

News

Moves

- Tax lawyer **Vern Krishna** has joined Toronto boutique firm *TaxChambers LLP* as counsel. Krishna, a professor of law at the University of Ottawa and columnist with *The Lawyers Weekly*, was formerly at Borden Ladner Gervais.
- **Avinash Maharaj** has joined the Toronto office of business law and litigation firm *Fasken Martineau* as counsel, and will also serve as an advisor in sustaining an environment that supports diversity. Maharaj is chair of the Legal Leaders for Diversity initiative, whose membership is drawn from 70 companies.
- **JoAnne Barnum** and **Michael Robinson** have joined *Harper Grey* in Vancouver as associates with the firm's commercial litigation group and insurance and health law groups respectively. Barnum was the recipient of this year's Raymond Herbert Award, given to the top all-round graduating student from the UBC Faculty of Law.
- **Jonathan Levy** has joined the litigation practice at Toronto firm *Torkin Manes* as an associate. Levy, formerly at Stikeman Elliott, is a member of the Ontario and B.C. bars.
- The Toronto office of *McLeish Orlando* has added three new associates in **Lindsay Charles**, **Ian Perry** and **Petrina Wallebeck**, each of whom previously served as articling students.
- **Nicola Brankley**, **Michael Cremasco** and **Ashley Goren-Gibson** have joined insurance law firm *Stieber Berlach* as associates.
- **Robby Goodrich**, **Ravinder Bindra** and **Andrew Charters** have joined *Clark Wilson* as associates. Goodrich and Bindra will join the firm's commercial real estate and corporate and commercial groups. Charters is part of the corporate finance group.

Court balks at blending actions

CHRISTOPHER GULY

When considering two or more allegations in a statement of claim, courts must examine whether related errors, omissions or negligent acts have sufficient association or connection underlying them, the Ontario Court of Appeal recently ruled in a case involving an action against a law firm's insurance policy.

In determining whether there is such a connection, a court "must consider the similarities and differences between the nature and kind of the alleged misconduct which underlies each claim, and the kind and character of the losses for which recovery is sought in each claim," wrote Justice Eileen Gillese in *Simpson Wigle Law LLP v. Lawyers' Professional Indemnity Co.* [2014] O.J. No. 3037, agreed to by Justices Katherine van Rensburg and William Hourigan.

As a result of the ruling, the appellants successfully obtained a declaration that the allegations in an action against them constituted two separate claims under a LAWPRO insurance policy rather than a single claim as found by the application judge.

Based on the statement of claim, brothers and business owners Angelo and Frank Agro were Simpson Wigle clients. When Angelo became ill, the law firm prepared powers of attorney for Frank and nephew Richard Agro. But when Frank was unable to fulfil his POA duties, one of the firm's since-deceased lawyers, Francis Wigle, and CIBC Trust Corp. successfully applied for an order appointing them as Angelo's committees, but didn't disclose that Richard was an alternate attorney.

The law firm represented the committees and charged various fees to Angelo's estate; he died in 2000. Frank died four years ear-



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Alan Lenczner

Lenczner Slaght Royce Smith Griffin

lier, and Wigle acted for his estate while another lawyer, Paul Milne, served as executor. Both lawyers arranged for the sale of the brothers' six properties.

Following Angelo's death, his estate trustees (including nephew Richard) commenced an action against the law firm, Wigle, Milne and CIBC (not an appellant in this case). The action said that Simpson Wigle breached its duty to Angelo and his estate and was in a conflict of interest; sought damages for breach of fiduciary duty, breach of contract and negligence; and sought an order disgorging committeship, guardianship, administration and legal fees.

Last year the appellants argued before Superior Court Justice David Edwards that the allegations constituted at least two separate claims: one alleging improper appointment of Wigle and CIBC as committees of Angelo and his estate, and a second claim alleging conflict of interest due to the various roles that Wigle and Milne played regarding the brothers' estates.

While the application judge determined that the disgorgement request wasn't covered by the LAWPRO policy, he found that the POA and conflict allegations were related and constituted one claim under the policy—most of the losses sus-

tained were the same; Wigle's fiduciary duty to Angelo was the same for both allegations arising from his failure to disclose the POAs; and Milne was in a similar situation and his actions as Frank's executor breached the same fiduciary duty.

In setting aside that judgment, the appeal court said it was "not sufficient to identify, at a general level, the relationship or obligations between the parties or the nature of the losses alleged to have been suffered."

The Court of Appeal said there were two claims: one arising

from the allegedly improper appointment of Wigle and CIBC as committees of Angelo and his estate and the failure to disclose Richard Agro as an alternate attorney. The other claim concerned the allegedly negligent administration of Angelo's estate. Both "arise from errors, omissions or negligent acts that are sufficiently different in nature and kind" that they are unrelated within the LAWPRO policy's meaning, wrote Justice Gillese.

Veteran Toronto commercial litigator Alan Lenczner, who represented the appellants (which included Wigle's estate and Milne), said the Court of Appeal outlined an approach to determine whether claims under a LAWPRO policy are related.

"You have to look at the way a claim is framed, understand its substance, and analyze whether other claims are different in nature and kind. You have to determine whether or not each allegation in a statement of claim is related or not, and the way you do that is by looking at the underlying substance of each allegation. If there is a substantial relationship between the claims, do damages from the allegations flow from one act, or two or more acts?"

The appellate court said the nature of the damages sought in the two claims was also different in "kind and character."

One claim sought recovery for losses representing the costs, fees and expenses arising from the allegedly wrongful appointment of Wigle and CIBC as Angelo's committees. The real property claim sought recovery for the alleged diminution of Angelo's estate due to the improvident or unnecessary sales of properties in which he had an interest.

Stephen Cavanagh, LAWPRO's counsel in the appeal, didn't respond to an interview request.

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