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Litigation requires creative problem solving. In this issue we examine how unpaid debts can be recovered where there is no enforceable contract; and where liens can be used for personal property. There is also a discussion about the procedure for collecting on a judgment once obtained. Finally, a recent case is highlighted which may signal the potential demise of solicitor/client privilege.

Recovering the Value of Services Rendered in the Absence of an Enforceable Agreement

Zachary Kerbel

What recourse do you have when you have provided services based on an agreement that is found by the court to be unenforceable? Can the value of these services be recovered despite the invalidity of the underlying agreement?

The remedy which the law offers in situations such as these is referred to as *quantum meruit*, and its application is well-illustrated by the recent decision of the Ontario Court of Appeal in *Consulate Ventures Inc.* v. *Amico Contracting & Engineering (1992) Inc.*

In this case, the plaintiff company, Consulate, had entered into negotiations with the Heritage Group, a related company of the defendant Amico, for the development of a number of factory outlet malls. Over the course of negotiations, the plaintiff company had provided Heritage with a range of services, including the provision of draft signage, the provision of extensive advice regarding planning, design and construction specifications, the provision of leasing plans and precedent marketing plans, and extensive efforts to secure tenant commitments.

One day before the first phase of the development was scheduled to begin, the Heritage Group's solicitors denied the existence of a binding joint venture agreement, taking the position that it was only an agreement to agree and therefore unenforceable.

The plaintiff sued for damages for breach of contract and for restitutionary relief related to the value of the services rendered on a *quantum meruit* basis. At trial, the court found that no joint venture agreement had been concluded and that damages were therefore unavailable in contract. The trial judge also found that since she could find no underlying valid contractual relationship, there was no viable claim to relief on the basis of a *quantum meruit* claim.

While the Court of Appeal agreed with the trial judge that the conduct of the parties supported the conclusion that no valid joint venture agreement

existed, it disagreed with the trial judge that a *quantum meruit* claim required the existence of a valid underlying contract. Rather, the Court held, the claim based on *quantum meruit* "is a discrete cause of action, separate and apart from claims grounded in contract or tort, which contemplates a remedy for unjust enrichment or unjust benefit."

Where a claim is brought on the basis of *quantum meruit*, the court held that "an explicit mutual agreement to compensate for services rendered is not a prerequisite to recovery." Rather, "it suffices if the services in question were furnished at the request, or with the encouragement or acquiescence, of the opposing party in circumstances that render it unjust for the opposing party to retain the benefit conferred by the provision of these services."

It suffices if the services in question were furnished at the request, or with the encouragement or acquiescence, of the opposing party.

Amico argued that the services in question were merely services furnished "between colleagues" or for the purpose of moving towards the joint venture, and, as such, were unrecoverable.

But on the evidence, the Court of Appeal rejected this position, finding that many of the services rendered by Consulate had been provided at either the request, or with the acquiescence, of Heritage. Consequently, the Court of Appeal directed a new trial to determine the nature, extent and value of the services provided.

The decision in the *Consulate* case does not mean that courts will ignore the formal contractual requirements of binding legal relationships or that parties may safely disregard these requirements and simply rely on the equitable relief that the claim of *quantum meruit* potentially provides. But it should provide litigants with some solace that the law will protect the interests of contracting parties who extend themselves to another's benefit on the basis of an ultimately unenforceable agreement.

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Solicitor-Client Privilege: Down the Slippery Slope?

Joseph D'Angelo

Benjamin Bathgate

When a client communicates with legal counsel, he or she expects and relies upon the confidential nature of those communications. A client's ability to speak frankly and honestly with his or her legal counsel, without fear of self-incrimination, for the purpose of obtaining professional legal advice, forms the very foundation of our solicitor-client relationship and is a critical factor in ensuring access to justice. The court protects these communications from disclosure under the rubric of solicitor-client privilege, if the communications meet three criteria. The communications must be: (1) between a client and his or her legal counsel, who must be acting in a professional capacity as a lawyer; (2) given in the context of obtaining legal advice; and (3) intended to be confidential.

There are, however, several strictly delineated exceptions to the protection afforded by solicitor-client privilege. Communications made in furtherance of unlawful conduct, for example, are not protected by solicitor-client privilege and must therefore be disclosed by legal counsel. The courts have typically defined unlawful conduct as meaning crimes or acts of fraud. The question, however, is whether this definition of unlawful conduct can be extended to include tortious conduct.

In what The Honourable Justice Perell himself admitted was a contentious conclusion, the court in *Dublin* v. *Montessori Jewish Day School of Toronto* has recently concluded that solicitor-client communications that *may* have been in furtherance of *tortious conduct* are not protected by solicitor-client privilege (emphasis our own).

In *Dublin*, the plaintiff, Dr. Max Dublin, enrolled his son, the plaintiff Ephraim Dublin, in the defendant Montessori

Jewish Day School of Toronto. (Dr. Dublin also worked at the school.) Ephraim suffered from a medical problem that produced occasional incidents of incontinence. The plaintiffs alleged that the defendants' actions led to the mistreatment, public ridicule, embarrassment and illegal suspension of Ephraim, in breach of contract, in breach of trust and confidence and was the result of either intentional or negligent infliction of emotional harm. The plaintiffs further alleged that Dr. Dublin was wrongfully dismissed by the defendant school in breach of the same duties and that these actions were undertaken with malice, dishonesty and subterfuge.

On October 26, 2003, Ms. Nashman, the chair of the corporate defendant's board of directors, e-mailed her legal counsel. This e-mail was inadvertently disclosed to the plaintiffs during the course of litigation. When the plaintiffs refused to return their copy of the e-mail, the defendants brought a motion for its return. The main issue to be decided was whether or not this communication was in furtherance of unlawful conduct and therefore not protected by solicitor-client privilege.

At the outset of his decision, Justice Perell explained that the e-mail in this case was an exception to solicitor-client privilege "because it was arguably in furtherance of unlawful conduct." Unfortunately, there is no detail in the case as to what was stated in the e-mail.

> *Is it likely that in all cases involving a tort (eg. misrepresentation) any communications with counsel pertaining to that tort will be characterized as being "in furtherance of tortious conduct" and therefore will no longer be afforded the protection of solicitor-client privilege?*

In his reasons, Justice Perell reviewed several authorities in order to support an expanded definition of unlawful conduct. For example, he referred to *Goldman, Sachs & Co.* v. *Sessions* and *Northwest Mettech Corp.* v. *Metcon Services Ltd.* for the proposition that crimes and acts of fraud were but two examples of intentional unlawful conduct that were not protected by solicitor-client privilege. Other types included abuse of process, breaches of regulatory statutes, breaches of contract and torts and other breaches of duty.

According to Justice Perell, the implication from this line of authorities was that the definition of unlawful conduct could be expanded to include torts, if the client *knew or should have known* that the communications in question were with respect to the conduct of a tort (emphasis our own). As cited with approval by the Supreme Court of Canada in *R.* v. *Shirose*: "The knowledge requirement minimizes the effect of the exception on proper communications…."

This begs the question: What constitutes sufficient evidence of an illegal purpose? Justice Perell stated that a mere assertion of illegal purpose was insufficient and appeared to accept that a *prima facie* case was necessary to vitiate solicitor-client privilege. In applying this requirement to the facts in *Dublin*, however, Justice Perell concluded that sufficient evidence was present to find that the e-mail *might* show that the defendants intended to inflict emotional harm on the plaintiffs (emphasis our own). In fact, Justice Perell emphasized that the illegal purpose remained to be proven. This was found to be sufficient evidence upon which to vitiate solicitor-client privilege.

The decision in *Dublin* has left clients and their legal counsel in a troubling position. Is it likely that in all cases involving a tort (e.g. misrepresentation) any communications with counsel pertaining to that tort will be characterized as being "in furtherance of tortious conduct" and therefore will no longer be afforded the protection of solicitor-client privilege? Need these communications only show the possibility of illegal purpose to require disclosure? Are all intentional torts deemed to be unlawful conduct and therefore an exception to solicitor-client privilege? These uncertainties, if left unanswered, risk undermining the frank and honest lines of communication that form the basis of the solicitor-client relationship and which enable persons needing legal advice to seek it out without fear of self-incrimination.

Since the release of Justice Perell's decision, permission to appeal has been granted. In fact, in a brief endorsement, The Honourable Justice Carnwath has brought into question Justice Perell's decision, stating that: "there is good reason to

doubt the correctness of Perrell J.'s decision. Given the sanctity of solicitor-client privilege, the expansion of the exception for furtherance of crime to tortious acts of the kind alleged in this Statement of Claim, may go too far."

Litigators, and parties involved in litigation, will be anxiously awaiting the outcome of the appeal.

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The *Repair and Storage Liens Act*: The One to Watch Out For

Glenn Grenier

The *Repair and Storage Liens Act* ("RSLA")[1] covers the repair and/or storage of "articles," defined as "tangible personal property other than a fixture." A "repair" "means an expenditure of money on, or the application of labour, skill or materials to, an article for the purpose of altering, improving or restoring its properties or maintaining its condition…" Though the term "storage" is not defined in the Act, a "storer" is "a person who receives an article for storage or storage and repair on the understanding that the person will be paid for the storage or storage and repair, as the case may be."

To use the RSLA to full advantage, however, one must think creatively with respect to the foregoing definitions. If one believes the RSLA is confined to auto repairs and u-store outlets, the benefits of the RSLA will be lost. I once filed an RSLA lien on behalf of a company that was unpaid after having rented movie production equipment to a film producer. I took the position that the film negative was an "article" that had been altered and improved by the movie cameras and thus, had been "repaired" within the meaning of the RSLA. (I will tell you how this ended later in the article, so keep reading.)

To use the RSLA to full advantage however, one must think creatively with respect to the foregoing definitions. If one believes the RSLA is confined to auto repairs and u-store outlets, the benefits of the RSLA will be lost.

Possessory and Non-possessory Liens

The RSLA lien world is further divided into possessory liens and non-possessory liens. A possessory lien is automatically created when a repairer or a storer obtains possession of the article and commences an authorized repair or storage. The possessory lien continues until the amount for such services is paid or until possession of the article is surrendered. Thereafter, an unpaid repairer or storer has a non-possessory lien.

Signed Acknowledgment of Indebtedness

In order for a non-possessory lien to be enforceable, the repairer or storer requires a "signed acknowledgment of indebtedness." This term is not defined in the statute; however, the statute does state that the written acknowledgment *may* be on an invoice or other statement of account. Case law has interpreted that this provision does not require that a specific or discrete amount has to be admitted as owing, but simply an acknowledgment that *some* amount is owing will be sufficient.[2]

The acknowledgment of indebtedness does not have to be signed by the owner of the article but may be signed by others on behalf of the owner. In the Ontario Court of Appeal decision, *Royal Tire Service Ltd.* v. *Shelleby Transportation*,[3] an equipment lessee, and not the registered owner, executed the document relied upon as supporting the non-possessory lien. The Court of Appeal held that others in legal possession of the article had the authority to authorize repairs and to execute the required acknowledgment.

What is really surprising is that by simply carrying out

their statutory duty to provide a listing of creditors of an insolvent person or corporation, a trustee or receiver can unwittingly provide a non-possessory lien claimant with the means to enforce his/her lien. It has been held that being enumerated on a "List of Creditors" in a Statement of Affairs signed by the Trustee was sufficient to constitute a signed acknowledgment of indebtedness for the purposes of the RSLA.[4] Further, an RSLA lien claimant can then register their lien *after* a bankruptcy or receivership, and as a result, claim a higher interest in the article than any other interest, including that of the trustee or receiver.[5]

Timing and Priority

A non-possessory lien claimant has no prescribed time limit under the RSLA to register a lien in the article. By filing a registration of a lien, a lien claimant is giving notice to all others of that non-possessory lien. A non-possessory lien becomes enforceable against third parties after registration. If a third party acquires an interest in an article *after* a non-possessory lien in that article has arisen but *before* the lien is registered, that third party will have priority over the non-possessory lienholder.

One of the primary incentives for a non-possessory lien claimant to register quickly is to ensure they do not lose priority to a third party who acquires some interest in the article *after* the lien arises and who would be otherwise unaware of the unregistered non-possessory lien (and thus granted priority as a result). Further, registration is required in order to allow the non-possessory lien claimant to utilize the seizure mechanism in the RSLA.

Priority in an article is not determined by the order of registration. A subsequently registered non-possessory lien will have priority over a previously registered security interest. Further, priority amongst non-possessory lien claimants is not determined by the order of registration, but by the reverse order of giving up possession, the last repairer or storer having priority.

The following should be noted with respect to the RSLA: the priorities enjoyed by lien claimants over other interests; the fact that such priorities can be registered and asserted after an insolvency; and the fact that self help remedies can be asserted quickly, simply and initially, without any court oversight.

Tacking

Each individual repair or storage of an article must be registered as a separate lien, as the statute prevents the tacking of liens. For example, if lien claimant "A" acquired rights in January and March, and lien claimant "B" acquired rights in February, then section 16 provides that the priorities, in order, would be A (March repair), B (February repair) and A (January repair). If A were allowed to tack his/her January claim to the March claim, it would defeat B's right to have the February claim have second priority, behind A's March claim and before A's January claim.

In the *Canadian Imperial Bank of Commerce* v. *Kawartha Feed Mills Inc.*[6] case, Justice Ferrier explained that aggregating lien claims was only a concern between competing non-possessory lien claimants, and not between a non-possessory lien claimant and a prior *Personal Property Security Act* claimant.

Seizure

Once a non-possessory lien is registered, a lien claimant can provide a copy of the registered lien to the local sheriff or a licensed bailiff and direct that the article be seized. Upon receipt of the registered lien and direction, the sheriff shall seize the article wherever it may be found and deliver it to the lien claimant. Note that in doing so, the lien claimant is not required to start any court proceeding nor obtain a court order.

To conclude my film story, after registering the lien, I provided a copy to the local sheriff who was directed to seize the negative which happened to be in the possession of another firm which was developing the negative. That firm could have asserted a possessory lien and resisted my sheriff under the RSLA, but they did not know they had such rights, and thus did not assert them. Following seizure and upon having possession of the film negative, I was able to secure funds for my client, who otherwise would have remained unpaid as an unsecured creditor, hopelessly seeking funds from an insolvent movie production company.

Conclusion

The following should be noted with respect to the RSLA:

- the priorities enjoyed by lien claimants over other interests;
- the fact that such priorities can be registered and asserted after an insolvency; and
- the fact that self-help remedies can be asserted quickly, simply and initially, without any court oversight.

1 R.S.O. 1990, c. R.25.

2 *Altruck Transportation Services (c.o.b. Kirby International Trucks Ltd.)* v. *Barry Humphrey Enterprises Ltd.* [1993] O.J. No. 964 (Gen. Div.); *Alexandrov* v. *1030999 Ontario Ltd.* [1994] O.J. No. 2338 (Gen. Div.).

3 [1999] O.J. No. 3288 (C.A.).

4 *1538565* v. *Leggat Aviation Ltd.*, 2004 CarswellOnt 4755 (S.C.J.); *Fountain Tire Corp.* v. *Sturgeon Timber Ltd. (Receiver of)*, [2007] O.J. No. 2424 (S.C.J.).

5 *Fountain Tire Corp.* v. *Sturgeon Timber Ltd. (Receiver of)*, [2007] O.J. No. 2424 at para. 38 (S.C.J.).

6 (1998) 41 O.R. (3d) 124, 14 P.P.S.A.C. (2d) 35, 1998 CarswellOnt 2918 (Gen. Div.).

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The Examination in Aid of Execution

David Debenham

In order to get the information necessary to seize a debtor's assets or garnish his income, Rule 60.18 of the Rules of Court permit a creditor to require a debtor to attend an examination under oath before a court reporter and be questioned in relation to:

(a) the reason for non-payment or non-performance of the judgment;

(b) the debtor's income and property;

(c) the debts owed to and by the debtor;

(d) the disposal the debtor has made of any property either before or after the making of the order;

(e) the debtor's present, past and future means to satisfy the order;

(f) whether the debtor intends to obey the order or has any reason for not doing so; and

(g) any other matter pertinent to the enforcement of the order.

Clients retain high paid legal counsel to win trials for them, but often leave it to collection agencies to collect those judgments. Obtaining a judgment may only be half the battle, and it is important to treat post-judgment realization of that asset with the importance it deserves.

In reading the rule, the most important provision is the ability to ask a question about "any other matter pertinent to the enforcement of the order." That means that legal research into the panoply of post-judgment enforcement remedies must be done before the examination in aid of execution (formerly called a judgment debtor examination) to determine what you have to establish to obtain those remedies and, therefore, what evidence you need from the debtor to assist you in obtaining those remedies. Obviously, the debtor is hesitant to cooperate in this process, so one has to be prepared for the possibility that the debtor will ignore a personally served Notice of Examination,[1] and one will have to get a court order to re-attend. The court may set out the method of service of for the second Notice of Examination. A copy of that Order, and the second Notice of Examination is then served. Ultimately, the court may make an Order for contempt, but only after service of the motion for contempt personally, and not by an alternative personal service, absent extraordinary circumstances, such as proof that the Debtor was evading service.[2]

An officer or director of a corporate debtor or, in the case of a debtor that is a partnership or sole proprietorship, a partner or sole proprietor against whom the order may be enforced may be examined on behalf of the debtor. Only one examination may be held in a twelve-month period in respect of a debtor in the same proceeding unless the court orders otherwise. Therefore, proper preparation is key. Where it appears from an examination that a debtor has concealed or made away with property to defeat or defraud creditors, a judge may make a contempt order against the debtor, so pursuing a line of questioning about the history of the property belong to the debtor into the hands of third parties is an important part of the examination.[3] When the debtor feigns a lack of knowledge, or cannot be located, one can rely on Rule 60.18 (6) which provides that where any difficulty arises concerning the enforcement of an order, the court may,

(a) make an order for the examination of any person who the court is satisfied may have knowledge of the matters set out in (a) through (g); and

(b) make such order for the examination of any other person as is just.

Because the Rules of Court therefore provide that a creditor may examine a debtor not only as to his income and property, and debts owed to and by the debtor, but also with respect to the disposal that the debtor has made of any property either before or after the judgment, the creditor is entitled to examine not only as the debtor's present means to satisfy the judgment, but also his means and assets previous to the judgment, for example, at the time that the debt to the plaintiffs was contracted. A debtor who contracted for the purchase of items at a time when they could not have paid for them may be guilty of fraud. Property transferred by the debtor prior to judgment for the purpose of avoiding creditors may also be challenged. Preferential transactions with non-arm's length creditors to the detriment of other creditors at a time when the debtor was insolvent, may also be the subject of a challenge. All of these areas may be explored at an examination in aid of execution. A historical examination of the debtor's assets and income is critical to determining historical patterns which demonstrate whether, and when, the debtor started to divert or hide income and assets from the impending threat of creditors' claims.

Conclusion

Clients retain high paid legal counsel to win trials for them, but often leave it to collection agencies to collect those judgments. Obtaining a judgment may only be half the battle, and it is important to treat post-judgment realization of that asset with the importance it deserves as part of an overall process of turning a claim into cash. Taking advantage of the expansive rights allowed under the Rules of Civil Procedure by a properly conducted Examination in Aid of Execution is a critical feature to that process, and must be understood as such.

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1 Or by an alternative to personal service, but not by service on a solicitor, as set out in Rule 60.18 (7)

2 Rule 60.11 (2)

3 Rule 60.18 (5)

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Announcements

Lang Michener LLP Welcomes New Associates

The Toronto, Ottawa and Vancouver offices of Lang Michener are all welcoming new associates to the firm. We are pleased to announce the following recent additions: Benjamin M. Bathgate joined the Commercial Litigation Group in Toronto in April 2007. His practice covers a broad range of subject matters, including contract law, professional negligence, insurance law and defamation. Zachary Kerbel joined the Commercial Litigation Group in the Toronto office in August 2007 after summering and articling with the firm. Zachary's varied practice includes a range of civil litigation and public law matters. As a member of the Litigation Group in Vancouver, Katherine Reilly's practice includes general civil litigation, employment and labour law and corporate and commercial litigation. She also completed her articling period with the firm and was called to the B.C.

Bar in 2007. Aaron Rousseau joined Lang Michener as an associate in the Employment and Labour Law Group in the Toronto office in September 2007 after summering and articling with the firm. Aaron practices in the areas of labour and employment law and commercial litigation. Ruba El-Sayegh joined the Commercial Litigation Group in Lang Michener's Ottawa office in June 2007 after articling with the firm. The focus of her practice is civil and commercial litigation.

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Directors' and Officers' Liability – Updated Chart

Lang Michener has released a new edition of our popular Directors' and Officers' Liability chart. This chart provides a general overview of the types of liability that are imposed on directors and officers. There are currently over 100 federal and Ontario statutes which impose such liability, either directly or indirectly on directors or officers. Legal counsel should be sought to provide a more complete analysis of liability faced by a director or officer in particular circumstances. The chart is not an exhaustive list of all federal and Ontario statutes that impose liability on directors and officers and is intended only as a guide. The chart can be found on the Lang Michener website in the Litigation section under the title Factsheets.

CommercialLitigationBrief

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