs, and the revelation to the Plaintiffs on the date that the Plaintiffs had originally sought to have the summary judgment heard, that the Defendant were seeking leave to amend their claim.

123 It is also clear that Mr. Spartaco provided all that he could, as requested by the Defendant There may have been some lag in some of the production, but it clearly does not connote to a failure to provide what he was requested to provide, or was otherwise obliged to provide.

124 I agree with the Plaintiffs that even at the examination for discovery of Mr. Spartaco, the reason asserted for not paying out the claim was non-compliance for failing to provide documentation.

125 Counsel for State Farm attempted to examine Mr. Spartaco in May 2011 during his discovery, to suggest he had set the fire, or had it set, but that line of questioning was quite properly objected to, as for the previous 5 years, that allegation was never levelled.

126 Not content with the objections to the questions, State Farm moved before Mullins J. to compel the answer, but Mullins J, limited the further examination of Mr. Spartaco to damages and to compel answers to undertakings. Mullins J. also

ordered costs of \$1,000.00 payable to the Plaintiffs for such re-attendance.

127 On September 13, 2013, State Farm confirmed that it had all the necessary available documents from the Plaintiffs, and that it was not aware of any non-compliance with the policy.

128 To my eye the prejudice that would be occasioned on the Plaintiffs is clear. First the delay would become not only longer in getting this matter to trial, but would effectively re-start the process given the entirely new proposed pleadings and the need to undergo new discoveries.

129 In addition as I noted above it is entirely unrealistic to now expect the Plaintiffs to seek out witnesses, (potential as they are) at this stage and attempt to either get co-operation or evidence after this significant lag in time.

130 I hasten to add that State Farm did investigate as they said they were going to do, but didn't completely investigate as they could have within a timely period. Delay in this case involving a known arson, within days of the arson, is particularly germane to the issue of prejudice and would visit, I find, a complete injustice on the Plaintiffs if the amendment were to be allowed.

131 Prejudice, where as here, is fed by the actions of the Defendant, with the passage of time and the failure to do its own diligence in an investigation, cannot be rectified by costs and most certainly not an adjournment. Mr. Spartaco has been waiting some 9 years between the time of the fire that destroyed his business to the date of hearing of the motion, to get justice in his case.

132 I find he cannot do so if I were to allow the amendment as proposed given the clear non-compensable prejudice that would occur.

133 Had State Farm originally plead that the Plaintiff set the fire, or if State Farm had directly pointed the litigation linger at Mr. Spartaco, or if Mr. Spartaco had not co-operated, the prejudice could have been attenuated.

134 I completely agree with the Plaintiffs that had Mr. Spartaco been accused of arson in the pleadings, a pleading that was open to the Defendants, there was much he could have done to counter the claim. I adopt what the Plaintiff advances under the rubric of prejudice in its factum in this regard.

135 I recognize that delay in and of itself is not a reason to refuse an amendment, there is a time when the delay is so significant that it equates to a showing of at least some prejudice.¹¹ I find that State Farm has no reasonable excuse to explain its delay, I therefore find a showing of presumptive prejudice, I find that some prejudice is presumed given the failure of the Defendant to demonstrate that there is no prejudice occasioned by the delay.

136 Furthermore the courts have become increasingly concerned about delay in the civil justice process wrought by delay that is not justifiable.

137 In the context of insurance law and the duty of utmost good faith, I find in this case that State Farm has waited much too long to pull the trigger on an amendment to the claim which not only seeks to add a defence but which effectively attempts to retract a claim that was in the works for 8 years.

138 I find that State Farm has no reasonable excuse to explain its delay, I therefore find a showing of presumptive prejudice, I find that some prejudice is presumed given the failure of the Defendant to demonstrate that there is no prejudice occasioned by the delay.

139 Furthermore, it is curious at best, and scandalous at worst, that State Farm only moved to amend after it was put on notice that the Plaintiffs were seeking summary judgment. Indeed other than advising the Plaintiffs by letter dated April 01, 2014 that counsel for State Farm disagreed with counsel for the Plaintiffs on the merits of a summary judgment motion, State Farm did not advise the Plaintiffs until the return date of the summary judgment motion on December 19, 2014 that it was bringing its motion for leave to amend.

140 It certainly appears to me that State Farm has acted tactically, in its timing and decision to seek to amend its claim. Although I need not find it did so in bad faith, I do find that there is more than an inkling of a failure of State Farm to act with utmost good faith under the evidentiary framework of this case.

141 Having made this comment, I clearly reject the argument of State Farm, that there is a public policy concern in this

case. Counsel cited *Whiten v. Pilot Insurance Co.*¹², and argued that an insured is effectively damned if it alleges arson too quickly but also damned if it waits, because it risks the type of argument made by the Plaintiffs in *Whiten*.

142 It is of note that in *Whiten* there was no evidence of arson. Rather *Pilot* plead arson without any evidentiary foundation to suggest that the Whittens were arsonists. Punitive damages were re-instated by the Supreme Court to sanction that conduct and recognize the fact that the insured breached its duty of utmost good faith.

143 In our case arson was always known to be the cause. That is beyond dispute. But in our case it took in excess of 8 years to plead that arson was perpetuated by or at the behest of the Plaintiffs. This is not a case where public policy has any application. Rather it is a case where the real prospect of the failure to act in the utmost good faith casts a significant shadow upon the very reason that the amendment is sought.

144 Applying Rule 26, I find the amendment proposed is prejudicial to the Plaintiffs. That prejudice is presumed to some extent given the delay. It is manifestly elevated to real prejudice given my acceptance of the Plaintiff’s argument on prejudice.

145 The prejudice to the Plaintiffs cannot be compensated by costs or an adjournment, They are simply not the panacea for protection from the prejudice. Nor would an adjournment or costs guard against the failure of State Farm to act in utmost good faith.

146 The amendment proposed was thus denied.

Motion dismissed.

Footnotes	
1	This report was commissioned by the Defendant.
2	Although the report in the record is not dated, it appears it was printed off on July 18, 2007.
3	The Plaintiffs loss is said to be \$295,317.00 for loss of assets and \$64, 962.00 for loss of income.
4	September 2013 and October 2013.
5	2011 ONSC 5909 (Ont. S.C.J.)
6	See Motion Record of the Respondent, Affidavit of Adam Romain, at Tab 1, paragraph 56.
7	In that case the delay was 22 years.
8	My recitation of the contents of the statement of defence is limited to the focus of the defences that State Farm was relying upon.
9	Mullins J. ordered Mr. Spartaco to answer a question In relation to employment earnings of members of the Spartaco family in relation to work elsewhere than at the locale of the fire. All other requests for compliance with refusals were dismissed by the Court.
10	I am aware that the Defendant says it never agreed to the December 19, 2014 date for the summary judgment motion, but the Defendant was well aware that December 2014 was the time frame for availability for the hearing of the motion, In any event, the fact remains that it was not until the motion date for summary judgment that State Farm advised of its intention of bringing a motion to amend, which as noted was filed on January 27, 2015. That motion had a return date in February 2015 but the motions judge of the day adjourned it to the next long motions date, it would appear, which was May 2015.
11	In <i>Family Delicatessen</i> , the Court of Appeal stated: “While delay is not in and of itself a basis for refusing an amendment, there must come a point where the delay is so long and the justification so inadequate that some prejudice to the defendants will be presumed absent a demonstration by the party seeking the amendment that there is in fact no prejudice despite the lengthy and unexplained delay.”

