

COURT OF APPEAL FOR ONTARIO

CITATION: 1770650 Ontario Inc. v. McEnery, 2023 ONCA 238

DATE: 20230406

DOCKET: C70474 & C70475

Benotto, Trotter and Zarnett JJ.A.

DOCKET: C70474

BETWEEN

1770650 Ontario Inc.

Moving Party (Appellant)

and

Paul McEnery

Responding Party (Respondent)

and

Lawyers' Professional Indemnity Company

Responding Party (Respondent)

DOCKET: C70475

AND BETWEEN

1062484 Ontario Inc.

Moving Party (Appellant)

and

Paul McEnery

Responding Party (Respondent)

and

Lawyers' Professional Indemnity Company

Responding Party (Respondent)

Christine Carter and Justin Papazian, for the appellants 1770650 Ontario Inc.
and 1062484 Ontario Inc.

Valerie Edwards and Christoph Pike, for the respondent Lawyers' Professional
Indemnity Company

Heard: March 22, 2023

On appeal from the order of Justice Marc E. Smith of the Superior Court of Justice,
dated February 24, 2022, with reasons reported at 2022 ONSC 1230.

REASONS FOR DECISION

A. INTRODUCTION

[1] The appellants each hold an unsatisfied judgment against a dishonest (and now disbarred) lawyer. They each appeal the dismissal of their motion to compel payment of the amount of their judgments from the lawyer's insurer.

[2] For the reasons that follow, we dismiss the appeals. The motion judge made no reversible error in concluding that the dishonest lawyer coverage for which the insurer was liable was subject to an aggregate limit, and that the limit had been properly paid out leaving nothing that the insurer could be compelled to pay to the appellants.

B. BACKGROUND

[3] During 2015, in unrelated transactions, each of the appellants advanced funds to Paul McEnery, who was then a lawyer. They each gave McEnery specific instructions as to the use of their funds. McEnery did not follow the instructions, and instead intentionally misapplied or misappropriated the funds.

[4] In February 2020 each of the appellants obtained a judgment against McEnery; the appellant 1770650 Ontario Inc.'s judgment is for \$241,000 plus interest and costs, and the appellant 1062484 Ontario Inc.'s judgment is for \$380,000 plus interest and costs.

[5] McEnery did not pay the judgments. The appellants therefore commenced garnishment proceedings. They moved, under r. 60.08(16) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for a determination that the respondent Lawyers' Professional Indemnity Company ("LawPRO") owed money to McEnery under a policy of insurance (the "Policy") that it had issued in 2015. McEnery was one of the insureds under the Policy. The appellants asked that the proceeds of the Policy be paid to them in satisfaction of McEnery's judgment debts.

[6] The motion judge found in favour of LawPRO. He concluded that, except for the sum of \$27,123.63 that was paid by LawPRO to the appellants before the motion was heard, LawPRO owed nothing further under the Policy. His two pivotal holdings that are challenged on this appeal are: (1) that coverage in the Policy for

dishonest conduct of the type engaged in by McEnery (“dishonest lawyer coverage”) was subject to an aggregate limit of \$500,000; and (2) that LawPRO had properly spent the entire aggregate limit (less the \$27,123.63) on defence and investigation costs relating to all of the claims arising from McEnery’s conduct to which it was required to respond under the dishonest lawyer coverage. Those payments exhausted the aggregate limit.

C. ANALYSIS

(1) The Aggregate Limit of Liability Issue

[7] The appellants first argue that the motion judge misinterpreted the Policy. They assert that the Policy provides a \$500,000 limit “per claim” under the dishonest lawyer coverage, with \$2 million being the applicable aggregate limit (representing the maximum amount LawPRO can be compelled to pay out for all claims regardless of the number of those claims). They submit that, at the very least, the Policy is ambiguous about whether the \$500,000 limit is per claim only, or in the aggregate, and the ambiguity should be resolved against LawPRO.

[8] The parties agree that the standard of review on the issue of the interpretation of the Policy, which is LawPRO’s standard form, is correctness: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 24. Accordingly, the exact path of reasoning the motion judge took to arrive at his interpretation (aspects of which the appellants criticize)

is not as important as the ultimate result he reached. In our view, his interpretation that the \$500,000 limit was the aggregate limit for claims falling within the dishonest lawyer coverage, regardless of the number of claims, was correct.

[9] The Policy provided several different coverages. It provided a per claim limit of \$1 million for some coverages, and an annual aggregate limit, for all claims under any and all coverages, of \$2 million. For some specific coverages, which were provided by endorsements, the Policy provided for sublimits of liability, which applied to those coverages and were included in, and did not increase, the other limits such as the annual aggregate limit.

[10] Dishonest lawyer coverage was provided under Endorsement 5 of the Policy. It specified, under the heading “Sublimit of Liability” that the amount of dishonest lawyer coverage “shall be as set out in ITEM 8 of the INSURED’s Declarations as the SUBLIMIT OF LIABILITY.”¹

[11] Item 8 of the Declarations, referred to in Endorsement 5, provided that “SUBLIMIT of LIABILITY of \$500,000 per CLAIM and in the aggregate per POLICY PERIOD, shall apply pursuant to Endorsement No. 5” (emphasis added).

[12] The meaning of these provisions is clear and there is no ambiguity in them. Endorsement 5, which creates the dishonest lawyer coverage, expressly refers to

¹ The Policy used capitalized terms to indicate they have a defined meaning in the Policy or Declarations.

Item 8 of the Declarations as specifying the “amount of coverage”. Item 8 of the Declarations states that the \$500,000 limit on claims falling within the dishonest lawyer coverage in Endorsement 5 is both per claim “and in the aggregate”. This is fatal to the appellants’ position.

[13] In our view there is no basis for the appellants’ submission that ambiguity is created by the reference in Part IV of the Policy to the sublimit of liability under Endorsement 5 representing “the total of the INSURER’S liability in respect of that coverage per CLAIM per POLICY PERIOD”. The phrase appears in section A of Part IV that deals generally with per claim limits; it does not suggest that the sublimit of liability is not also an aggregate limit, a concept addressed separately in Part IV and elsewhere in the Policy.

[14] Nor do we agree with the submission of the appellants that the reference to “per claim per policy period” appearing in connection with the term “Sublimit of Liability” in section A of Part IV defines the term “Sublimit of Liability”, such that “per claim” is imported into that phrase no matter where it is used in the Policy.

[15] The Policy must be read as a whole so as to give effect to its clear language: *Ledcor*, at para. 49. Endorsement 5 stated that “[t]he amount of coverage provided with respect to this endorsed coverage shall be as set out in ITEM 8 of the INSURED’S Declarations as the SUBLIMIT OF LIABILITY”. Item 8 of the

Declarations clearly stated that the \$500,000 “Sublimit of Liability” is per claim and in the aggregate. This represents the amount of dishonest lawyer coverage.

[16] We therefore reject this ground of appeal.

(2) The Erosion Issue

[17] The limits under the Policy are reduced by payments for defence and investigation. The appellants challenge the finding of the motion judge that LawPRO acted reasonably in spending money in the investigation and defence of claims, thus exhausting the limits. They submit the motion judge should have found LawPRO breached its duty to settle the claims, and that the amounts expended for investigation and defence were unreasonable. Substantial amounts should therefore have remained available to pay the appellants, even within a \$500,000 aggregate limit.

[18] We agree with LawPRO that the standard of review on these issues is a deferential one. The issues are factual or of mixed fact and law. In the absence of a palpable and overriding error, we cannot interfere: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

[19] In analyzing this issue there are a few matters that are particularly germane. First, on a motion under r. 60.08(16), the creditor (here, the appellants) stands in the shoes of the debtor (here, McEnery) in terms of the ability to prove an entitlement against the garnishee (here, LawPRO). Therefore, we are concerned

with whether LawPRO breached a duty to McEnergy in spending funds on defence and in not effecting a settlement with the appellants.

[20] Second, McEnergy's dishonesty was not limited to the appellants. When he was disbarred in 2018, the Law Society found he had misapplied or misappropriated about \$2.5 million. The result was that there were nine claims brought to which LawPRO had to respond under the dishonest lawyer coverage, not just the appellants' two claims.

[21] Third, McEnergy was not the only insured under the Policy. The firm of Williams McEnergy (the "Firm") was also an insured and was made the target of the nine claims, although they were ultimately found not to have responsibility for McEnergy's conduct: see *1062484 Ontario Inc. v. Williams McEnergy*, 2020 ONSC 825, 149 O.R. (3d) 209, aff'd 2021 ONCA 129, leave to appeal refused, [2021] S.C.C.A. No. 124 (*1770650 Ontario Inc.*), and [2021] S.C.C.A. No. 125 (*1062484 Ontario Inc.*). LawPRO was required to investigate and defend those claims, through counsel separate from defence counsel appointed for McEnergy. The costs of the investigation for and the defence of all insureds, not just of McEnergy, reduced the amount available under the aggregate limit of liability.

[22] Fourth, the motion judge found that McEnergy was not helpful in the defence as he claimed no memory of what happened. This required the facts to be

investigated by defence counsel, to determine whether McEnery had a defence and also to defend the Firm.

[23] In these circumstances, we see no palpable and overriding error in the motion judge's primary factual determination that the amounts spent by LawPRO on investigation and defence of the nine claims against McEnery and the Firm were reasonable.

[24] The appellants point to a section of the motion judge's reasons where he states that "[t]o properly defend McEnery and the Firm, counsel needed to fully investigate the fraud perpetrated by McEnery". In their submission, this suggests the motion judge elevated an insurer's duty to defend to be paramount over all other duties owed to the insured. However, after reading his reasons as a whole in light of the evidence that was before him, he appears to have simply been referring to defence counsel investigating the circumstances of the claims (on which McEnery was shedding no light) in pursuit of their obligations to both McEnery and the Firm. This impugned statement does not change the fact that the motion judge's conclusion that the expenditures were reasonable – in the sense that they did not breach any duty LawPRO owed to McEnery – was open to him on the record.

[25] Similarly, we see no error in the motion judge's finding that LawPRO did not breach any duty it owed to McEnery about effecting a settlement of the appellants'

claims. As the motion judge noted, there was no evidence that a settlement of all the claims against McEnery and the Firm was ever available within the Policy limits. Nor was there evidence that the appellants had ever made an offer to settle, before or after they attained judgments against McEnery and achieved “first past the post” status. This was not a case of an insurer ignoring an opportunity to settle a claim within the policy limits or ignoring a request of an insured to do so.

D. CONCLUSION

[26] For these reasons, the appeals are dismissed.

[27] In accordance with the agreement of the parties, LawPRO is entitled to its costs of the appeals in the total amount of \$20,000, inclusive of disbursements and applicable taxes.

“M.L. Benotto J.A.”
“Gary Trotter J.A.”
“B. Zarnett J.A.”