

Introduction

- [1] In 2012, the Respondent John Belton (“Belton”) sued the Applicant Katie Spencer (“Spencer”) in relation to alleged injuries he suffered while walking Spencer’s horse.
- [2] Belton was represented at trial by the Martin & Hillyer Associates firm (“MHA”) on a contingency fee agreement basis.
- [3] Prior to trial, MHA obtained Legal Expense Insurance policy (“LEI”) coverage for the Belton claim through Omega General Insurance (“Omega”) with a Policy limit of \$100,000.00 (“Policy Funds”).
- [4] MHA was the policyholder.
- [5] The Belton trial proceeded in 2020 over an eight-week period. Belton’s claim was dismissed.
- [6] In 2021, a costs award was made against Belton in the amount of \$469,972.52. (“Costs Award”) This remains unpaid.
- [7] MHA claimed disbursements of \$59,842.23 in relation to advancing the claim to trial.

The Application

- [8] This was an application brought pursuant to Rule 14.05(3)(d) for the determination of rights that depended on the interpretation of the LEI.
- [9] The Applicants sought several declarations relative to the LEI, those being:
- a) That Spencer met the definition of Defendant in the LEI.
 - b) That Elite Insurance Company (“Elite”) met the definition of Defendant in the LEI.
 - c) That the costs awarded were “Defendant’s Costs” as set out in the LEI.
 - d) That the dismissal of Belton’s claim was an “Unsuccessful Outcome” as set out in the LEI.

- e) That the Applicants were third-party beneficiaries under the LEI.

[10] In addition to the declaratory relief noted above, the Applicants sought either a pro rata sharing of the policy funds as between Spencer and HLA or in the alternative, that the Applicants be awarded 100% of the funds.

Procedural History and Positions of the Parties

[11] MHA initially took the view that the Omega policy was strictly for its own benefit, covering only its own disbursements incurred on Belton's behalf in taking the matter to trial. Spencer disagreed, claiming she had an interest in the policy funds to offset her unpaid costs award.

[12] In October 2021, this application was issued.

[13] In responding to this application, MHA changed its initial position and asserted that payment of their own disbursement took *priority* over any other costs and was a *first charge* on the policy funds. In support of this proposition, MHA relied upon a direction signed by Belton prior to trial, which provided that in the event of an unfavourable outcome at trial, the MHA disbursements were to be paid in priority of the defendant's (Applicants') costs.

[14] In November 2021, the application against Omega was dismissed. Omega was ordered to continue to hold the \$100,000.00 policy funds pending further order of the court as to disposition.

[15] In December 2023, Belton advanced a position by way of a "cross application" that he was the "*beneficiary*" of the proceeds of the Omega policy and that he was entitled to the entire \$100,000.00. Belton also sought declaratory relief as against MHA that he had no legal obligation to pay the MHA disbursements and that the direction he had signed, was not valid. Belton also advanced an alternate position seeking a declaration that the monies from the

Policy, which were owed to him, be paid to the Applicants to satisfy the costs of the action.

[16] In June 2024, MHA made the commercial decision to abandon any claim it may have had for the policy funds and agreed to take no steps and or make any submission regarding the remaining parties' entitlement to the policy funds, effectively leaving the dispute to Spencer and Belton.

[17] Shortly before the hearing of this application, the Respondent initiated a separate, new Application. The relief requested in that Application was identical to that sought in Mr. Belton's cross application with the exception that in this new application, Belton's counsel had requested a *Charging Order*.

[18] After hearing submission, I made a ruling that we would not be entertaining Belton's *new* application and that the application that was properly before the court, could be determined on its merits by relying upon the evidence and submissions previously delivered and specifically those set out in Belton's earlier cross application record.

[19] With regards to Belton's cross application, specifically paragraphs 1 (c), (d) and (e), Belton agreed at the start of the hearing, that he would not be proceeding with that relief, nor seeking any declaratory relief in relation to MHA. Issues relating to the MHA's retainer agreement, outstanding disbursements or allegations of negligence, would not be argued in this Application as they were all the subject matter of two separate actions currently before the courts.¹

The Relevant Terms of the LEI

[20] The cover page of the LEI set out the following important details:

- a) This was a "Legal Expense Insurance" policy.

¹ Belton and MHA are involved in two separate actions against each other, in two other jurisdictions. MHA has sued Belton for outstanding disbursements and Belton has sued MHA for professional negligence in relation to the prosecution of his claim. Neither claim has yet been defended by the respective parties. As we were not dealing with issues as between MHA and Mr. Belton, and as MHA was no longer seeking any payment from the proceeds of the policy, MHA made no substantive submissions in this Application, although they were present throughout.

- b) The policy holder was Martin & Hillyer Associates.
- c) The commencement date of the policy was 29 December 2017.
- d) The policy stated that “In return for the payment of the **Premium We** agree with **You** to provide the insurance as stated in the **Policy**, subject to all the terms, conditions, exclusions and stipulations contained in the **Policy** and **Endorsements** attached thereto.”²

[21] Paragraph 1.1 of the policy then stated that:

1.1 **We** shall pay the **Insured Liability** for **Defendant’s Costs** and **Own Disbursement** following an **Unsuccessful Outcome** up to the **Maximum Limit**.

[22] The following helpful definitions were also found within the policy itself.

- e) **You/Your/Yours** means the lawyer and /or the law firm stated in the **Schedule** as the **Policyholder** and the lawyer who will act for the **Claimant** in the **Litigation**.
- f) **Insured Liability** means the amount payable for the **Defendant’s Costs**, and/or **Own Disbursements**, which **We** have agreed to indemnify up to the **Maximum Limit** for a **File**.
- g) **Defendant’s Costs** means **Costs** owed by the **Claimant** to the **Defendant** in respect of the **Litigation** which the **Claimant** becomes liable to pay to the **Defendant** by way of Order.
- h) **Claimant** means a person who signs a **Contingency Fee Agreement** with the **Policyholder** for **Litigation** covered by this **Policy**.

² Emphasis by way of bolding and capitalization in the text above, are as set out in the policy.

- i) **Defendant** means any person opposing the **Claimant** in the **Litigation** and/or the **Defendant** insurer.
- j) **Insured Liability** means the amount payable for the **Defendant's Costs**, and/or **Own Disbursements**, which **We** have agreed to indemnify up to the **Maximum Limit** for a **File**.
- k) **Own Disbursements** means amounts incurred by **You** on the **Claimant's** behalf to advance the **Litigation** pursuant to the **Contingency Fee Agreement**, including the **Premium** (but excluding **Own Solicitor's Fees**).

The Law

[23] With regards to the general principals of insurance policy interpretation, the Supreme Court in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 331 wrote:

[22] The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (Scalera, at para. 71).

[23] Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (Consolidated-Bathurst, at pp. 900- 902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (Gibbens, at para. 26; Scalera, at para. 71; Consolidated-Bathurst, at p. 901), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (Scalera, at para. 71; Consolidated-Bathurst, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (Gibbens, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.

[24] When these rules of construction fail to resolve the ambiguity, courts will construe the policy contra proferentem — against the insurer (Gibbens, at para. 25; Scalera, at para. 70; Consolidated-Bathurst, at pp. 899-901). One corollary of the contra proferentem rule

is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (Jesuit Fathers, at para. 28). 42.

[24] In the *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 (CanLII), the Supreme Court also wrote that the rules of interpretation for insurance policies should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; and that it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies.

[25] In summary, if the policy language is found to be unambiguous, it should be given effect, in the context of the contract. If the language is ambiguous and if the policy language supports it, it should be interpreted consistent with the reasonable expectations of the parties while avoiding a surprising and unrealistic result.

[26] Belton relied upon the decision in *Peter B. Cozzi Professional Corporation v Szot* 2019 ONSC 1274, in support of his argument that he was the sole beneficiary of the LEI. This was a case that also involved a LEI policy. Although I found that this case was distinguishable on its facts, it was worthy of review. The relevant background to that case was that Cozzi acted for Quoc Nguyen, a plaintiff in a motor vehicle accident case. Szot was the defendant. Following trial, the Court determined that Nguyen did not meet the statutory threshold. Costs of \$161,790.00 were ordered against Nguyen.

[27] Prior to trial, Nguyen had obtained a \$100,000.00 LEI policy through his lawyer Cozzi. It should be noted that this was different than in the application before this court, wherein, MHA obtained the LEI and not Belton.

[28] Nguyen signed a contingency fee agreement with Cozzi in which he agreed to pay all of Cozzi's disbursements, without regard to success of his claim

and further, assigned all the proceeds of the LEI to Cozzi, as security for those disbursements.

[29] Throughout the litigation, Nguyen had a litigation guardian and required a Vietnamese interpreter, however, in the absence of his litigation guardian and without the assistance of an interpreter, Cozzi had Nguyen sign a direction authorizing Cozzi to receive almost \$70,000.00 for disbursements with a further direction that the remaining balance of the policy funds be applied towards the outstanding costs award.

[30] Having paid his own disbursements, Cozzi then offered to pay the remaining balance of the policy to Szot in full satisfaction of the Costs Order. Szot declined that offer.

[31] Cozzi then brought an application seeking the following declarations:

- (a) that the proceeds of the LEI were the sole property of Nguyen,
- (b) that the LEI was not a bond of insurance for any person, third party or non-party to the contract, and
- (c) that the \$100,000 was properly paid to Nguyen who in turn had the legal right to assign the proceeds to Cozzi.

[32] Szot (through his insurers) sought a declaration that he was entitled to proceeds of the LEI or in the alternative that he was entitled to a *pro rata* share.

[33] As was the case in our application, the LEI policy for Nguyen did not address the priority of payments of adverse costs or disbursements as between Cozzi and Szot.

[34] Cozzi argued that Nguyen was the beneficiary of the LEI and as such had the absolute authority to direct payment of those proceeds as he sought fit, relying upon the terms of the contingency agreement and direction. Szot argued that the purpose of the LEI was to pay costs awards and as such his Costs Order should take priority over Cozzi's disbursements, which had increased from \$30,000.00 to almost \$70,000.00 and included non-trial related expenses.

[35] The Court ultimately found that the contingency agreement between Nguyen and Cozzi was invalid, as Nguyen was a party under disability and the agreement had not been approved by a judge. Absent an underlying agreement between Cozzi and Nguyen, there was no support for the redirection of funds from the policy to Cozzi on account of his own disbursements.

[36] Since the insurer had already paid out the policy funds and was not seeking their return, the analysis turned to whether Szot could assert a claim over those funds. Interpreting Nguyen's LEI policy, the court found that Szot could not assert a claim and further determined that Nguyen was a "beneficiary" of the LEI, and as the only person entitled to the proceeds of the policy, he had the right to determine how those funds were to be used. It is important to note that at paragraph 56 of the Cozzi decision, the Court wrote, "... each case has its own circumstances, and the unique terms of the policy should be reviewed." Based upon this interpretation, Nguyen was free to use the policy funds as he saw fit and not necessarily to pay the costs award or disbursements.

[37] The Cozzi decision was appealed but not on the issues of Szot's entitlement for his own costs or Nguyen's apparent windfall. The Court of Appeal addressed only two issues, the first was the enforceability of the contingency fee agreement and the second was the dismissal of Mr. Cozzi's charging order motion. The appeals were dismissed.

[38] I would distinguish the Cozzi decision from the case at bar because:

- a. The policy in this application was not obtained by Belton, but by his lawyers, recalling the Nguyen had obtained his own policy.
- b. Belton was not a party under disability and the contingency agreement was not set aside as was the case for Nguyen.
- c. The wording of the Belton policy made it clear that the funds were meant to pay down costs awarded in an unsuccessful litigation and to cover disbursements and not to provide a cash award to an unsuccessful litigant.

Analysis

[39] The LEI was a standard form contract, written in easily comprehensible language. It employed bolded text alerting the reader that to defined terms within the LEI.

[40] I found most of the language of the LEI to be clear and unambiguous, except for a lack of clarity in determining how policy funds were to be divided as between competing claims for costs of the action and disbursements.

[41] Paragraph 1.1 of the LEI provided a clear plan of action:

We, shall pay the Insured Liability for Defendant's Costs and Own Disbursements following an Unsuccessful Outcome up to the Maximum Limit

which I interpreted to mean

Omega shall pay Spencer's/Elite's costs, owed by Belton, in respect of the litigation, which Belton became liable to pay by way of Justice Nightingale's Costs Order and also the amounts incurred by Martin & Hillyer on Belton's behalf, to advance the Litigation pursuant to the Contingency Fee Agreement, including the Premium but excluding Martin and Hillyer's own fees.³

I found no ambiguity or confusion here with regards to the general terms of this policy. The policy funds were intended to pay the Applicants' costs and MHA disbursements.

[42] Returning to the issue of priority of payment as between the costs awarded or disbursements which was not set out clearly in the policy, I found that the reasonable expectation of the parties would be that there would be a *pro rata sharing* of the available policy funds. This interpretation would avoid any

³ This interpretation was based upon replacing the bolded defined terms in the actual policy with the names of the parties along with the wording from the definitions set out in the policy.

surprising or unrealistic results, because in most cases where there has been an unsuccessful outcome at trial, both sides have been put to significant costs and the purpose of an LEI policy is to assist in reducing the impact of those costs on both sides. It would make little sense, absent specific wording to that effect in the policy itself, to allow one set of costs to be paid in priority to the other or for one to eclipse the other.

Conclusion

[43] Based upon a plain and ordinary reading of the policy with the interpretation being as noted above, the payees of the proceeds of this insurance policy would be Spencer/Elite and Martin & Hillyer, and not Belton himself. While the payment of the LEI policy funds benefit Belton by ultimately reducing his own indebtedness for the costs associated with his unsuccessful litigation, they were not meant to be paid to him, to do with as he pleased, including as was suggested in Belton's submissions, using the funds to purchase groceries if he wanted. To be clear on this point, what the LEI did not say was that Belton was a beneficiary of the policy but rather, Belton was the claimant (as defined) who signed a contingency fee agreement (as defined) with MHA who was the policy holder (as defined) and the loss of Belton's case, triggered the payment of the policy funds to the Defendant Spencer and her insurer Elite (as defined) and MHA for their own disbursements (as defined).

[44] For the foregoing reasons this court makes the following declarations:

- a. That Spencer met the definition of Defendant in the LEI.
- b. That Elite Insurance Company ("Elite") met the definition of Defendant in the LEI.
- c. That the costs awarded were "Defendant's Costs" as set out in the LEI.
- d. That the dismissal of Belton's claim was an "Unsuccessful Outcome" as set out in the LEI.

e. That the Applicants were third-party beneficiaries under the LEI.

[45] Additionally, this court interprets the LEI as requiring a *pro rata* sharing of the available policy funds as between Defendant's Costs and Own Disbursements (as defined).

[46] In this case, since MHA was no longer seeking their own disbursements from the policy fund, their *pro rata* share was *nil*, accordingly the remaining \$100,000.00 policy amount shall be paid to the Applicants to offset their costs.

Costs

[47] If the parties cannot agree on costs of this application, the Applicants shall deliver their costs submissions of no more than 2 pages, double spaced, (not including offers to settle and bills of costs) within 14 days of the date of release of this decision.

[48] The Respondent Belton shall deliver his costs submission, also of no more than 2 pages, double spaced (not including offers to settle and bills of costs) within 7 days thereafter.

[49] If required, the Applicant shall deliver any reply to submissions, of no more than 1 page, double spaced within 3 days thereafter.

[50] If a submission is not delivered within the aforementioned time frame, the party who had the opportunity to make it, will be deemed to take no position.



Justice J Krawchenko

Released: February 14, 2025

CITATION.: Spencer et al v. Omega General Insurance Company et al., 2025
ONSC 1022

COURT FILE NO.: CV-21-77158

DATE.: 2025-02-14

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KATIE SPENCER and ELITE INSURANCE
COMPANY

Applicants

- and -

OMEGA GENERAL INSURANCE
COMPANY, MARTIN & HILLYER
ASSOCIATES and JOHN BELTON

Respondents

DECISION ON APPLICATION

Justice Krawchenko

Released: February 14, 2025