CITATION: Spencer v. Martin and Hillyer, 2023 ONSC 6353
COURT FILE NO.: CV- 21-77158
DATE: 2023-11-10

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KATIE SPENCER and ELITE INSURANCE COMPANY, Applicants

A N D:

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

BEFORE: The Honourable Justice A.J. Goodman

COUNSEL: Olivier Guillaume and Dennis Ong, for the Applicants

Jason Wadden, for the Respondent, Martin and Hillyer

Peter Waldmann, for the Respondent, John Belton

HEARD: September 28 and October 13, 2023

E N D O R S E M E N T

[1] For the purposes of this discrete Application, the moving party/applicants, Katie Spencer ("Spencer") and Elite Insurance Company, "(Elite") seek an order for the respondent, Martin & Hillyer Associates ("Martin and Hillyer") or ("the law firm") to produce the policy ("M&H Policy") or ("the Policy") with the respondent, Omega General Insurance Company ("Omega") for the *Belton v. Spencer* action in its entirety, without any redactions. In the alternative, an order is sought to produce the M&H Policy with redactions but limited only to references to premium-related information and any direct references to files handled by Martin & Hillyer which are unrelated to the underlying Action.

[2] The applicants have brought this Application to determine whether the Policy limits of $100,000.00 should be divided on a *pro rata* basis between the Martin & Hillyer's disbursements [valued at $65.965.47] or the trial costs owed by John Belton ("Belton") to Spencer, valued at $469,972.52.

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[3] For this Application, Martin & Hillyer has only provided a partially redacted copy of the M&H Policy on the basis that certain portions of the Policy are either "confidential" or "privileged".

[4] Omega was let out of the Application on November 25, 2021 after it agreed to continue to hold the M&H Policy limits of $100,000, until further order of the Court as to disposition of these proceeds.

[5] Belton takes no position with respect to this discrete application.

[6] During the course of the two-day hearing, I had an opportunity to review the unredacted version of the policy *in camera* with respondent's counsel.

Background:

[7] The respondent, Belton brought an Action in Hamilton, for damages as against Spencer as a result of an accident that he sustained while walking the applicant's horse 'May' on May 31, 2010. Belton was represented by Martin & Hillyer during the course of the underlying action and at trial.

[8] Following a trial lasting over eight weeks, Belton's action was dismissed as against Spencer. On August 16, 2021, Belton was ordered to pay $350,000 in legal fees plus HST, and $74,472.52 in disbursements, for a total of $469,972.52 to the applicants.

[9] Martin & Hillyer had an adverse costs insurance policy with Omega that is exercised to respond to the trial outcome, by paying for the firm's disbursements and/or the applicants' trial costs owed by Belton to Spencer, up to the Policy limits of $100,000.

[10] Belton has yet to pay any of the trial costs to Spencer. Belton is also now suing his former law firm, Martin and Hillyer.

[11] Arguably, Martin & Hillyer may have implicitly recognized that Belton may be a beneficiary under the Policy, as the firm had Belton sign a Direction to Legal Insure Services Canada back on Sept. 10, 2020, which stipulated that: "*I hereby direct LISC to give first priority to my lawyers, Martin & Hillyer Associates (also known as Hillyer Professional Corporation) when paying out the policy. That means my lawyers must be paid first from the policy to the full extent of their disbursements covered by the policy before the Defendant or her lawyers are paid anything from the policy.*"

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[12] Nevertheless, for the purpose of this application, Martin & Hillyer has refused to specifically acknowledge that Belton and/or the applicants are beneficiaries or have priority under the M&H Policy.

[13] It is clear that the impugned policy does not have any priority provisions.

Positions of the Parties:

[14] Martin & Hillyer's main concern with respect to producing an unredacted copy of the M&H Policy is that the applicants and their lawyers, and potentially other parties and their lawyers on other files, will effectively know the advice the firm is giving to clients, what communications the firm is having with them, what clients must do for the firm as their lawyers, or what duties Martin and Hillyer owes to them.

[15] Moreover, Martin & Hillyer has taken the position that some of its own redacted portions of the M&H Policy are not relevant to the court's determination of the issues in the forthcoming Application.

[16] Belton has waived privilege over the M&H policy, as it applies in this case.

[17] In its materials filed, Martin and Hillyer says that Belton's purported waiver of privilege over the Policy after both Aviva and Belton worked to prevent the firm from obtaining evidence on this issue, is out of time and should not be entertained on this motion. To do so would violate the principles of procedural fairness and due process. During the course of oral submissions, counsel resiled from that position, and I was not called upon to make a preliminary determination of that issue.

[18] Notwithstanding the waiver of privilege by the client, Martin and Hillyer argues that the privilege and client confidentiality issues transcend this one case and impacts the law firm's other clients and more expansively, all such potential clients. Specifically, whether Belton consents or not, or purports to waive privilege or not, Martin and Hillyer says that it is not the end of the analysis, as the Policy applies to multiple clients and potentially, the clients of other firms.

[19] Martin and Hillyer submits that if this Court is of the view that the redactions do not cover clients' privileged or confidential information, the firm does not oppose their disclosure. If the Court agrees that the redactions cover privileged or client confidentiality matters or risks the disclosure of such

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matters, then in keeping with the principle of minimizing disclosure of such information to minimize the risk of harm: (i) only those provisions that are actually relevant to the matters at issue in the Application should be considered for disclosure; and (ii) if disclosed, only those parts of the provisions that actually deal with relevant information should be disclosed and such disclosure should be ordered on such terms as minimizes the potential harm that could be caused by such disclosure.

[20] The applicants submit that the court will not be able to determine the issues in the substantive Application without the entire M&H Policy in play. It is not up to Martin & Hillyer to decide on behalf of all parties what is relevant or not relevant in order to determine the issues in this litigation. The substantive Application is intended to be brought under Rule 14.05(3)(d), for the specific purpose of determining priorities and rights arising from interpretation of an insurance contract.

[21] Furthermore, Omega's position is that "*if the Policy wording is to be produced by Martin & Hillyer either on agreement or by virtue of Court order, there should be redaction of all premium related information and all information relating to other files insured under the Policy which have nothing to do with the Belton Action.*"

Issues:

[22] The issues for this motion are:

(a) Are the Respondent Martin & Hillyer's redactions in the M&H Policy "privileged"?

(b) Are the Respondent Martin & Hillyer's redactions in the M&H Policy "confidential"?

(c) Is the entirety of the M&H Policy relevant to the Application?

Discussion:

[23] Martin & Hillyer obtained its adverse costs, M&H Policy with Omega on December 29, 2017, and covers litigation involving presumably a number of Martin & Hillyer's clients, including its now former client, Belton.

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[24] For this Application, the applicants have identified and presented into evidence another publicly-filed adverse costs policy insured by the Omega, which was filed at the Brantford Court on December 9, 2022. That policy was issued to Pace Law Firm on October 30, 2017 ("the Pace Policy"). Based on the size and locations of the various clauses in the M&H Policy, it appears that the contents in the Pace Policy (except for the various Schedules) are identical to the ones (including the redacted ones) in the impugned Policy for this Application.

[25] I am able to draw the reasonable inference that these standard clauses are identical, subject to the various schedules or specific percentages.

[26] Martin & Hillyer's list of files, which contains client names and that are covered under the M&H Policy, is contained in a separate document from the M&H Policy called the "Portfolio Monthly Declaration". Omega has indicated that the "Portfolio Monthly Declaration" forms part of the M&H Policy but it has not been produced in this application except for one line referring to the policy limits for Belton's Action. Martin & Hillyer has undertaken to advise if the "Portfolio Monthly Declaration" forms part of the M&H Policy.

[27] Importantly, Martin & Hillyer has admitted that if its redactions were removed in the M&H Policy, there would be no particular communications between solicitors and clients but rather "references" to types of communications that take place between the law firm and its clients.

[28] As mentioned, the contents of the Pace Policy are the same as the ones contained in the redacted portions of the M&H Policy. As such, the wording in the Pace Policy and M&H Policy is the same generic wording generated by the Omega for all of its law firm clients; There are no clients or file names that are mentioned in the M&H Policy; and there does not seem to be any solicitor-client privilege content in the M&H Policy, since clause 4.2 states in part: "*No clause within this Policy shall interfere with lawyer-client privilege…*".

[29] As suggested by Mr. Wadden during submissions, under the *Rules of Professional Conduct*, lawyers have a duty to hold in strict confidence all information concerning the business and affairs of their clients. There are certain exceptions including where the disclosure is expressly or implicitly authorized by the client or as required by law or by order.

[30] That being said, I agree with the applicants that Martin & Hillyer has failed to meet its onus that there are any privileged communications within the M&H Policy. There is no actual legal advice or information in furtherance of litigation contained in the M&H Policy, but rather a description of when and how the M&H Policy gets triggered and the role of the parties to the agreement. While almost all but conceded by counsel for Martin and Hillyer during the course of oral submissions, I am persuaded that the privilege argument related to the M&H Policy is entirely without merit.

[31] This matter will likely be decided by the Applications judge on the principles of contract law. The Supreme Court of Canada has set out clear principles when dealing with matters of contractual interpretation. It is trite law that the primary object of contract interpretation is to give effect to the intention of the parties at the time of contract formation.

[32] Turning to the specific issue of confidentiality, Laforest J. speaking for the majority of the Supreme Court of Canada in *Lac Minerals Ltd. v. International Corona Resources Ltd.* [1989] 2 SCR 574, adopted the following reasoning from Lord Greene in *Saltman Engineering Co. v. Campbell Engineering Co*. (1948), 65 R.P.C. 203 (C.A.) (leave to appeal to House of Lords refused), at p. 215:

> I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

[33] In effect, there can be no breach of confidence in revealing to others something which is already common knowledge.

[34] In the case of *Peter B. Cozzi Professional Corporation v. Szot*, 2019 ONSC 1274**,** the judge analyzed and interpreted a “Contingency Fee Agreement” and the “after the event” legal protection insurance policy to arrive at her decision on who was entitled to the $100,000.00 in insurance proceeds.

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There is no mention in the decision of these documents being redacted in any way. This decision was also affirmed by the Ontario Court of Appeal, albeit the issue before me was not specifically addressed. Yet, I find the case instructive.

[35] Here, the M&H Policy is quite simply an adverse costs insurance policy that originates from and was crafted by Omega. Again, it bears repeating that I am satisfied that the contents in the Pace Policy are the same as the redacted portions of the M&H Policy, and importantly, the applicants note that the M&H Policy specifically states at section 4.2 that "*No clause within this Policy shall interfere with lawyer-client privilege…*" which the applicants interpret to mean that there are no solicitor-client privilege communications within the M&H Policy.

[36] I am persuaded that the clauses in the M&H policy is common knowledge for these types of adverse cost coverages contracts. I agree with the applicants that the redacted information in the M&H Policy that Martin & Hillyer claims is "confidential" is already in the public domain. This includes the Pace Policy that was publicly filed with the Brantford Superior Court.

[37] It may be that Martin & Hillyer is relying upon its alleged right to payment of its own disbursements in priority within the Policy, but is also redacting portions of any reference - or not, to that very definition or interpretation of the Policy that it has produced. This may exert procedural unfairness to the applicants in order to properly advance their point, or respond to any argument from Martin and Hillyer regarding the Policy.

[38] While Martin & Hillyer takes the position that its redactions only go to restrict anything to do with "priority", in matters involving contractual interpretation, a court must review the entirety of the contract to ensure proper contractual interpretation can occur. The Supreme Court of Canada has been extremely clear that the desired approach with respect to contractual interpretation and insurance policy interpretation is to focus on interpretation of the words of the policy, read as a whole. Further, without a fulsome review of the policy, the Applications judge may be constrained from making an informed decision regarding the contractual interpretation of the M&H Policy. I agree with the applicants that a contract cannot be understood without gleaning the entirety of the words of the policy themselves, taken in their ordinary and plain meaning, consistent with the surrounding circumstances relevant to contract formation.

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Conclusion:

[39] Despite persuasive arguments from counsel to expand the cloak of confidentiality or a solicitor's obligations under the Law Society Rules to the impugned policy, with respect, the redacted portions of the M&H Policy do not contain any privileged or confidential communication. Nor am I convinced that future clients of Martin and Hillyer, (or any law firm) may be prejudiced if these redactions do not remain intact. In my opinion, there is nothing in the Policy wording that involves or compels litigation strategy to be disclosed to a party opposite. Rather, it merely contains information on how the M&H Policy functions in the context of a court proceeding.

[40] Returning to the issues at bar: Are Martin & Hillyer's redactions in the M&H Policy "privileged"? No. Are Martin & Hillyer's redactions in the M&H Policy "confidential"? No. Is the entirety of the M&H Policy relevant to the Application? Yes.

[41] The application is hereby granted. Order to go compelling Martin & Hillyer to produce the complete unredacted Omega M&H Policy to the applicants, with the only exceptions related to those specific redactions already agreed-upon by the parties.

Costs:

[42] If the parties cannot agree on the issue of costs, I will consider brief written submissions. These cost memoranda shall not exceed three pages in length, (not including any bill of costs or offers to settle). The applicants shall file their costs submissions within 15 days of the date of this endorsement. Martin and Hillyer shall file its costs submissions within 15 days of the receipt of the applicants' materials. The applicants may file a brief reply within five days thereafter. There will be no costs for or against Belton. If submissions are not received by December 20, 2023, the file will be closed and the issue of costs considered settled.

A.J. Goodman J.

Dated: November 10, 2023