



## No cause of action for third party claims against solicitors when negligent advice given about mitigation, Ontario Court of Appeal rules

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In its decision released last Fall in *Davy Estate v. CIBC World Markets Inc.*<sup>1</sup>, the Ontario Court of Appeal affirmed an Ontario Superior Court order striking out a third party claim in which the defendant had tried to sue the plaintiff's lawyer. The third party claim had alleged that the plaintiff's lawyer had given the plaintiff bad advice on the mitigation of her damages. In addition to finding that the third party claim against the plaintiff's lawyer could not succeed at law, the Court of Appeal also cited policy reasons against permitting one party to sue another party's lawyer for alleged negligence; noting that such claims undermine a lawyer's loyalty to their client and invade the sanctity of the lawyer-client relationship.

In the underlying action the plaintiff, Deborah Marie Davy, argued that CIBC World Markets Inc. was negligent in accepting the instructions of her late father to transfer shares into a joint account with his wife, given their knowledge of his mental incapacity. She also argued that CIBC World Markets was negligent in accepting the wife's instructions to subsequently transfer those shares into the wife's personal account.

After the shares were transferred into the joint account, the plaintiff's solicitor requested that CIBC World Markets freeze the account. CIBC World Markets refused to do so without a court order, but the plaintiff did not move for a court order. The wife eventually transferred the shares to an account she held with another financial institution. In defending the plaintiff's claim for conversion and breach of fiduciary duty CIBC World Markets claimed, among

other things, that the plaintiff had failed to mitigate her damages by moving for a court order to freeze the relevant account. After hearing that the plaintiff had relied upon her lawyer's advice in not moving for a freezing order, CIBC World Markets commenced third party proceedings against the plaintiff's lawyer claiming that he was negligent in not doing so.

The plaintiff's lawyer then moved to strike out the third party claim against him and won. That decision was upheld by the Court of Appeal. Mr. Justice Sharpe, writing for a unanimous Court, distinguished this case from cases where the plaintiff's lawyers were implicated in events giving rise to the initial loss. He wrote that the defendants could not claim for indemnity against the plaintiff's lawyer for negligent advice about mitigation since the duty to mitigate is the plaintiff's, not the lawyer's. In addition, he noted that mitigation occurs after the loss has occurred in an effort to reduce the loss. Therefore, while the defendants can raise failure to mitigate in defence to a plaintiff's claim in order to reduce the damages awarded, this does not mean that they can claim indemnity from plaintiff's counsel.

Justice Sharpe did not rule that a claim against an opposing party's solicitor is never possible. In that regard, the Court of Appeal distinguished this case from situations where the lawyer is implicated in the very events giving rise to the plaintiff's initial loss. In such cases, the desire to avoid the "obvious mischief" caused by an action against an opponent's lawyer cannot prevail over a

defendant's right to seek contribution and indemnity from a person who may be jointly responsible for the plaintiff's loss.



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<sup>1</sup> <http://www.canlii.org/en/on/onca/doc/2009/2009onca763/2009onca763.html>