

Lessons in Litigation

In a recent decision, Mark Charron and Kelly Hart, successfully moved to have allegations against their client dismissed. The client, the County of Lennox and Addington, was being sued in relation to a serious motor vehicle accident, which occurred on a road owned by the County.

On January 3, 2003, Mrs. Lloyd was driving along County Road 9, in the County of Lennox and Addington, when she collided with a propane truck.

Mr. and Mrs. Lloyd sued the truck driver, the owner of the truck, the County of Lennox and Addington and the Town of Greater Napanee. With respect to the County, they argued that it had been negligent in its failure to keep the road in a reasonable state of repair, to remove snow and ice, to provide warning signs and to properly design the road.

In 2002, the County had entered into an agreement with the Town of Greater Napanee, whereby the latter assumed responsibility for the maintenance and repair of County Road 9. The Town admitted in its defence that it was responsible for maintenance of the road. Further, it agreed

to take over the County’s defence in the action in respect of the maintenance issue.

Although the agreement between the County and the Town addressed the issue of who was responsible for the maintenance and repair of this road, signage and design remained the sole responsibility of the County. The Lloyds alleged that the County was negligent in:

- failing to locate proper warning signs on the roadway;
- failing to properly design and construct the roadway such that the road was a hazard; and
- that it knew or ought to have known that the design and construction of the road was unsafe and took no steps to correct the deficiency.

Throughout the course of the litigation no expert evidence of deficient design or signage was tendered by the Lloyds in support of their claim.

Despite the County’s request to have the lawsuit against it dropped, the Lloyds refused. The County brought a summary judgement motion at the opening of trial.

Summary Judgement

A summary judgment involves the court making a decision about an entire case or one or more issues without going to a full trial. The court shall grant summary judgement if it is satisfied there is no genuine issue for trial with respect to a claim.

To counter a motion for summary judgement, the responding party must show that its case has a real chance of success. In order to do this, the party must provide detailed facts as well as evidence supporting those facts. In other words the party must put its best foot forward.

Opinion Evidence

Generally speaking, a witness may only testify about what he or she knows based on knowledge, observation and experience. Witnesses may not give an opinion about evidence. However, as with all things in the law, there are exceptions, in this case two, to the general rule excluding opinion evidence. The first is the lay opinion based on the witness’ personal knowledge. The second is the expert opinion on matters calling for special knowledge and skill whether or not the expert has personal knowledge of the facts at issue.

Over the years, the courts have made it clear that a cause of action for negligent design of a roadway is an area that requires an expert opinion. Such an expert must have special training in road design. In fact, any testimony on road design from witnesses without such specialized/expert training should not be heard by a trial judge.

Although a number of experts reports were filed in the case, the only evidence supporting the alleged negligence regarding the construction of the road was an affidavit of Mr. Lloyd. The evidence was anecdotal as Mr. Lloyd had no expertise in the area of road design or construction.

The Decision

The trial judge, Justice Robert Scott, agreed with the arguments put forward by our firm on behalf of our client, and granted summary judgement for the County, finding there was no genuine issue for trial, thus avoiding a 4-week trial. The decision was based on the fact that the Town agreed that it was responsible for maintenance and repairs as well as the fact that Mr. Lloyd was a lay person who did not possess the required expertise to testify about the construction of the roadway. ☐

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Say What You Mean and Mean What You Say

Contracts are an every day part of our lives. A contract may involve something as simple as the purchase of an item at the mall to something as complex as the financial arrangements for a joint venture. As long as the parties are not contracting to do something illegal, individuals and businesses are free to make the legal arrangements that best suit them.

The Restrictive Covenant

It is only in exceptional circumstances that the courts will interfere with a parties' legal agreement. One such exception is when a contract includes a restrictive covenant, which the common law refers to as a restraint of trade. Employment relationships as well as agreements for the purchase and sale of a business are the most likely contracts to include restrictive covenants. In the former case, a departing employee will be precluded from competing with the former employer. In the latter, the person selling the business will agree not to compete with the new owner of the business.

In 1894 the British House of Lords found that a restraint of trade was contrary to public policy because it interfered with individual liberty of action. They also said that the exercise of trade should be encouraged and should be free. These twin notions continue to be sound public policy in 2009.

Therefore, the law presumes that a restrictive covenant is unenforceable unless it can be shown to be reasonable.

Reasonable vs Unreasonable

To determine whether a restrictive covenant is reasonable, the terms of the covenant must be unambiguous. The court must be able to clearly determine what the covenant specifically intends.

If the court concludes that a restrictive covenant is unreasonable it will either strike down the covenant or it will alter the terms of the original contract by applying the doctrine of severance.

Severance

Where severance is permitted, the illegal portion of the covenant will be dealt with in one of two ways: "blue-pencil" severance or "notional" severance.

The Supreme Court of Canada has described "blue-pencil" severance as being possible only "if the judge can strike out, by drawing a line through, the portion of the contract they want to remove, leaving the portions that are not tainted by illegality, without affecting the meaning of the part remaining."

In the case of "notional" severance, the court will read down the illegal provision. For instance, if the parties' contract calls for the payment of an illegal interest rate and it is clear that the parties did

not intend anything illegal, the court can read down the interest rate to the legal statutory maximum.

Shafron vs KRG

In a recent Supreme Court of Canada case involving an employment contract, the principles of restraint of trade, restrictive covenants and severance were considered.

The Facts

Morley Shafron owned a Vancouver-based insurance agency business. In 1987, he sold the business to KRG Insurance Brokers Inc. He continued to be employed in the business and entered into a three-year employment contract. The employment contract included a non-competition clause indicating that upon leaving his employment for any reason, other than termination without cause, he would not be involved directly or indirectly in the insurance business within the Metropolitan City of Vancouver.

When entering into a contract it is important that the language used is clear and unambiguous.

Every three years, until 2000, the parties continued to enter into a new employment contract which contained a similar non-competition clause. In 2001, Morley left KRG and began working for the Shaw Insurance Agency, which was based in Richmond, BC. KRG commenced a legal action against

Morley claiming he was in breach of the non-competition clause.

The Lower Courts

At trial, the judge dismissed KRG's action partly on the basis that the non-competition clause, specifically the term "Metropolitan City of Vancouver" was neither clear nor certain. The judge found that the term was ambiguous because there was no legal or judicial definition of "Metropolitan City of Vancouver" and, in any event, the provision was unreasonable.

The B. C. Court of Appeal agreed that the term "Metropolitan City of Vancouver" was ambiguous, however the Court felt it was possible to rectify the ambiguity. The Court applied the doctrine of "notional" severance to construe the term as applying to the City of Vancouver and municipalities contiguous to it, including Richmond. Defining the term in this manner, the Court was able to find the non-competition clause to be reasonable and enforceable.

The Supreme Court of Canada

The highest court in the land disagreed with the Court of Appeal, instead finding the trial judge's view of the situation to be the correct one.

The Court began by stating that the doctrine of "notional" severance could not be used in cases involving an employment contract.

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In order to apply “notional” severance it must be obvious what the parties intended, what the courts have referred to as the “bright-line”. In the case of a restrictive covenant, attempting to apply “notional” severance would amount to the court rewriting the covenant in a manner that it, and not the parties, subjectively considers reasonable. Therefore, it cannot be used in such cases.


In addition, if “notional” severance were used, some employers could impose an unreasonable restrictive covenant on the employee. The only negative to the employer in such a case would be that if the covenant was found to be unreasonable, the court would rewrite it.

The Court next considered whether “blue-pencil” severance could be applied in this case. The Court could find no evidence that Morley and KRG would have unquestionably agreed to remove the word “Metropolitan” without varying any other terms of the contract or otherwise changing the bargain. Therefore, “blue-pencil” severance could not be used to correct the ambiguity.

Its arguments for severance being unsuccessful, KRG next suggested that the Court was in a position to rectify what it referred to as a mistaken description. Rectification will be used to restore what the parties’ agreement actually was were it not for the error in the written agreement. In this particular case, there was no evidence to indicate that the parties had ever agreed to a specific geographic area but mistakenly written down “Metropolitan”. Therefore, this argument was not accepted either.

The end result was that because the non-competition clause was ambiguous and unreasonable, KRG could not rely on it to restrict Morley’s current activities.

The Lessons

When entering into a contract it is important that the language used is clear and unambiguous. Any significant terms should have an actual legal meaning or one should be spelled out. These lessons are particularly important when drafting restrictive covenants, since the general rule is that a restrictive covenant will not be upheld if it is unreasonable. 

Changes Are Coming

Civil justice needs to be accessible and affordable if it is to work for all Ontarians. Each of these changes - and particularly the Small Claims or ‘people’s court’ reform - will help everyday Ontarians to fairly resolve disputes that they can’t resolve on their own.

Ontario Attorney General Chris Bentley


Several years ago, the McGuinty government asked former Associate Chief Justice Coulter Osborne to head up the *Civil Justice Reform Project*. Mr. Justice Osborne’s mandate was to review and recommend ways to make the civil justice system more accessible and affordable for the citizens of Ontario.

Mr. Justice Osborne made recommendations for changes in a number of areas, including:

- Judicial resources
- Small claims court
- Unrepresented litigants
- Discovery
- Trial management
- Costs of litigation

Based on Mr. Justice Osborne’s recommendations and input from various members of the legal community and the public, the government has agreed to implement a number of major reforms to the rules of Ontario’s civil courts. These changes, which take effect on January 1, 2010, include:

- The monetary jurisdiction of the Small Claims Court being increased from \$10,000 to \$25,000.
- The Simplified Procedure Rules being available for cases with a monetary limit of \$100,000, double the previous limit.
- Within the Simplified Procedure, parties will be allowed up to two hours of oral discovery. In addition, each party will be limited to a total of seven hours of pre-trial Examination for Discovery, unless the parties consent or the court orders otherwise.
- The new rules are designed to encourage parties to bring motions for summary judgement, since it will now be less likely that costs will be awarded against the party that loses the motion.
- The civil courts will be subject to the general principle of proportionality, meaning the time and expense devoted to any case must reflect what is at stake in the proceedings.

As the January 1st deadline approaches, more information about the changes will become available. We will provide you with updates in future issues of the *Legal Observer*. 

For general information about a number of different legal topics visit *Justice Ontario* at www.attorneygeneral.jus.gov.on.ca

Clients' Victory Upheld


In our fall 2008 issue of the *Legal Observer*, we told you about Temple and Donovan, who sold their home with Royal LePage. When their real estate agent failed to make full disclosure about the connection between herself, the buyer's realtor and the buyer, they refused to pay the commission. Royal LePage unsuccessfully sued. Temple and Donovan were represented by Juliet Knapton of our firm.

The trial judge concluded that a fiduciary relationship existed between the sellers and their real estate agent. He went on to find that the disclosure made by the real estate agent in the agreement of purchase and sale was too ambiguous, since it did not reveal that Kelly Williams was the agent making the offer on behalf of her

husband, the buyer and that she worked in the same office as the sellers' real estate agents.



Royal LePage's appeal to the Divisional Court was heard in early April.

The appellate court upheld the trial judge's decision that the sellers' real estate agent forfeit her commission. They found there was ample evidence to support the breach of the realtor's fiduciary obligation owed to Temple and Donovan. The Court also agreed that they had been entitled to receive and consider the information concerning the relationship between Kelly Williams and Paul Williams before proceeding further with the transaction. 

Firm News

Baby News

On February 23rd **Chris Reil** and his wife, Lillian Camilleri, welcomed Aidan Christopher into their lives. He weighed in at 7 lbs, 10 oz with dark brown hair and blue eyes.

Paul Muirhead and **Jaye Hooper** welcomed their family's newest member, Abigail Elizabeth Muirhead ("Abby") on June 11, 2009. Although almost two weeks early, Abby weighed 8 lbs and is adapting well to the busy Muirhead/Hooper home. Jaye will be on maternity leave until the beginning of November.

Election

Earlier this year, **Jaye Hooper** was elected as a trustee for the County of Carleton Law Association. The CCLA has as its mission to advance the interests of its members and promote the administration of justice.

Competition

Each year, hundreds of law students participate in competitive mooting. Mooting is an opportunity to develop and demonstrate advocacy skills, analyze and research complex legal problems, develop arguments, and present a case before experienced judges.

Juliet Knapton coached the University of Ottawa team to a second place finish in the Wilson Moot. In addition, three members of the team finished among the top 10 oralists. The Wilson Moot honours the late Madame Justice Bertha Wilson, the first female justice to sit on the Supreme Court of Canada. The competition focuses on equality issues raised by various provisions of the Charter. 



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