September 2011

BRIEFING NOTE

The Latest Chapter in Litigation Finance – Back from the Brink?

The costs judgment in *Guiliani* v. *Region of Halton* (2011 ONSC 5119), handed down August 31, followed an 11 day trial in February 2010 concerning injuries incurred in a motor vehicle accident. The damages award was $375,000, however the costs and disbursements incurred by the Plaintiff's counsel totaled approximately $788,000. Murray J., was critical of the amount of costs, however of particular note are the circumstances, and the judge's consideration of, a loan which the Plaintiff had obtained from Lexfund Inc., to finance disbursements.

The Plaintiff took out a loan in the amount of $150,000 on November 15, 2009. Repayment was contingent on success at trial. The interest rate was 3.5% compounded monthly, however there was an additional underwriting fee of 7.5% on the amount advanced that was added to the principal debt. Further, the agreement provided for a penalty if the loan was repaid within 24 months from drawdown. As of November 25, 2010, the total owing on the loan was $368,186.72. The effective actual annualized interest rate on the funds advanced was (by these authors' calculations) approximately 48.78%. Counsel for the Plaintiff sought from the Defendant as a disbursement $92,700.00 in interest (of $206,936.72 total interest and penalties that the Plaintiff allegedly owed to Lexfund).

The court declined to rule on whether the loan agreement was champertous. However, Murray J. noted in *obiter* that Courts have taken into account excessive fees as one of the factors to be considered in determining whether third party funding of litigation is champertous, and if so, it may be that the loan at issue amounted to champerty and would be unenforceable for that reason alone.

However, the issue of recovery of the interest payment turned on the less esoteric argument of whether the disbursement was reasonable in assessing costs payable by the Defendant under the Ontario equivalent of British Columbia Rule 14-1(2). In that regard, Murray J. held:

> "I am in complete agreement with the submissions of Defendants' counsel that: "this Court should not reward, sanction or encourage the use of such usurious litigation loans, which in this case has interest provisions that are arguably illegal, otherwise such loans will be seen to be judicially encouraged and could become a common-place tactic." *I agree that an award of interest in this case would likely have an adverse impact on other Defendants' decisions to proceed to trial or to Appeal. I think the Defendants' counsel is correct in stating that access to justice is a two-way street. As I have indicated above, to*

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> *award interest as requested by the* [Plaintiff's counsel] *would not facilitate access to justice and would undoubtedly bring the administration of justice and to disrepute."*

Murray J. thus disallowed the interest claim in its entirety (as opposed to substituting a lesser amount). An argument raised in other cases in which interest was awarded (e.g., *Bourgoin* v. *Oullette* (2009) 343 NBR (2d) 258 and *Herbert* v. *City of Brantford* 2010 ONSC 6528) has been the question of whether litigation financing is required to facilitate access to justice. On that topic, the judge held:

> *"The interest rate on the loan obtained by the Plaintiff for disbursements is unconscionable. It is turning the world on its head to assert, as does* [the Plaintiff's counsel] *that this is an access to justice issue and that ordering interest payments on the Lexfund* [sic] *is reasonable. This loan agreement does not facilitate access to justice. This loan agreement does nothing to advance the cause of justice. It is difficult to believe that any lawyer would refer a vulnerable client to such a lender."*

The court declined to order payment on a number of disbursements claimed. The court clarified that the rate for interest for the disbursements that were allowed should be calculated using the amounts stipulated in *Courts of Justice Act*.

This is a scathing criticism of the terms of the loan obtained, in circumstances where other such loans with high interest rates have been allowed (e.g. *Bourgoin* v. *Oullette* – 32.9% annual compound interest). What is the 'tipping point' such that the rate renders the loan agreement champertous, remains to be seen. It will be interesting to see what steps the litigation finance industry may take in response to this decision, given its indictment of the high interest rates that until now have defined this market niche.

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