LawPRO repairs

Everyone knows that LawPRO defends lawyers who are sued for malpractice. Not everyone appreciates that LawPRO also "repairs" errors or alleged errors made by our insureds, so that a malpractice claim never comes forward. These "repairs" are carried out in all practice areas. Some cases may reach the Supreme Court of Canada, others are never reported at all. Here is a sample of recent LawPRO "repairs."

1. The case

Somersall v. Friedman, [2002] S.C.J. No. 60, dismissing an appeal from a judgment of Ontario Court of Appeal, [2000] O.J. No. 401 , allowing an appeal from a judgment of the Ontario Court (General Division) (1998), 40 O.R. (3d) 461.

The facts

The plaintiffs Somersall, on the advice of their solicitor, released the tortfeasor motorist Friedman from any claim in excess of his $200,000 policy limits, in exchange for an admission of liability, and an advance payment of $50,000. This was done without any notice to the plaintiffs' own insurer, Scottish & York Insurance. Scottish & York took the position that the plaintiffs were not entitled to recover under their underinsured motorist coverage because they were no longer "legally entitled to recover" from the tortfeasor an amount in excess of $200,000, and because the plaintiffs had prejudiced their insurer's ability to recover its subrogated claim against the tortfeasor.

The judgment

Scottish & York was successful at first instance. The plaintiffs successful appeal to the Ontario Court of Appeal. Scottish & York unsuccessfully appealed to the Supreme Court of Canada.

The Court reasoned that the limits agreement with the tortfeasor did not block the action. It had no bearing on the right of the insured against the tortfeasor at the time of the accident, which was the relevant time for the determination of legal entitlement. It only rendered the plaintiffs unable to further their legal rights against the tortfeasor in the courts.

The plaintiffs did not interfere with the insurer's rights of subrogation to such an extent as to deprive it of a right it acquired in the contract. Only a clear and unambiguous obligation upon the insured to maintain a claim in tort and not to waive it in exchange for a payment can support an interpretation favourable to the insurer. Further, the insurer's right of subrogation did not arise until the insured has been fully indemnified. Here, the insurer's right of subrogation had not yet arisen, and in any event there was no evidence that the plaintiffs did not honestly and in good faith believe that it was prudent and wise to enter into the limits agreement. Absent any evidence of actual or probable loss, the insurers should not be allowed to raise an alleged breach of subrogation rights in order to bar a claim made in good faith by the insured.

2. The case

Re Raina and the Land Titles Assurance Fund, Unreported decision by Jean C.H. Iu, Deputy Director of Titles, released February 22, 2002.

The facts

Imposters and forgers have been a problem for the real estate bar over the past ten years. In this case, LawPRO represented a defrauded lender before the Land Titles Assurance Fund, even though the lender's solicitor had done nothing wrong.

Ms. Raina purchased a property in Richmond Hill in April, 1999. She gave a charge to the Royal Bank of Canada. Six months later, unbeknownst to Raina, Emanuele Tesoro fraudulently transferred the title to the property to himself. He then fraudulently discharged the Royal Bank of Canada mortgage, and gave a charge to Ila Weiser and Midking Investments Limited for $350,000. The solicitor who represented Tesoro and Weiser/Midking in the placement of that mortgage requested a photo ID from Tesoro, and received it. The Weiser/Midking charge was also fraudulently discharged in December 1999.

Two months later, Tesoro gave a charge to Equitable Trust Company in the amount of $252,5000. Tesoro eventually went to prison, but none of the stolen money could be traced.

The decision

Ms. Raina sought relief from the Land Titles Assurance Fund, as did Weiser/Midking Investments. In a decision by the Deputy Director of Land Titles, Ms. Raina was awarded the sum of $725,498.29, on the understanding that this money would be given to Ila Weiser/ Midking Investments and Equitable Trust to discharge their mortgages. The Deputy Registrar ordered that title be rectified to show Ms. Raina as registered owner and to reinstate the Royal Bank charge. Raina and Weiser/Midking were awarded their costs.

3. The case

Doraty v. Dallas Homes and Costanzo, Unreported judgment of Charbonneau, J. (Ont.S.C.J.) released June 21, 2001, Court file 98-CV-7638 (Ottawa).

The facts

A solicitor discharged a mortgage by mistake. Dallas Homes took advantage of this mistake by quickly reselling the land to a purchaser without notice of the mortgagee's interest. The mortgagee therefore had no interest in the land, or any recourse against the new purchaser. LawPRO paid out the innocent mortgagee, and then sued Dallas Homes.

The judgment

LawPRO obtained judgment against both Dallas Homes and its owner Costanzo personally on the basis of unjust enrichment. Costanzo acted willfully and in bad faith, and his conduct was independently tortious.

4. The case

Value Village Stores Inc. v. Battlefield Square General Partner Inc. and Goodwill, the Amity Group, Court File No. 02-CV-227470 CM3, April 11, 2002.

The facts

The landlord of a shopping plaza entered into a lease with the anchor tenant, whose lease provided that the landlord would not permit the sale of second-hand clothing in the shopping centre. This has long been characterized as a "character" clause in a shopping centre lease. The anchor tenant sublet the premises to Value Village Stores, whose main business was the sale of second-hand clothing. The landlord consented to the sublease. Value Village did not request a non-competition agreement.

Subsequently, the landlord, Battlefield Square General Partner Inc., entered into an offer to lease for another store in the plaza with Goodwill, whose primary business was also the sale of second-hand clothing. The landlord's solicitor advised that there was no impediment to leasing to Goodwill. Value Village brought an application for an injunction to prevent the leasing to Goodwill on the basis that the character clause was also a non-competition clause. LawPRO argued the landlord's position.

The judgment

Backhouse, J. dismissed the application. In her opinion, this clause was intended to prevent a diminution of the reputation of the shopping centre. Value Village was attempting to turn a clause which has nothing to do with competition into a clause restricting the landlord's right to lease to a competing business. It would be inequitable to enforce this provision. Obviously, Value Village waived the character clause when it leased premises for a purpose contrary to the character clause. There is no reason why it should now be entitled to rely on the clause, the purpose of which ended with its own sub-lease.

5. The case

Ball v. Ball, [2001] O.J. No. 5196 (Ont.S.C.J.), affirmed [2002] O.J. No. 1772 (C.A.).

The facts

A wife's solicitor served an offer to settle matrimonial litigation on April 30, 2001. One of the terms of the agreement was that the parties would enter into a shareholders' agreement by December 31, 2001. The wife's solicitor neglected to include a term in the offer to the effect that the wife would continue to draw a $75,000 annual salary from her husband's corporation. The husband accepted the offer on July 23, 2001. On July 26, the wife's solicitor wrote to the husband's solicitor, stating that the wife expected to continue to draw the salary. The husband rejected this contention. The husband moved for judgment on the offer to settle.

The judgment

Aston, J. dismissed the application. The wife's solicitor's failure to stipulate for the continuation of the salary was at most a unilateral mistake. There was no evidence that the husband or his solicitor knew or should have known of this mistake.

Aston, J. did, however, hold that the execution of a shareholders' agreement was a true condition precedent to settlement. A shareholders' agreement was fundamentally important to the wife as part of a settlement of the matrimonial issues. Without such an agreement, enforcement of her entitlement under the settlement might become difficult or impossible. The husband submitted that the shareholders' agreement was "superfluous" to the terms of settlement because the subject matter of the agreement was outside of the pleadings and issues before the court. The Court disagreed with this contention. No final agreement has been reached until a shareholders' agreement was in place.

Before the condition precedent was met, and hence before any binding agreement, the wife effectively modified her offer to settle to include the additional provision of her ongoing salary. Since the husband was not prepared to accept that modification, there was no binding agreement.

The husband unsuccessfully appealed to the Court of Appeal. The Court agreed with the motions judge that the offer to settle and its acceptance, when viewed in the context of the negotiations between the parties, did not constitute a binding contract. The two documents merely outlined the parameters of future negotiation between the parties. It was therefore still open to the wife during the course of these negotiations to clarify her position on the issue of her salary. The husband never having agreed to this term and the shareholders' agreement never having been entered into, there was no settlement agreement to enforce.

Debra Rolph is LawPRO's Director of Research.