


Updates & Reforms

This edition of the *Legal Observer* is all about updates and reforms. In our last issue we told you about a recent decision involving title fraud. It was a watershed in that the judge ruled in favour of the homeowner, whose home had been fraudulently stolen and mortgaged, rather than the mortgagee. Since then, the Ontario Court of Appeal has had the opportunity to weigh in on this issue.

In the fall *Observer*, we recounted the epic battle of small town insurance agent, Reg Ward, against Manulife Insurance. Despite the decisive victory, in favour of Reg Ward, he has had to continue to fight for what is owing to him. In part 2 of the story we explain the court’s costs decision.

Ontario’s civil courts have recently been undergoing an overhaul. Last year, a

number of changes were made to the Small Claims Court Rules. In addition, the Ontario Government has set up a task force to review and suggest recommendations to improve the civil justice system generally. A synopsis of the County of Carleton Law Association’s position can be found on page 2. 

A Corporate David and Goliath Story - Part II

Last fall we told you about a corporate David and Goliath story. Our firm represented “David” in a legal battle which pitted a small town insurance agent against one of Canada’s largest insurance companies. The Plaintiff, our client Reg Ward, had provided 30 years of productive and loyal service at the time his agency agreement was unceremoniously terminated.

Following a 22-day trial, the Court provided a complete vindication of the Plaintiff. He was awarded substantial damages, as well as punitive damages. This past January, the Court issued its endorsement concerning costs.

Awarding Costs

Going to trial is not an inexpensive proposition. However, if the trial judge finds in your favour you may be entitled to recover a portion of your legal costs. In deciding whether costs should be allowed and in what amount, the judge may consider a number of factors, including:

- The result in the proceeding;
- Any offer to settle or to contribute made in writing;
- The principle of indemnity;
- The amount claimed and the amount recovered in the proceeding;
- The apportionment of liability;
- The complexity of the proceeding;
- The importance of the issues raised by the litigation;
- The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and/or
- A party’s denial of or refusal to admit anything that should have been admitted.

Partial vs Substantial

In addition to deciding whether costs should be awarded, the judge will also decide whether a party is entitled to costs on a partial indemnity basis (formerly referred to as party and party costs) or on a substantial indemnity basis (formerly referred to as solicitor and client costs).

As the name suggests, costs on a partial indemnity basis mean that the court will award only a portion of what was actually expended. Generally the award amounts to somewhere below fifty per cent of the lawyer’s actual charges. Substantial indemnity, although not a total reimbursement, will be much closer to the actual fees. Cost awards on a substantial indemnity basis are the exception rather than the rule.

The Case

Our client sought and was awarded costs on a substantial indemnity scale. Plaintiff’s counsel argued that in the circumstances the parties would reasonably expect a higher level of costs to be assessed.

see **DAVID** page 2

Spring 2007, Volume 24

In this issue:

Civil Litigation Reform.	p. 2
Small Claims Court.	p. 3
Victory Confirmed.	p. 4

DAVID - continued from page 1

Counsel pointed to a number of decisions made by the Defendant, including:

- Making unproven allegations of fraud and dishonesty;
- Failing to accept the Plaintiff's offer to settle;
- Over-documentary production;
- An aggressive defence with full knowledge of the Plaintiff's financial vulnerability; and
- The Defendant's full use of its unlimited resources.

One of the arguments advanced by the Defendant against the substantial indemnity scale was the punitive damages award. The Defendant argued that to award costs on the higher basis and punitive damages would amount to double indemnity. The Court did not agree,

recognizing that an award of costs, regardless of the appropriate scale, is to indemnify, or partially indemnify, the winning party. This was contrasted to the purpose of punitive damages, which is meant to punish, deter and denounce.

The Risk


In addition to costs on a substantial indemnity scale, the Plaintiff also sought a risk premium. The Court concluded that the Plaintiff was entitled to this premium in an amount of slightly less than 9% of the costs awarded. In coming to this decision, the Court considered the risks that had been faced by Plaintiff's counsel, including:

- The Plaintiff's lack of financial resources to fund a lengthy and complex litigation;
- Counsel's decision to finance the litigation and thus assume the risk of not only delayed but possible non-payment of fees; and

- The Defendant's decision to contest liability at every step.

A Significant Award

There are three aspects of this award that make it significant. The first is that costs were awarded on a substantial indemnity basis. As previously indicated, costs on this scale are reserved for exceptional cases. The second significant aspect is the Court's decision to allow a premium. Again this type of award is granted only rarely. And finally, it is compelling that the Court recognized that an award of punitive damages was not an impediment to costs being awarded on a substantial indemnity basis.

The Defendant has appealed the original decision as well as the decision on costs. The appeals will be heard together by the Ontario Court of Appeal in September. Stay tuned for Part III. 

Civil Litigation Reform

Last summer, the Ontario Government announced the creation of a new task force to review and suggest recommendations to improve the province's civil justice system. The goal of this task force is to provide greater access within the civil legal system while addressing issues of proportionality (i.e. cost of the procedure versus amount of recovery) and regional differences.



In the fall of 2006, the County of Carleton Law Association, our region's law association, became actively involved in this reform project and organized the local town hall meeting and prepared written submissions on Justice Osborne's reforms. The CCLA also presented our jurisdiction's own concerns and appointed Jaye Hooper of our office to draft submissions on behalf of our local bar.

Justice Osborne, who heads up the task force, made a number of preliminary recommendations, which included:

Increasing the monetary amount for Simplified Procedure to \$100,000

While this recommendation has merit, the concerns raised focused on the absence of examinations for discovery as well as the need for a cap on the total amount of a claim under this procedure. Currently, each individual claimant is subject to the monetary threshold and therefore several Family Law Act claimants can cause a Simplified Rules case to be valued far in excess of the traditional \$50,000 maximum.

In an attempt to address part of the above concerns, the task force will likely accept limited discoveries be available for Simplified Proceedings. These examinations will be time limited (likely 2 hours per party). This should be sufficient time

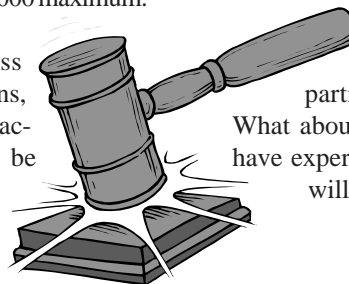
to obtain key liability information, witness information and undertakings to ensure all documents have been produced.

The removal of juries for civil disputes

The right to a jury was definitely a hot-topic among the members of our local bar. The CCLA strongly rejected this recommendation and we are hopeful this will not form part of Justice Osborne's final report.

Require parties to retain a joint expert

For the majority of cases, this could be a useful initiative although it creates many problems for implementation. What if parties can't agree to an expert? What about clients/lawyers who already have experts they prefer to retain? Who will pay for this expert?



see CIVIL page 3

Rule Changes in Small Claims

Most people's experience of Small Claims Court comes from TV shows like *Judge Judy* and *The People's Court*. While these television arbitrations hear and decide real cases, they are first and foremost entertainment. On the other hand, Ontario's Small Claims Court, a branch of the Superior Court of Justice, is a serious Court that forms an integral part of this province's judiciary.

More than fifty per cent of all civil cases that are started in Ontario fall within the jurisdiction of Small Claims. One of the most attractive aspects of Small Claims Court is its relative simplicity, including the rules and procedures.

There are two categories of cases that can be brought before the Small Claims Court. The first is an action for the payment of money, for example an unpaid loan, damages for personal injuries, or damages to your property. The second category of cases is for the recovery of possession of personal property.

Regardless of the type of case, the monetary ceiling for Small Claims is \$10,000.

In 2006 a number of rule changes were introduced in an effort to make Small Claims Court more efficient and effective. The following are changes we think you should be aware of.

- √ The proper court forms must be used. Copies of the forms can be downloaded at www.ontariocourtforms.on.ca
- √ A settlement conference remains mandatory. There are several reasons for a settlement conference, including an attempt to resolve or narrow the issues in the litigation, to encourage settlement of the action, to assist the parties in effective preparation for trial and to provide full disclosure between the parties of the relevant facts and evidence.
- √ If a self-represented party makes an offer to settle the dispute and that offer is turned down and the party obtains a


more favourable judgement, the party may be awarded compensation for inconvenience and expense up to \$500. This amount has been increased from \$300.

- √ Prior to the changes a lawyer was entitled to a maximum of \$300 in costs. They can now claim substantially more, perhaps as much as \$1,500 in fees and disbursements. Depending on the size of the claim it may be worth having legal representation.
- √ Although a defendant can bring a motion to have a default judgement set aside, under the new rules he or she must now prove a meritorious defence and a reasonable explanation for the default.

√ Under the new rules, a distinction is drawn between default judgements in cases of liquidated damages and unliquidated damages. An amount which is due under an express agreement is referred to as a liquidated claim. All other claims are claims for unliquidated damages. The court clerk can deal with the former, a judge must assess damages in the latter case. Unliquidated damages can be assessed in writing or by way of a hearing.

- √ An undefended action will be considered abandoned and administratively dismissed if more than 180 days have passed since the claim was issued and since any other action was taken by the plaintiff.

Although Small Claims Court can be navigated without the assistance of a lawyer, there are some legal issues that are fairly complex. In these cases, particularly if the dollar amount sought is significant, you may want to consider obtaining legal advice. Our lawyers would be pleased to speak to you.

For more information about Ontario's Small Claims Court visit the Attorney General's website at www.attorneygeneral.jus.gov.on.ca and click on the Small Claims Court link. 

CIVIL - continued from page 2


Creating a new threshold for summary judgment

Summary judgment is very difficult to obtain under the current rules and jurisprudence. Once a party raises a triable issue including a question of fact, a motions judge is reticent on granting summary judgment. It is hopeful that the Rule will be revised to allow a more effective

mechanism for screening out frivolous and unmeritorious claims.

These are not the only recommendations but, for the most part, the remaining recommendations are aimed at the current problems in Toronto after the failure of case management in that region. From the response of our local bar, it is clear that one of our region's main priorities is to protect case management. From the preliminary

comments and feedback from Justice Osborne, we do not believe there is any risk that our case management system will be changed.

In a speech this past February, Attorney General Michael Bryant promised to implement this task force's final recommendations which are expected this June. We are keeping our fingers crossed that our region's concerns will be addressed. 

Homeowners' Victory Confirmed

In the most recent edition of the *Legal Observer*, we told you about a couple who had the title to their home stolen by fraudsters. These fraud artists went on to secure a mortgage of almost a quarter of a million dollars. When the couple discovered what had happened, they successfully sued the mortgagee.

Shortly after that case was decided, the Ontario Court of Appeal heard *Lawrence v. Maple Trust Company*, a case involving a similar fact situation.

The Facts

An impostor, posing as Susan Lawrence purported to sell her house to Thomas Wright, another impostor. Wright then mortgaged the property for \$291,924. The scam was brought to light two months later when Lawrence decided to actually sell her house.

Lawrence sued the mortgagee, Maple Trust. Following an earlier Court of Appeal decision, the Superior Court Judge ruled against Lawrence and in favour of Maple Trust. The basis for that decision was that since the mortgages had been given for valuable consideration and without notice of the fraud, they were, once registered, effective and could be relied on. Lawrence appealed.

Court of Appeal Decision

The Appellate Court allowed Lawrence's appeal and set Maple Trust's mortgage aside.

The key to Ontario's Land Registry System is a guarantee that the person named as property owner has title subject only to any registered encumbrances. In addition, the *Land Titles Act* states that only a registered owner is entitled to transfer or charge land. It also states that a fraudulent instrument that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void.

In spite all this, there remains the question of whether the indefeasibility (can-

not be annulled or made void) of title is immediate or deferred. Maple Trust argued that Ontario's is a system of title by registration. In other words, once an instrument is registered, it is effective immediately even if procured by fraud.


Following a lengthy review of the law in this area, the Appellate Court concluded that the theory of deferred indefeasibility is the proper approach in situations like the one described in the Lawrence case. Explaining its position, the Court stated,

"...Under the theory of immediate indefeasibility, the innocent homeowner has no defence to a mortgagee's action for possession. The homeowner is exposed to the loss of her home through eviction with the only available remedy being to make a claim for loss of value of the property from the (Land Titles Assurance) Fund.

...By interpreting the Act in accordance with the theory of deferred indefeasibility, the law encourages lenders to be vigilant when making mortgages and places the burden of the fraud on the party that has the opportunity to avoid it, rather than the innocent homeowner who played no role in the perpetration of the fraud."

With respect to the Appellate Court's previous decision, this panel found that both the result and the reasoning in the previous case were incorrect. In particular, the Court had failed to recognize that the *Land Titles Act* gives statutory effect to the theory of deferred indefeasibility.

When all was said and done, Maple Trust lost the contest with Lawrence, the true registered owner of the property. Maple Trust had taken from Wright, a fraudster, not the registered owner. And unlike Lawrence, Maple Trust had had an opportunity to avoid the fraud.

Homeowners can at last breathe easier knowing that they are not expected to run down to the registry every day to ensure their home still belongs to them. 



williams mcenery
barristers & solicitors

169 Gilmour Street
Ottawa, Ontario K2P 0N8
Phone: (613) 237-0520
Fax: (613) 237-3163

www.williamsmcenery.com

Eric R. Williams
williams@williamsmcenery.com

Paul T. McEnery
pmcenery@williamsmcenery.com

Chris F. Reil
creil@williamsmcenery.com

Aaron E. Moscoe
amoscoe@williamsmcenery.com

Mark O. Charron
mcharron@williamsmcenery.com

Paul W. Muirhead
muirhead@williamsmcenery.com

Jennifer E. Jolly
jjolly@williamsmcenery.com

Jaye E. Hooper
hooper@williamsmcenery.com

Juliet L. Knapton
jknapton@williamsmcenery.com

AREAS OF PRACTICE

Civil/Commercial Litigation
Construction & Lien Litigation
Employment Matters
Motor Vehicle Litigation
Personal Injury Litigation
Real Estate
Wills & Estate Administration
Insurance Defence Claims

If you prefer to receive this newsletter by e-mail, please notify us at newsletter@williamsmcenery.com

www.williamsmcenery.com

