Newsletter

IN THIS ISSUE

Force Majeure Clauses

Force majeure clauses are intended to allocate risk for future events that, if they occur, will affect the ability of one party to perform its obligations under the contract. In *Atcor Ltd. v Continental Energy Marketing Ltd*. (*1) Justice Kerans of the Alberta Court of Appeal described the objective of the clause: "The office of the clause is to protect the parties from events outside normal business risk."

When considering a *force majeure* clause, and particularly when drafting a contract, it is helpful to know how the common law would address the contemplated supervening events. In other words, what is the clause supplanting or supplementing? The default doctrine of the common law is impossibility and frustration. The courts have, at times, been influenced by the law of frustration when interpreting *force majeure* clauses.

Frustration

The doctrine of frustration holds that both the frustrated party and the other party to the contract are relieved of all obligations (including obligations to perform and to pay) while extraordinary and unexpected circumstances exist. These circumstances include floods, earthquakes, storms and electrical failures. They can sometimes include work stoppages and shortages of materials.

A good example of the doctrine of frustration is the decision in *Krell v. Henry* (*2). There, the defendant rented two rooms from the plaintiff for a specified period and paid a deposit. While there was nothing express in the contract, it was apparently understood by both parties that the purpose of the defendant renting the rooms was to watch the coronation procession of Edward VII. When the coronation was postponed, the defendant refused to take the rooms and pay the remainder of the agreed rent. The plaintiff sued for the outstanding balance. The Court found for the defendant on the basis that while

FIRM AND INDUSTRY NEWS

- Annual Dinner of the **Association of Average Adjusters of the United States and Canada** October 2, 2014, New York.

- **Kim Stoll** and **Martin Abadi** will be representing the firm at the **Surface Transportation Summit** in Mississauga on October 15th.

- **Rui Fernandes** and **Kim Stoll** will be representing the firm at the **Ft. Lauderdale Mariner's Club** seminar in Ft. Lauderdale on October 28th.

- **Gordon Hearn** has co-authored an article entitled "Motor Carrier Cargo Liability: Shipments Between the United States and Canada, and Conflicts of Law Considerations" which will be published in the October, 2014 issue of **For The Defence** by the Defence Research Institute.

- **Gordon Hearn** will represent the firm at the **Transportation Law Institute** on November 7 and at the Executive Committee Meeting of the **Transportation Lawyers Association** on November 8th. **Kim Stoll** will be moderating a panel, "The Transportation of Dangerous Cargoes"**,** at the Transportation Law Institute. Both events are being held in St. Louis, Missouri.

- **Rui Fernandes** will be presenting a paper on "New Developments in Maritime Law Affecting Vessel Operators" at the **Canadian Passenger Vessel Association** annual meeting to be held in Toronto on November 19 to 21.

performance was not physically impossible, it was impossible in the sense that a "state of things, going to the root of the contract, and essential to its performance" had ceased to exist. This “frustration of purpose” was common in the early 1900’s.

Today in Canada, the common formulation of the doctrine of frustration is often referred to as the “construction theory”. The formulation was set out in the U.K. decision of *Davis Contractors Ltd. v. Fareham Urban District Council* (*3):

> [F]rustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

This formulation adopted by the Supreme Court of Canada in *Naylor Group Inc. v Ellis-Don Construction Ltd.* (*4).

Contractual Clauses with “Force Majeure”

Parties may expand or limit the types of events that will be considered severe enough to warrant relief from performance by including what is known as a *force majeure* clause. Such a clause allows the parties to define and allocate the risk of extraordinary events. The parties can specify what events they believe render the contract impossible to perform and the circumstances under which they ought to be relieved from the performance of their obligations. Such clauses need to be clearly drafted for the courts to enforce them.

One of the leading Canadian decisions interpreting the meaning of a *force majeure* clause in a contract was the Supreme Court of Canada decision in *Atlantic Paper Stock Ltd v St. Anne-Nackawic Pulp and Paper Co Ltd.* (*5) (hereafter referred to as “St. Anne”). The clause in the contract stated:

> St. Anne warrants and represents that its requirements under this contract shall be approximately 15,000 tons a year, and further warrants that in any one year its requirements for Secondary Fibre shall not be less than 10,000 tons, unless as a result of an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities, or the nonavailability of markets for pulp or corrugating medium

One year into the contract for the sale of waste paper in the manufacture of corrugated material, St. Anne-Nackawic Pulp and Paper Co. Ltd. served notice that it would not be receiving any further deliveries of waste paper as there were no available markets. It pleaded the *force majeure* clause and in particular, the "non-availability of markets for pulp or corrugating medium." The court interpreted the meaning of the words in the clause in light of its placement within the *force majeure* clause. The court found that the words in the clause all referred to events over which the party can exercise no control. The court found, in this case, that St. Anne lacked an effective marketing plan, lacked appreciation of the Canadian market, and had high costs compared to competitors. The failure was within the control of St. Anne.

It is noteworthy that there was no “basket clause” in *St. Anne*. In later cases, the inclusion of a basket clause has defeated the *ejusdem generis* interpretation rule (*6) used in *St. Anne*. In *Morris v Cam-Nest Developments Ltd.* (*7), the *force majeure* clause was contained in two purchase and sale agreements for residential condominiums. The clause contained a list of specific events ("strikes, lock-outs, fire, lightning, tempest, riot, war and unusual delay by common carriers or unavoidable casualties") followed by an actual basket clause that read "or by any other cause of any kind whatsoever beyond the control of the

Vendor." If the vendor was delayed in completing the condominium units by reason of a *force majeure* event, the vendor was entitled to a reasonable extension in the completion date. The vendor invoked the *force majeure* clause, arguing that it had been delayed by unusually cold weather followed by strikes among sub-trades. The purchasers argued that the cold weather (with potential exacerbation by strikes) was not the type of catastrophic, out of the ordinary or unusual event contemplated by the specific events listed in the force majeure clause. The purchasers cited the *ejusdem generis* principle and its application in *St. Anne*. The Court found the *ejusdem generis* rule inapplicable as a result of the basket clause and the vendor was entitled to an extension in the time to complete the condominium units.

Parties should be aware that, while courts are prepared to give effect to a broad definition of *force majeure*, they will be wary of allowing the clause to become an "escape clause." (*8) Contracts must be drafted so as to put reasonable limits on the application and extent of *force majeure*.

Most modern force majeure clauses include a requirement that, in order for an event to qualify as *force majeure,* it must have been unforeseeable, outside the control of the parties, not caused by the parties, or other similar language. Events up and down the chain are important when considering the wording of *force majeure* clauses. For example, does negligence or some other failure to perform by a supplier or service provider that in turn causes the contracting party to default, constitute *force majeure*? Also, in some cases, the events listed in the *force majeure* clause do not happen directly to one of the contracting parties, but, rather, to a party's customer or supplier. What is the result if, for example, in a supply contract with a *force majeure* clause, a strike occurs at one of the purchasing party's main customers, thus significantly reducing that party's demand for product? When drafting a *force majeure* clause, these issues must be addressed in the clause with specific wording. It is advisable when dealing with a series or chain of related contracts to have mirror *force majeure* provisions to avoid gaps.

It is also worthwhile considering whether a protracted extraordinary event of *force majeure* should result in the termination of the contract. At some point, the non-affected party must “get on with its business” and put the contract and its obligations behind it. It may need to enter into a new contract with a new supplier. A carefully drafted *force majeure* clause can achieve this result.

Rui Fernandes

Endnotes

(*1) (1996), 178 AR 372 at para 12 (CA)

(*2) [1903] 2 KB 740

(*3) [1956] AC 696 at 729 (HL).

(*4) 2001 SCC 58, [2001] 2 SCR 943

(*5) [1976] 1 SCR 580

(*6) Where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned

(*7) (1988), 64 OR (2d) 475

(*8) See the comments in *Atcor Ltd v Continental Energy Marketing Ltd* (1996), 178 AR 372 at paragraphs 13-14.

2. Defendant Insurer Added By Plaintiff

Williams v. Pintar, 2014 ONSC 1606 (CanLII) March 14, 2014

When an insurer denies coverage and the affected insured decides not to sue the insurer (typically as a third party in an action), no other party can bring a motion to add that insurer to the action. This has always been the prevailing view, but this has recently been re-considered by the Ontario Supreme Court. The motion at bar suggested that addition of a defendant's insurer by the plaintiff in the original action could allow for earlier resolution of insurance issues. Rather than waiting to sue after judgment (after which time the plaintiff/ judgment creditor steps into the shoes of the defendant/ judgment debtor to sue the defendant's insurer for direct payment on the policy), the parties could have all aspects dealt with at an earlier date. Such addition of the defendant's insurer then would be in keeping with the post-*Hyrniak* world, as discussed below, of judicial efficiencies, cost reduction and access to justice.

Facts

In *Williams v. Pintar, 2014 ONSC 1606 (CanLII*), the plaintiff, Williams, was struck while crossing the street on November 1, 2007 by the defendant owner and driver, Pintar. Williams brought an action for personal injuries sustained.

The Jevco Insurance Company denied coverage to Pintar, who did not defend and was noted in default. Under Section 258(14) of the *Insurance Act* R.S.O 1990 (as amended), the insurer added itself as a statutory third party on the basis that Pintar was not covered for the vehicle he was driving at the time of the accident. Unfortunately, Williams did not have her own motor vehicle coverage and was unable to look to and add her own insurer, as would have been typical, under either the uninsured or underinsured coverage provisions of her auto policy.

Despite not defending, Pintar was compelled to attend discovery by a court order and produced his relevant documents including his insurance policy (*1). His broker was also compelled to produce relevant documents regarding Pintar's insurance coverage.

In July 2007, Pintar purchased a motor vehicle insurance policy with his insurer covering July 20, 2007 to January 20, 2008. The insured vehicle was a 1991 Acura Legend and premiums were paid in July 2007. On October 26, 2007, Pintar purchased a new vehicle, a 1993 Lexus. The standard Ontario Automobile Policy specifies a 14-day grace period regarding coverage for personal liability for newly acquired automobiles. The accident occurred just 6 days after his purchase being November 1, 2007, when Pintar was driving his newly purchased Lexus.

The insurer denied indicating that Pintar was driving a motor vehicle that was not insured on the date of the accident and that Pintar had made no attempt to add the Lexus to his insurance policy until *six weeks* after the accident.

The insurer made no attempts to defend or indemnify Pintar, but took the necessary steps to add itself as a statutory third party, as it is entitled to do under section 258(14) of the *Insurance Act*. The insurer exercised its rights as a third party to plead to the plaintiff's action and to raise any defences to the action that Pintar might have been able to raise.

The plaintiff, Williams, then brought a motion seeking an order granting leave to amend the statement of claim to add Pintar's insurer as a defendant to the main action and to seek declaratory relief related to the denied insurance coverage. Williams also sought to increase the amount of damages sought as well to fix a minor typographical error, to which the insurer consented. However, the insurer vigorously defended against being added to the claim as a main action defendant.

The amendments sought included:

(a) a declaration that Jevco was obligated to pay, pursuant to Pintar's insurance policy, any Judgment issued in favour of Williams against Pintar;

(b) a declaration stating the limits of coverage available under Pintar's insurance policy and determination of any conditions or exclusions affecting the availability of payment thereunder;

(c) a declaration and determination of the rights of Williams in respect to payment under the Pintar policy as issued by the insurer; and

(d) an order for enhanced costs for failure to attempt to settle as expeditiously as possible in accordance with Sections 258.5(1) and (5) of the *Insurance Act.*

(e) a paragraph stating that the insurer was licensed in the Province of Ontario to sell and administer automobile insurance to Pintar under the subject insurance policy; and

(f) a paragraph stating that the insurer sold a standard automobile policy providing rights to Williams and a declaration of her rights of payment in respect of the policy.

The Parties' Positions

The insurer argued that a judgment against the insured is required before a plaintiff has a cause of action against an insurer. In the absence of such a judgment, Williams had no contractual relationship or otherwise with the insurer and had no cause of action against the insurer either. The insurer stated that the amendments sought would not be permitted in the first place as both Rule 5.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. (addition of a party) and Rule 26.01 (amendment of a pleading) require that the proposed amendments support a claim that is tenable at law.

Williams argued that the insurer could be added because she was seeking declaratory relief; specifically, a determination of coverage, for which a cause of action (at common law or under the provisions of the *Insurance Act*) is not required provided that the person seeking the declaration and the person opposing the declaration have a true interest.

The Court then considered whether Williams would be granted permission to amend the statement of claim to add the insurer as a defendant.

The Court's Decision

The Court reviewed the rules and noted:

> Rule 26.01: 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.
>
> Rule 5.04 (2): At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

Further the Court noted that, on a motion to amend a statement of claim, a court will consider whether a proposed claim is tenable by applying the principles developed under Rule 21.01 (b) (determination of an issue before trial). The Court cited, the Ontario Court of Appeal in *Andersen Consulting Ltd. v. Canada (Attorney General)* 2001 CanLII 8587 (ON CA) at paragraph 37:

> Without diminishing the concerns raised by the motions judge, they cannot be used to emasculate the well-established rule that amendments like those sought in the present case should be presumptively approved unless they would occasion prejudice that cannot be compensated by costs or an adjournment; they are shown to be scandalous, frivolous, vexatious or an abuse of the court's process; or they disclose no reasonable cause of action.

The Court also looked to the decision of Master MacLeod of the Ontario Superior Court, in *Plante v. Industrial Alliance Life Insurance Co.* 2003 CanLII 64295 where it was confirmed that, on such motions, the court is not concerned with a

factual consideration of the merits and, therefore, evidence surrounding the merits of the claim was not required. Rule 26.01, the Court stated, requires that a proposed amendment be tenable at law and the test to amend and to add parties was laid out in the *Plante* decision:

(1) While the court will not therefore conduct a detailed examination of the evidentiary merits of a proposed amendment, the court is required to scrutinize the proposed claim to ensure it is meritorious in the sense of raising a tenable plea. In addition it must be scrutinized to ensure it is a proper pleading complying with Rule 25.
(2) a) the amendments must not result in irremediable prejudice. The onus of proving prejudice is on the party alleging it unless a limitation period has expired. In the latter case the onus shifts and the party seeking the amendment must lead evidence to explain the delay and to displace the presumption of prejudice.

b) the amended pleading must be legally tenable. It is not necessary to tender evidence to support the claims nor is it necessary for the court to consider whether the amending party is able to prove its amended claim. Amendments are to be granted unless the claim is clearly impossible of success.

c) the proposed amendments must otherwise comply with the rules of pleading.
(3) Rule 26.01 requires that a properly framed proposed amendment that is tenable at law will be allowed providing it does not result in prejudice that cannot be addressed in costs. An evidence-based analysis of the merits is not appropriate on a pleadings motion.
(4) The addition of a party under Rule 5.04(2) is discretionary and not mandatory and so the court retains a discretion to refuse addition of a party. Such discretion is based on the principles of fairness and judicial efficiency. It would be appropriate to withhold consent in certain situations (such as if such addition of a party would unduly complicate or delay the proceeding) or if the addition of a party appears to be an abuse of process.

The Court went on to find that the absence of a cause of action was not enough to dismiss the motion because the draft amended statement of claim disclosed a tenable claim in the form of declaratory relief between interested persons sufficient for such amendments to be allowed applying the above tests. Williams, in this matter, was not suing for payment under the policy but rather seeking declaratory relief.

The Court stated that a judge of the Superior Court of Justice, in fact, has a general power to make a declaration whether or not there is a cause of action, at the instance of any party who is interested in the subject matter of the declaration. "Judges also have broad jurisdiction to make declaratory orders. If a substantial question exists which one person has a real interest to raise, and the other to oppose, then a judge has jurisdiction to resolve it by a declaration."(*2)

Further, the Court referred to the recent case of *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII) which is a case about the shift in culture and the effect on summary judgment procedure (*3). The Court references the *Hyrniak* decision and that "the greatest challenge to the rule of law in Canada today: access to justice." and that the principal goal remains a "fair process that results in a just adjudication of disputes but that this process must be accessible, proportionate, timely and affordable." (*4)

The Court then went on to note the legislature's recognition of the importance of requiring the disclosure of insurance issues well in advance of trial to enable opposite parties to have information necessary such as availability of funds to make informed decisions as to whether to proceed with lawsuits and to have one trial instead of two (*5).

In holding that Williams' amendments were granted (although not the amendment regarding a declaration to pay), the Court stated that the amendments as sought were not inconsistent with the provisions of section 258(1). (*6) At para. 29:

> The plaintiff is not seeking to have the insurance money payable under the contract applied in or towards satisfaction of the plaintiff's judgment. She is not maintaining a collection remedy or an action against the insurer to have the insurance money so applied. She is seeking declaratory relief. If successful, she will still have to seek payment from the insurer after recovering a judgment against the defendant/insured. Section 258(1) is not exclusive. It provides how a plaintiff may, upon recovering a judgment, proceed against the insurer of the defendant for payment of available insurance money. It does not provide that a plaintiff may only proceed as provided therein and does not prevent a plaintiff from seeking declaratory relief.
>
> …
>
> (at para 31) In the case at hand, the plaintiff did not have access to automobile insurance and, therefore, could not add her insurer. The plaintiff in this action is pursuing these declarations not to minimize her exposure, as is the case when two insurers move to have this issue resolved, but to uncover whether she can obtain compensation for her injuries through this action. Without being granted these amendments, the plaintiff will not resolve this issue until after she has obtained a judgment in what might be a long and complex personal injury trial. Allowing these amendments may allow the issue of coverage to be resolved by way of motion for summary judgment or other fair process, as recently defined by the Supreme Court of Canada to mean a process that is proportionate, timely and affordable. This, in turn, might result in a just adjudication of this dispute.

The Court also dismissed the argument brought by Williams citing an exception to the concept of privity of contract for third party beneficiaries noting that the Supreme Court of Canada in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., 1999 CanLII 654 (SCC), recognized an exception to protect a party from liability, not to permit a party to sue.

Conclusion

The Court attempted here to follow *Hyrniak's* lead but cost/efficiency might still be an issue. For example, jury trials would be very difficult to conduct with such insurance issues in play and may indeed lead to an order for bifurcation or a split of the trial into two separate trials (coverage and liability/damages), leading to increased costs and delay.

This decision involves an insurer that is already a party to the action albeit a statutory third party. It is difficult to know if this decision will be helpful in an attempt by a future plaintiff to add a defendant's insurer who is not related already to the action.

Kim Stoll

Endnotes

(*1) Under the Rules of Civil Procedure, the defendant is required to provide a copy of the responding insurance policy, advise of available indemnity limits and conditions affecting coverage. See Rule 30.02(3) and 31.06(4). This is not required in all jurisdictions or in the Federal Court.

(*2) *Canada v. Solosky*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821 at para 8

(*3) Please see the author's article about the effects of this important case in the Fernandes Hearn LLP August 2014 newsletter and also Gordon Hearn's article in the Fernandes Hearn LLP January 2014 newsletter.

(*4) See para 27 of this case

(*5) *Seaway Trust Co. v. Markle* (1992), 11 C.P.C. (3d) 62 Ont. C.J. (Gen. Div.)

(*6) The insurer was already a statutory third party and one wonders if this made the decision to allow the amendments any easier for the Court to allow.

3. *An "Unfounded" Bad Faith Claim May Result in a Significant Cost Award in Favour of an Insurer: 2068286 Ontario Inc. v. Jevco Insurance*

Plaintiff insureds seem to be increasingly pleading "bad faith" against defendant insurance companies in coverage litigation, whether the sentiment be heartfelt or for the purpose of settlement leverage (or both). The decision of *2068286 Ontario Inc. v. Jevco Insurance* (*1) serves as a reminder to plaintiff insureds and their counsel to seriously consider whether there is merit to advancing any such claim against an insurer. If such a claim is not established, the insurer may be entitled to recovery of a significant portion of its legal expenses exceeding a conventional range or a "glass ceiling" of costs recovery. The general rule is that a costs award is constrained or limited to something proportional (such as a modest percentage) of the amount sought in the underlying claim. As this case indicates, in special cases such as where an insurer has a legitimate reason to mount a determined and full defence to a bad faith claim, a court may permit a further or an enhanced costs recovery.

The Court Decision

In the July, 2014 edition of this newsletter, we reported on the *2068286 Ontario Inc. v. Jevco Insurance* trial decision and that the plaintiff insured had brought an action on an insurance policy issued to it by Jevco Insurance ("Jevco") for indemnification for the theft of an insured tractor.

Jevco prevailed at trial on the basis that there was no duty to indemnify the insured by virtue of section 233 of Ontario's *Insurance Act* as the insured had not disclosed the existence of 'unrepaired damage" to the tractor at the time of the application for the insurance. The court found that this was a reasonable and material consideration that would have influenced Jevco's underwriter had the "unrepaired" state of damage been disclosed to Jevco. Accordingly, Jevco was entitled to "avoid" the loss and it did not have to pay the insured plaintiff the value of the lost tractor.

The plaintiff also had advanced a bad faith claim against Jevco Insurance, which the court found had no merit or substance at all.

Subsequent to the release of the trial decision, the court issued an "Endorsement" on the award of legal costs for the trial. Jevco had earlier filed submissions that it should be entitled to a significant recovery of legal costs, without constraint to the foregoing "proportionality" principle, it being the general rule that there should be some reasonable relationship between the amount of costs being claimed by the successful party and the amount of the claim in the litigation. The Court agreed with Jevco that the unmerited claim of "bad faith" called for a significant defence, justifying a significant recovery of costs without constraint as not being tied into the amount of the insured's indemnify claim in the underlying coverage litigation.

The Costs Regime in Ontario

Rule 57 of the Ontario Rules of Court lists several factors that a court may take into account when awarding costs to a party. Included amongst the considerations – in addition to the preliminary consideration as to the result of the lawsuit – is the "amount of costs that an unsuccessful party could reasonably expect to pay in relation to a step in the proceeding for which costs are being "fixed" and "the amount claimed in the proceeding".

Governing case law in Ontario has embedded the general rule that a claim for costs should be proportionate to the amount of the claim. In the Endorsement, the Court cited the following general rule from *Boucher v. Public Accountants Council for the Province of Ontario* (*2):

> There is now a presumption that costs shall be fixed by the court unless the court is satisfied the case is an exceptional one. The fixing of costs is not simply a mechanical exercise and does not begin and end with a calculation of hours times rates: the introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in Rule 57.
>
> Overall the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

The Court also cited *Marcus v. Cochrane* (*3) in the Endorsement:

> In fixing … costs, it is important to remember that the dispute was essentially about a claim for approximately $80,000. The partial indemnity bill of costs (submitted by the successful party)… was $172,645.55 … The comparison of what this dispute was about and what was spent on it is stark and difficult to justify. While undoubtedly … counsel asserting the claim must bear the greater responsibility, the principle of proportionality which is fundamental to any sound costs award cries out for application by both counsel. With the assistance and indeed the direction of the trial judge if need be, counsel simply must cut the cloth to fit. The health of the justice system depends on it. Trial costs cannot serve as an incentive to look away from this important challenge.

The need for 'proportionality' between the costs sought by the successful party after trial and the amount and nature of the underlying claim was also the subject of judicial commentary *in Buchanan v. Geotel Communications Corp.* (*4):

> … the bottom line is that the proposed costs are excessive. They are excessive from two perspectives: costs of this magnitude will make litigation inaccessible as a method of dispute resolution; costs of this magnitude are also disproportionate to the value of the legal work reasonably necessary to represent a client in this dispute.
>
> If counsel do not use more restraint in deciding how much to invest in litigation they will put both the bar and the courts out of business which will profoundly harm the public whom we both serve.

Accordingly, the general rule is that "the concept of proportionality must be kept in mind when costs are being fixed" by a court: *Lipsitz v. The Queen* (*5).

The Endorsement in the present Jevco case recognized that, while the costs claimed by Jevco were significant, exceeding any rule of thumb of "low ratio proportionality" to the claim amount, the amount of the claim as filed was reasonable (after ruling that there should be a minor discount from the claim

amount), reflecting necessary and measured work taking into consideration the following:

1) As stated above, the claim included an allegation that the defendant acted in bad faith that was found to have no merit. Jevco was entitled to ensure that a full answer was provided to the bad faith claim in addition to the other elements of the statement of claim;
2) Jevco necessarily and reasonably called various defence witnesses including two expert witnesses to defend the allegations against it;
3) The trial lasted a full week involving significant preparation;
4) Jevco Insurance has submitted an "offer to settle" to the plaintiff, which would have afforded the plaintiff a better result than eventually came to pass with the dismissal of all of the plaintiff's claims, and
5) The Court found (as reported in our July, 2014 edition) that the plaintiff "knowing misrepresented" the condition of the insured property being the subject of the litigation at the time of application for the coverage with Jevco.

In the circumstances and in light of the guiding legal principles the Court found that Jevco's claim for a significant costs recovery was for a reasonable range and "proportionate".

The "take away" here is that despite the general rule that a successful party's costs recovery will be fixed so as to be proportionate to the claim amount, in special circumstances the criterion of proportionality will be assessed in light of the overall circumstances, not necessarily being limited by or being a function of the amount of the plaintiff's claim for the underlying loss. Certainly, as in this case, the Court will consider the reasonable and foreseeable interest of an insurance company mounting a determined and thorough defence in answer to a claim of bad faith against it in assessing the extent of a costs award and whether it is "proportionate".

Gordon Hearn

Endnotes
(*1) 2014 ONSC 3929
(*2) 71 O.R. (3d) 291 (Ont. C.A.)
(*3) 2014 ONCA 207, at para. 15
(*4) [2002] O.J. No. 3063 at paras. 10 and 11
(*5) 2010 ONSC 5232 at para. 14

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CONTEST

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