COURT OF APPEAL FOR ONTARIO

CITATION: 908593 Ontario Limited v. Atradius, 2023 ONCA 156
DATE: 20230306
DOCKET: C70721

Roberts, Nordheimer and Favreau JJ.A.

BETWEEN

908593 Ontario Limited, operating as Eagle Travel Plaza by its Court appointed receiver, BDO Canada Limited

Plaintiff (Appellant)

and

Atradius Crédito y Caución S.A. de Seguros y Reaseguros

Defendant (Respondent)

Dennis M. O'Leary and Max Muñoz, for the appellant

Sam Sasso, for the respondent

Heard: March 1, 2023

On appeal from the order of Justice Barbara A. Conway of the Superior Court of Justice, dated April 25, 2022, with reasons reported at 2022 ONSC 2517.

REASONS FOR DECISION

[1] 908593 Ontario Limited, operating as Eagle Travel Plaza ("Eagle Travel"), by its Court appointed receiver BDO Canada Limited (the "Receiver"), appeals from the decision of the motion judge who dismissed its claim for coverage under a credit risk insurance policy (the "Policy") issued by the respondent. At the

conclusion of the hearing, we dismissed the appeal with reasons to follow. We now provide our reasons.

[2] Prior to its receivership and bankruptcy in 2019, Eagle Travel carried on business as a fuel and fleet service provider. The respondent issued the Policy, with a policy start date of June 1, 2018, to Eagle Travel. Under the Policy, the respondent agreed to indemnify Eagle Travel for covered losses if Eagle Travel did not receive full payment from its customers – truck transportation companies and proprietorships (the "Buyers") – for fuel and other items purchased by them. The Policy was renewed by Eagle Travel on June 1, 2019.

[3] After its appointment on September 30, 2019, the Receiver discovered that Eagle Travel had millions of dollars in outstanding accounts receivables relating to non-payment for fuel and other items purchased by its Buyers. The Receiver made a claim for indemnity under the Policy with respect to those accounts receivable. It then commenced this action seeking damages of $5.94 million (the insurer's maximum liability) and a declaration that Eagle Travel is validly insured such that coverage is owed under the Policy. The respondent defended the action on the basis, *inter alia*, that the Policy contains an aggregate limit applicable to certain Buyers that limits its liability during the one-year term of the Policy to $100,000.

[4] The motion judge agreed with the respondent. She found that there was a maximum liability amount of $100,000 for certain Buyers under Article 23300.00 of the Policy. Article 23300.00 reads, in part:

> However, where you establish Discretionary Credit Limits for your Buyers, the maximum amount we shall be liable to pay in respect of such Buyers per *insurance year* shall be 100000. [Emphasis in original.]

[5] There were two categories of Buyers provided by the Policy: those that have been reviewed by the respondent and for which a Credit Limit Decision has been made ("Buyers with Credit Limit Decisions"), and those with Discretionary Credit Limits that are made by Eagle Travel without the input of the respondent ("Discretionary Credit Limit Buyers"). The Buyers with which we are concerned here are Discretionary Credit Limit Buyers. The Receiver made 175 claims under the Policy with an aggregate value of over $4 million in respect of Discretionary Credit Limit Buyers.

[6] The appellant submits that the Policy is a standard form contract and thus the standard of review is correctness, in accordance with the principles set out in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.,* 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 4. We do not agree that the standard of review of correctness is applicable in this case. There is simply no evidence that the Policy is a standard form contract as that term is used in *Ledcor*: see e.g., at paras. 25, 28. Absent such evidence, the motion judge's interpretation of the Policy involves

issues of mixed fact and law subject to deferential review on appeal: *Ledcor*, at para. 24; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50. As a result, the palpable and overriding error standard of review applies: *Ledcor*, at para. 21; *Hemlow Estate v. Co-operators General Insurance Company*, 2021 ONCA 908, 160 O.R. (3d) 467, at paras. 13-14, leave to appeal to S.C.C. refused, [2022] S.C.C.A. No. 51. The appellant has failed to demonstrate that the motion judge made a palpable and overriding error in interpreting the Policy.

[7] However, even if the standard of review is correctness, the conclusion reached by the motion judge is the correct one. As she found, the language of Article 23300.00 of the Policy is clear and unambiguous. It limited the exposure of the respondent for DCL Buyers to a total of $100,000 per insurance year.

[8] We also reject the appellant's submission that the motion judge failed to consider or give effect to the factual matrix in interpreting the Policy. In particular, the appellant says that Eagle Travel was unaware of the limit on claims for Discretionary Credit Limits Buyers. It is clear from her reasons that the motion judge considered the factual matrix. The problem for the appellant is that it is clear from the record that the officer of Eagle Travel who signed the Policy did not read it, nor is there any evidence that anyone from Eagle Travel asked the respondent's representative questions about it. The appellant cannot avoid the effect of the limitation on claims because it did not review the Policy before signing it. We note

on this point that the appellant renewed the policy after a year, so it had plenty of opportunity to review the terms of the Policy and raise any issues with respect to it. As a general proposition, in cases involving signed contracts, knowledge of what the contract contained is presumed: see, for example, *Apps v. Grouse Mountain Resorts Ltd*., 2020 BCCA 78, 445 D.L.R. (4th) 615, at para. 79. The decision in *Crosby (Estate) v. Native Fishing Assoc*., 2001 BCCA 118, that the appellant relies on for notice of a limitation, is distinguishable on its facts.

[9] Further, the appellant's reliance on this court's decision in *Chilton v. Co-Operators General Insurance Co.* (1997), 32 O.R. (3d) 161 (C.A.) does not assist its case. *Chilton* observes that an insurance policy is a contract, and that the prime goal of contract interpretation is to give effect to the intention of the parties as expressed by the words they have used: *Chilton*, at para. 11. *Chilton* also observes that a court should not strain to create an ambiguity where none exists: *Chilton*, at para. 26.

[10] Finally, we do not accept the appellant's submission that the interpretation of the Policy arrived at by the motion judge was a commercially unreasonable one. To the contrary, the interpretation given to Article 23300.00 was commercially reasonable when one recognizes that the respondent was seeking to limit its exposure to potential claims arising from Discretionary Credit Limit Buyers with whom Eagle Travel dealt without requiring pre-approval from the respondent.

[11] The appeal is dismissed. The respondent is entitled to its costs of the appeal fixed in the agreed amount of $15,000, inclusive of disbursements and HST.

"L.B. Roberts J.A."
"I.V.B. Nordheimer J.A."
"L Favreau J.A."