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## WAIVER OF TORT

Have you ever heard of it? Aside from some cases out of England and the occasional article, neither had we. However, it has now been dealt with, at least peripherally, in Aronowicz v. Emtwo Properties Inc. (2010), 64 BLR (4<sup>th</sup>) 163 (Ont C.A.).

### Family Feud

Abe and Harry were brothers. They each owned 50% of the shares of a holding corporation that owned five commercial properties. Abe and Harry had entered into a unanimous shareholders agreement that contained a shotgun buy-sell provision.

In 2004, Harry pulled the trigger on the shotgun. The parties then arbitrated to settle the mechanism by which Abe would respond. Ultimately, the transaction closed and Harry bought Abe's shares for approximately \$26 million.

However, Abe was not satisfied. He learned that, as part of the financing transaction by which Harry bought him out, Harry had agreed to transfer three of the properties of the holding corporation to the lender. Abe alleged that had he known of this arrangement, he would have responded differently to the shotgun offer. Abe did not say how he would have responded differently and it did not bother him that he had agreed to mortgage the holding corporation's properties as part

of his unsuccessful attempt to buy Harry's shares.

In his action against Harry and his lender, Abe advanced claims of breach of fiduciary duty, breach of duty of good faith, theft of a corporate opportunity, disclosure of confidential information, oppression, deceit, misrepresentation, conspiracy, inducing breach of contract, unjust enrichment, and waiver of tort.

It almost seems that Abe's lawyers opened a textbook and alleged every tort that was available. Harry's lawyers were so impressed that, after discoveries had been completed, they brought a motion for summary judgment.

### Merits

The motions judge held that there was no genuine issue for trial and dismissed Abe's action. In particular, the judge held that there was no basis for a fiduciary duty in the exercise of a shotgun provision; there was no duty of honesty and good faith between the two shareholders as they unravelled their joint ownership; there was no reason for Harry to have disclosed his financing details to Abe; there was no basis for any of the other claims.

The Court of Appeal agreed with the motions judge. However, the Court also dealt with the claim of waiver of tort. It agreed that it was an uncertain area of the law, but also held that it had no application to the facts of the case,

facts that were well known.

### What Is It

Waiver of tort is a restitutionary remedy. By invoking it, the plaintiff gives up the right to sue in tort, but seeks to recover on the basis of restitution by claiming the benefits that the wrongdoer has derived from the wrongful conduct - regardless whether the plaintiff has suffered damages or not. For example, if a celebrity is photographed without consent and the photograph is published, then suing in tort - if there is one - would get the celebrity nowhere. The celebrity has suffered no damages. However, suing for the return of the benefits that the photographer or publisher received may be worthwhile.

The Court became almost lyrical about the concept: *"The claim is not so much 'novel' - it has its roots in the ancient action of assumpsit - as it is 'mysterious' or 'mystical'. In their text, The Law of Restitution, Maddaugh and McCamus describe it in this fashion*

*The doctrine known as 'waiver of tort' is perhaps one of the lesser appreciated areas within the scope of the law of restitution. From the outset, it seems to have engendered an undue amount of confusion and needless complexity. The almost mystical quality that surrounds the doctrine is attested to by the following famous couplet penned by a pleader of old ...:*

*Thoughts much too deep*

*for tears subdue the Court  
When I assumpsit bring,  
and god-like waive a tort.*

*One source of this confusion stems from the doctrine's very name. As one writer has pointed out, not entirely facetiously, it has 'nothing whatever to do with waiver and really very little to (do) with tort'."*

## Result

The Court dismissed the appeal – with an aggregate of \$57,000 in costs. The Court did not determine whether a plaintiff needed to show waiver of tort as an independent cause of action or whether it required proof of all elements of an underlying tort. However, at the very least, it concluded, waiver of tort needs some form of wrongdoing. Since Harry had engaged in none, the Court held that there was no waiver of tort.

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## Vendor's Lien

A vendor's lien allows an unpaid vendor to claim an interest in land, even without a mortgage in the vendor's favour. However, the vendor may still have priority problems. The priority issue was discussed in Hosseini v. Salerno 2010 CarswellOnt938 (SCJ).

## The Deal

Vendor sold to purchaser. Vendor was to discharge the 2<sup>nd</sup> and 3<sup>rd</sup> mortgages and purchaser was to assume the 1<sup>st</sup>. Third party advanced funds to the purchaser to be used on closing. A new 2<sup>nd</sup> mortgage was to secure these funds and the debt

was to be repaid quickly from permanent financing the purchaser was to arrange. Vendor used the funds, in part, to repay the existing 2<sup>nd</sup> and 3<sup>rd</sup> mortgages and pay all arrears on the 1<sup>st</sup> mortgage. Purchaser's mortgage to third party was registered on closing as a 2<sup>nd</sup> mortgage.

Several days after closing, vendor registered a vendor's lien. He claimed that purchaser had not paid him the full amount due on the sale. Vendor then commenced an action claiming priority over third party.

The property was later sold under power of sale and the surplus of \$500,000 was paid into court pending resolution of the two competing claims. Over \$836,000 was actually owed under the 2<sup>nd</sup> mortgage.

## Priority

A vendor's lien must give way in precedence to a mortgage that is registered on title at closing and used by a purchaser to obtain funds necessary to purchase the property.

Since third party's mortgage was registered before the vendor's lien in this case, it ranked in priority to it; third party had no knowledge of the differences between vendor and purchaser as to money allegedly owed to vendor and third party therefore took title for value without notice of the vendor's lien.

If a vendor wishes to create a vendor's lien that takes priority over all subsequent mortgages, the vendor must mention or reserve it in the transfer.

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