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CAN A DEFENDANT AVOID COSTS IN SUPREME COURT ACTIONS WHEN DAMAGES ARE WITHIN NEW PROVINCIAL COURT LIMITS?

ISSUE

The monetary limit in B.C. Provincial Court, Small Claims was increased on September 1, 2005 from $10,000 to $25,000. Since, a number of issues have arisen in relation to actions previously commenced in Supreme Court and resolved (either by way of settlement or judgement) after September 1, 2005 for a value between $10,000 - $25,000.

Supreme Court Rules contain a provision (Rule 37(37)) which permits recovery of disbursements but not taxable costs in the event that the proceeding could appropriately have been brought in Provincial Court (i.e. within Provincial Court monetary jurisdiction). Since the new legislation took effect, defence counsel have used Rule 37(37) to argue that actions settling at or below $25,000 will not attract cost consequences in favour of the plaintiff. In light of recent case law, this strategy will be less, if at all, effective.

RECENT DECISION

On February 9, 2006, reasons were delivered in *Menduk v. Ashcroft*, 2006 BCSC 274. The plaintiff commenced his action in the Supreme Court of British Columbia in July 2003 in relation to an accident that had occurred in July 2001. The pleadings were closed in 2004 and in November 2005, the plaintiff accepted the defendant's formal offer to settle in the amount of $24,100.

At issue before the court was the plaintiff's entitlement to costs. Three possible outcomes were considered by the court:

a) the plaintiff would receive his costs;
b) the plaintiff would not receive his costs;
c) the plaintiff would receive costs up to the date the monetary jurisdiction of Provincial Court increased (on the basis that following the new legislation, it would have been appropriate for the matter to have been transferred to Provincial Court).

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The Court concluded that a plaintiff who had commenced proceedings in Supreme Court prior to September 1, 2005 and who accepts a formal offer to settle after September 1, 2005 within the new jurisdiction of Provincial Court, is entitled to his costs. The Supreme Court held that no inquiry was required into whether the plaintiff could have transferred his proceedings to Provincial Court, after the rise in the monetary jurisdiction of that court.

DISCUSSION

It should be noted that *Menduk* relates only to settlements achieved pursuant to formal offers. Nevertheless, it is likely that plaintiff counsel will use this case to argue that Supreme Court cases settling between the old and new Provincial Court monetary limits should attract costs.

It is yet to be determined how the Supreme Court will respond to cases in which the award at trial falls between the old and new Provincial Court monetary limit. The rule relating to costs in matters resolved at trial (Rule 57(10)) has been interpreted as inviting the Court to consider the sufficiency of the plaintiff's reasons for maintaining or continuing a matter falling within Provincial Court monetary jurisdiction in Supreme Court. In *Menduk*, the court held that this consideration was not one that applied in the event of a formal offer of settlement.

One expects that if a case is nearing trial and the bulk of pre-trial proceedings were at or near completion at the time of the new legislation, the courts may be inclined to forgive a plaintiff's failure to transfer the proceedings to Provincial Court and award costs.

PRACTICAL IMPACT FOR INSURANCE INDUSTRY

In light of *Menduk*, insurers should give consideration to an early application to have the proceedings moved to Provincial Court. This is particularly so where:

i) cost implications going forward are expected to be significant; and
ii) insurers are faced with a case commenced in Supreme Court relatively near the change in legislation date and likely within the new monetary jurisdiction of the Provincial Court.

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