IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Canadian Lawyers Insurance Association v. Drover*, 2023 NLSC 106
Date: July 19, 2023
Docket: 201901G3893

BETWEEN:

CANADIAN LAWYERS INSURANCE ASSOCIATION

APPLICANT

AND:

MICHAEL DROVER

FIRST RESPONDENT

AND:

MICHAEL DROVER PLC

SECOND RESPONDENT

Before: Justice Alexander MacDonald

Place of Hearing:	St. John's, Newfoundland and Labrador
Date of Hearing:	April 3, 2023

Appearances:

Gregory M. Smith, KC and Shane R. Belbin	Appearing on behalf of the Applicant
No Appearance	On behalf of the First Respondent
No Appearance	On behalf of the Second Respondent

Joseph J. Thorne	Appearing on behalf of Modern Heavy Civil Limited
Christopher E. Gill	Appearing on behalf of Moore Holdings Limited
Thomas W. Fraize KC	Appearing on behalf of Paul Madden, Patrick Street Holdings Limited, Madden's Limited and P&P Holdings Limited
Geoffrey Budden KC and Scott Lynch	Appearing on behalf of CBS Land Development Inc. and William Clarke
Geoff W.P. Davis-Abraham	Appearing on behalf of HSBC Bank Canada

Authorities Cited:

CASES CONSIDERED: *Simpson Wigle Law LLP v. Lawyers' Professional Indemnity Co.*, 2014 ONCA 492; *Royal Trust Corporation of* Canada *v. American Home Assurance Company* (1992), 90 D.L.R. (4th) 582, 112 N.S.R. (2d) 156 (S.C.(T.D.)); *Moore Holdings Limited v. Drover*, 2020 NLSC 11; *Cox v. Bankside Members Agency Ltd.*, [1995] 2 Lloyd's Rep. 437; *Laidlaw Inc., Re* (2003), 122 A.C.W.S. (3d) 244, 46 C.C.L.I. (3d) 263 (Ont. Ct. J.); *Perry v. General Security Insurance Co. of Canada* (1984), 11 D.L.R. (4th) 516, 47 O.R. (2d) 472 (C.A.); *Starr Schein Enterprises Inc. v. Gestas Corp*, [1987] 4 W.W.R. 664, 38 D.L.R. (4th) 593 (B.C.C.A.); *Harbor* View *Inn v. Ron Fougere Associates Limi*ted 2015 NLTD(G) 160; *Butler v. Maritime Life Insurance*, 2003 NLSCTD 64; *Reznick v. Zitzerman* (1994), 28 C.B.R. (3d) 234, 97 Man. R. (2d) 243 (C.A.); *Caisse populaire de St-Isiodore Ltée v. Assn d'assurance des juristes canadiens* (1992), 129 N.B.R. (2f) 227, 325 A.P.R. 227 (Q.B.(T.D.));

STATUTES CONSIDERED: *Insurance Contracts Act*, R.S.N.L. 1990, c. I-12; (*Insurance* Act, R.S.O. 1990, c. I-1.8); (*Insurance* Act, R.S.B.C. 2012, c. 1); *The Limitations Act*, S.N.L. 1995, c. L-16.1; (*Insurance Act,* R.S.M. 1987, c. 140); *Law Society Act, 1999,* S.N.L. 1999 c. L-9.1

TEXTS CONSIDERED: Craig Brown & Thomas Donnelly *Insurance Law in Canada,* looseleaf (Toronto: Carswell, 2004)

REASONS FOR JUDGMENT

MACDONALD, J.:

INTRODUCTION

[1] The Canadian Lawyers Insurance Association (CLIA) provides errors and omissions insurance to the Law Society of Newfoundland and Labrador, and its practicing member lawyers. The insurance indemnifies lawyers from claims made by clients when they make errors in providing professional services. The Policy at issue here (Policy) covers claims made from July 1, 2014, to July 1, 2015 (Policy Period).

[2] Michael Drover made errors. Five clients (Claimants) made claims (Claims) against him. These clients are Modern Heavy Civil Limited (Modern), Moore Holdings Limited (Moore), a group consisting of Paul Madden, Patrick Street Holdings Limited, Madden's Limited and P&P Holdings Limited (Madden), CBS Land Development and William Clark (CBS Holdings) and the HSBC Bank Canada (HSBC).

[3] CBS Holdings owned property in Conception Bay South (CBS Property) and in St. John's (St. John's Property). Four of the Claimants seek recovery based on Mr. Drover's negligent certification of marketable title to the CBS Property. HSBC seeks recovery based on Mr. Drover's negligent certification of marketable title to the St. John's Property. Madden reported its claim in August 2015. All other Claimants reported their Claims between July 1, 2014, and July 1, 2015.

[4] CLIA took this application seeking direction on how it was to interpret the Policy. It notified the five Claimants. They all participated in this hearing.

[5] The Policy defines an error as an "Occurrence," but two or more errors that are "substantially related" are a single Occurrence even if arising from more than one retainer.

[6] CLIA's liability to the Claimants is limited to an aggregate amount of $2 million, but each Occurrence has a limit of $1 million.

[7] The Parties agree, as reflected in the Case Management Order dated December 14, 2022, that I am to decide:

ISSUE 1: How many Occurrences do the Claims represent?

ISSUE 2: Do any of the Claims fall within another Policy Period?

ISSUE 3: Should CLIA make payments to the Claimants on a first-past-the-post or *pro rata* basis?

[8] I find that:

(a) Each of the Claims constitutes a separate Occurrence under the terms of the Policy;

(b) all of the Occurrences were within the Policy Period; and

(c) CLIA will make payments to the Claimants on a *pro rata* basis.

[9] I will now explain why I made these decisions. I will first deal with how many "Occurrences" the Claims represent.

ISSUE 1: How Many Occurrences do the Claims Represent?

[10] CLIA's liability in the Policy Period is limited to $1 million for each Occurrence. I find that the Claims of Madden, Modern, CBS Holdings, and Moore are each a separate Occurrence and limited to $2 million for all Occurrences in total.

[11] Everyone agrees that HSBC's claim is one Occurrence on its own. Its mortgage was on a different property from the others. CLIA claims that the other four Claimants are substantially related. It says they all base their Claims on one error. This error was Mr. Drover's negligent conclusion that the title to the CBS Property was marketable.

[12] In *Simpson Wigle Law LLP v. Lawyers' Professional Indemnity Co.*, 2014 ONCA 492, the Ontario Court of Appeal interpreted a lawyers' negligence policy and considered whether claims were "related."

[13] At paragraph 70 it said, "…Omissions … are 'related' when there is sufficient association or connection between them, reading the Policy as a whole and bearing in mind its objective."

[14] It said, "[t]he court must consider the similarities and differences between the nature and kind of the alleged misconduct which underlies each claim, and the kind and character of the losses which recovery is sought in each claim."

[15] The Nova Scotia Supreme Court dealt with a similar issue in *Royal Trust Corporation of* Canada *v. American Home Assurance Company* (1992), 90 D.L.R. (4th) 582, 112 N.S.R. (2d) 156 (S.C.(T.D.)) (at para. 64). The court interpreted a definition of Occurrence. The definition provided that if an error "is alleged to have occurred in relation to the *same professional service"* then all such errors are a single Occurrence. [emphasis added]

[16] The judge concluded that the negligence of certifying title with respect to five identical mortgages on five properties for one party pursuant to instructions which were "exactly the same" were one "Occurrence" under the policy at issue (at paras. 70 and 71).

[17] Mr. Drover had four different unrelated clients for the CBS Property, not one. Each had a different interest in the CBS Property for different reasons:

(a) CBS Holdings was the owner and developer of the property;

(b) Moore was the primary lender which financed CBS Holding's purchase of the property;

(c) Modern is the contractor that facilitated the conversion of the land into a subdivision; and

(d) Madden provided general financing to CBS Holdings.

[18] CBS Holdings relied on Mr. Drover's title certification to purchase the CBS Property. It relied on the title certificate to finance various aspects of its development of the CBS Property.

[19] Each of the other Claimants obtained mortgages to secure loan advances made for different purposes. There is no evidence that all Claimants had the same financing terms. Each obtained their mortgages at different times.[1] Each likely had different risk tolerances.

[1] Modern mortgage registered November 2013, Madden mortgage registered November 2012, and Moore's first mortgaged in September 2012.

[20] Thus, Mr. Drover had instructions from each client. Mr. Drover acted for both the owner and the mortgagees. He gave each one a different title certificate at different times.

[21] The only commonality is the underlying land title was not marketable, and Mr. Drover was the lawyer. There is no evidence that Mr. Drover's search was negligent or that he even did a search.

[22] There is evidence that the title certificates were incorrect and that Mr. Drover was negligent when he issued them (see *Moore Holdings Limited v. Drover*, 2020 NLSC 11, I refer to later). Thus, in each case the "error" under the Policy is not Mr. Drover's interpretation of his search or his failure to conduct one, but is his negligent title certificates.

[23] In the circumstances, I find that these Claims are not "substantially related" to each other. I now turn to whether any of the Claims fall into another policy period.

ISSUE 2: Do any of the Claims Fall Within Another Policy Period?

[24] The Claimants initially alleged that CLIA should have allocated the Madden and HSBC Claims to another policy period. At the hearing, they withdrew the allegation with respect to the Madden claim. I find that HSBC made its claim within the Policy Period.

[25] The Policy provides that CLIA will allocate claims on a "claims-made" basis. This means that the Policy provides that CLIA will allocate claims to a policy period in which a claimant gave CLIA or the Law Society notice of their claim.

[26] Mr. Drover did not notify CLIA or the Law Society of any of the Claims.

[27] The Law Society became aware of the HSBC claim when on July 11, 2014, HSBC gave the Law Society a copy of the Statement of Claim issued before the Policy Period. This is the first time CLIA or the Law Society heard of the claim.

[28] Section 4.3(c) of the Policy allows the Law Society to assume Mr. Drover's responsibility to provide notice to CLIA. It did so. Both CLIA and the Law Society agreed that Mr. Drover's failure to give notice did not prejudice them.

[29] I find that HSBC gave notice in the July 1, 2014, to July 1, 2015 Policy Period. I now turn to whether CLIA should make payments to the Claimants on a first-past-the-post or *pro rata* basis.

ISSUE 3: Should CLIA's make payments to the Claimants a first-past-the-post or *pro rata* basis?

[30] The Parties agree that the Policy does not explicitly provide for distribution on a first-past-the-post or *pro rata* basis. *Pro rata* means proportionate allocation.

[31] Section 2.1 of the Policy says CLIA will pay on behalf of the insured (in this case Mr. Drover and the Law Society), damages that either are legally obliged to pay because of an Occurrence.

[32] Section 4.10(d)(i), says Mr. Drover or the Law Society cannot start an action against CLIA unless it has complied with the Policy. CLIA and the Law Society have sole discretion to settle or compromise a claim[2]. CLIA says it will not settle a claim until the amount has been finally determined by a court or by written agreement or settlement between CLIA and the claimant(s).[3]

[2] Policy Section 4.4(f).
[3] Section 2.4(e) and Section 4.10(d).

[33] Section 2.4(e) says CLIA is not obliged to defend claims (or pay any damages or defence costs) after policy limits have been exhausted by either "payment of judgement or settlements *or after deposit of the applicable limits of liability in a court of competent jurisdiction*" [emphasis added]. CLIA's total liability under the Policy in any policy period is limited as I described earlier.

[34] The Policy provides coverage on a "claims-made" basis. Thus, if a person gives notice of a claim in a particular policy period, it does not matter when Mr. Drover's error actually occurred.

[35] The Policy is silent on how CLIA will deal with claims when they exceed the Policy limits. CLIA says that the Policy is consistent with an interpretation to allocate funds based on a first-past-the-post basis. Thus, it says, under section 2.4(e), CLIA will pay claims, as they are finally determined by a court of competent jurisdiction or by written settlement.

[36] Accordingly, CLIA says that it should pay the HSBC and Moore claims first because CLIA settled with HSBC, and Moore obtained a judgement. It says the other Claimants have done neither. CLIA will not pay them until they have done so, and then only to the extent that the Policy limits have not been exhausted.

[37] CLIA relies on the United Kingdom Court of Appeal case of *Cox v. Bankside Members Agency Ltd.*, [1995] 2 Lloyd's Rep. 437. At page 457 the court concluded that the first-past-the-post approach is to be considered the basic rule "from which any departure must be justified."

[38] The court said this approach "is plainly correct." It concluded there must be some good reason for departing from this basic rule. In that case, the Court of Appeal could not find a basis in law to order *pro rata* distribution. There was no statutory basis to make such a ruling.

[39] CLIA also relies on *Laidlaw Inc., Re* (2003), 122 A.C.W.S. (3d) 244, 46 C.C.L.I. (3d) 263 (Ont. Ct. J.). That policy is different in material respects from this Policy. Section 18 of the Ontario policy has a similar condition precedent to an action against the insurer found in section 4.10(d) of the Policy.

[40] However the Ontario section 18 also provides that a claimant "who has secured such judgement or written agreement shall thereafter be entitled to recover under this policy *to the extent of the insurance afforded by the policy*[4]" [emphasis added].

[41] The Ontario policy does not have a provision like the CLIA Policy section 2.4(e) that allows CLIA to deposit "the applicable limits of liability in a court of competent jurisdiction." Furthermore, section 2.1 of the CLIA Policy only says that CLIA "will pay on behalf of the Insured the Damages that the Insured becomes legally obligated to pay arising out of an Occurrence."

[42] Section 2.4(e) says that CLIA is not "obliged to pay Damages … after their respective limits of liability have been exhausted by the payment of judgments or settlements or *after deposit of* the *applicable limits of liability in a court of competent jurisdiction.*" [emphasis added]

[43] The Policy payment provision in section 2.1, the limits of liability in section 2.4(e), and the condition precedent in section 4.10(d) do not suggest that the Policy is consistent only with first-past-the-post payments to claimants.

[44] Thus, I find that *Laidlaw* does not bind me. I find that the Policy is consistent with distribution on both a first-past-the-post or *pro rata* basis. I will now consider whether there is a statutory basis to allow me to order *pro rata* distribution.

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[4] See paragraphs 8 and 13 of *Laidlaw.*

Statutory Authority for Pro Rata Distribution

[45] Section 14(3) of the *Insurance Contracts Act*, R.S.N.L. 1990, c. I-12 (*Act*) provides that in any action where several persons are interested in "insurance money, the court … *may apportion* among the persons entitled to a sum directed to be paid and may give all necessary directions and relief" [emphasis added]. I find that I may so apportion.

[46] Section 3 provides that the *Act* (with certain exceptions not relevant to this case) applies to every contract of insurance made in Newfoundland and Labrador. The Policy provides that Newfoundland and Labrador law applies. On its face, section 14(3) allows me to apportion proceeds among the Claimants as I see fit.

[47] However, section 14(1) says, "[w]here several actions are brought for the recovery of money payable under a contract [of insurance] the court may consolidate or otherwise deal with the actions so that there shall be but one action." CLIA says this means that all of Section 14 only applies if a party is *able* to sue the insurance company directly under section 13(1) of the *Act*.

[48] Section 13(1) provides that where a person "incurs liability for injury or damages to the person or property of another," has insurance for that liability and fails to satisfy a judgement against him, the claimant can sue the insurer directly for recovery.

[49] I find that Section 14(3) is a stand-alone provision. I find that I should not narrowly interpret it so that it only applies where "several claimants" take an action *against an insured* as is provided for in section 14(1). The Claimants took action against Mr. Drover, as they were required to do under the Policy. CLIA has an obligation to respond to the Claims and settle or defend them in accordance with the Policy.

[50] Furthermore, CLIA does not argue that section 14(3) has no application because the Claimants did not actually take an action against CLIA. It merely argues that they must be able to do so under section 13(1).

[51] However, if I were to find otherwise, I will consider whether the Claimants can take an action directly against the CLIA under section 13(1).

[52] CLIA says that the Claims cannot fall under the section because their Claims are for pure economic loss that is unrelated to damages associated with damages to a person or their property. Property includes "profits, earnings and other *monetary* interests."

[53] The Ontario Court of Appeal accepted this proposition in *Perry v. General Security Insurance Co. of Canada* (1984), 11 D.L.R. (4th) 516, 47 O.R. (2d) 472 (C.A.). The majority of the court concluded that the words in the Ontario legislation "liability for injury or damage to the person or property of another" does not include economic loss unrelated to physical damage to property (at para. 6). Justice Houlden dissented. I will refer to this dissent later.

[54] The Ontario Act (*Insurance* Act, R.S.O. 1990, c. I-1.8) says that property "includes profits, earning and other *pecuniary* interests…" [emphasis added]. This is materially similar to the Newfoundland and Labrador *Act.*

[55] The British Columbia Court of Appeal came to a similar conclusion in *Starr Schein Enterprises Inc. v. Gestas Corp*, [1987] 4 W.W.R. 664, 38 D.L.R. (4th) 593 (B.C.C.A.). Justice Lambert dissented. I will also refer to this later. The British Columbia Act (*Insurance* Act, R.S.B.C. 2012, c. 1) says that property "includes profits, earnings and other *pecuniary* interests." This too is materially similar to the *Act.*

[56] This interpretation finds some support in Newfoundland and Labrador. In *Harbor* View *Inn v. Ron Fougere Associates Limi*ted 2015 NLTD(G) 160, the Court

adopted the reasoning of Justice Orsborn in *Butler v. Maritime Life Insurance*, 2003 NLSCTD 64.

[57] Justice Orsborn observed that section 5(a) of *The Limitations Act*, S.N.L. 1995, c. L-16.1, that says "damages in respect of injury to a person or property, including economic loss arising from injury" refers to direct damages caused by an external act rather than to pure economic loss.

[58] Other courts in Canada have come to different conclusions. The Manitoba Court of Appeal in *Reznick v. Zitzerman* (1994), 28 C.B.R. (3d) 234, 97 Man. R. (2d) 243 (C.A.), at para. 6, expressly rejected the *Perry* interpretation that the words "for injury or damage to the person or property" do not include recovery of pure economic loss. The Manitoba Act (*Insurance Act*, R.S.M. 1987, c. 140, at s. 1) says that property "includes profits, earnings, and other *pecuniary* interests."

[59] The Court preferred Justice Houlden's dissenting opinion in *Perry.* In paragraph 7, the Court of Appeal said, "Houlden J.A., in dissent, pointed to the use of the abstract word 'property' in the corresponding section of the Ontario *Insurance Act*. He is not prepared to limit the interpretation of the word to 'physical property.'"

[60] It preferred (at para. 7) Justice Houlden's conclusion at pages 535-536. He said, "[r]ather I would interpret it as being wide enough to include damage to the pecuniary interests of a third party. If property in s. 109(1) … is given this interpretation, then the section is wide enough to include within its operation the claim of a client against a solicitor pursuant to a professional liability insurance policy".

[61] The Manitoba Court of Appeal also quoted with approval Justice Lambert's dissent in *Starr Shein* (at para. 8). It adopted his conclusion at page 669. Justice Lambert said:

(a) "The wording is not clear. It is capable of bearing the meaning … that the liability of the solicitor is not liability for damage to property."

(b) "But is also capable … of bearing the opposite meaning, namely, that the liability of the solicitor is liability for damages to property, that is, damage, to the chose in action which is was impaired or made valueless by the solicitors negligence; and

(c) "In those circumstances of legislative ambiguity, I prefer the construction which upholds the integrity of the legislative scheme embodied in the Insurance Act and gives the victims of solicitors' incompetence the protection that the rules of the Law Society intended them to have."

[62] Justice Deschênes of the New Brunswick Court of Queen's Bench, when interpreting the equivalent New Brunswick provision in *Caisse populaire de St-Isiodore Ltée v. Assn d'assurance des juristes canadiens* (1992), 129 N.B.R. (2f) 227, 325 A.P.R. 227 (Q.B.(T.D.)), referred in paragraph 11 to comments by Brown and Menezes in Craig Brown & Thomas Donnelly *Insurance Law in Canada,* looseleaf (Toronto: Carswell, 2004), at 395. The authors said:

(a) "An apparent limitation of the section from the third party's point of view arises from the words "liability for injury or damage to the person or property of another". It has been held in Ontario that this does not extend to a case where the plaintiff has suffered pure economic loss unrelated to physical damage or personal injury;

(b) the Ontario Court of Appeal held that a person who had lost money because of a lawyer's negligence in investigating a land title and who obtained

judgment for that loss could not invoke the section to proceed directly against the lawyer's insurer;

(c) The court, although sympathetic to the plight of the plaintiff, considered that his argument concerning the section distorted its language particularly the definition of 'property';

(d) This is a puzzling decision not the least because the Insurance Act itself defines property sufficiently widely to include the interest which was harmed. Moreover, on a dissenting judgment (on this point only) the court stated:

> The prime purpose of ... this coverage was, I believe, to protect members of the public who suffer damage by acts or omissions of members of the [Law] Society in the performance of their professional duties. If s. 109(1) does not extend to solicitors liability insurance, then part of that protection is, of course, lost."[5]

[63] Justice Deschênes concluded in paragraph 10, "I have reviewed these cases and it come to the conclusion that the reasoning behind the dissenting opinion of Houlden J.A. in *Perry* is most compelling and I would adopted as mine."

[5] The latest edition Craig Brown and Thomas Donnelley, *Insurance Law in Canada* loose-leaf (Toronto: Carswell, 2004) (updated 2023, release 2) vol. 1 at § 15:16, is now less editorial and now says, "There is an issue about whether the section is available when the loss suffered by the third party is purely economic, unrelated to property damage or personal injury. Except in British Columbia and Saskatchewan, where no such restriction applies, the wording of the section includes the phrase 'injury or damage to the person or property of another.' The Ontario Court of Appeal [in *Perr*y] has held that this excludes pure economic loss, such as that suffered by the client of a lawyer who was negligent in investigating a land title, so that the client has no claim against the insurer when the lawyer cannot or will not pay the judgment. On the other hand, courts elsewhere have held that the term 'property' is wide enough to encompass monetary loss and that 'if the legislature had intended such an exclusion, it would have said so in clear terms."

[64] I agree. I, too, adopt this reasoning. I also rely on the Manitoba Court of Appeal decision in *Reznick*.

[65] As I may under section 14(3) “apportion among persons entitled to a sum” of the proceeds of the Policy, should I do so?

[66] In *Cox,* the Court of Appeal observed that any proposed scheme of distribution other than first-past-the-post must not only be ”respectable in law” but must be ”viable in practice” (at page 441). CLIA in paragraph 164 of its brief suggests I should consider the following factors when I exercise my discretion:

(a) whether the Claims arose from the same factual circumstances;

(b) the relative status of the Claims being adjudicated upon or otherwise resolved;

(c) whether parties with unresolved Claims prosecuted their action with due diligence;

(d) how long will it take for the unresolved Claims to be adjudicated; and

(e) whether the unresolved Claims involve denial of liability or simply a dispute on quantum.

[67] I will apply these factors. I will also consider whether CLIA knows of all the Claimants under the Policy. I will first consider whether the Claims arose from the same factual circumstances.

Whether the Claim arose From the Same Factual Circumstances

[68] I discuss this factor earlier in this decision when I considered how many "Occurrences" the Claims represent. I found that the Claims are not "substantially related" because each title certificate relates to a deed or mortgage given at different times for different purposes. However, all the Claims do arise out of Mr. Drover's negligent title certifications. Thus, I consider this factor to favour *pro rata* distribution.

The Relative Status of the Claims Being Adjudicated Upon or Otherwise Resolved and whether Persons with Unresolved Claims Prosecuted their Action with Due Diligence

[69] HSBC notified CLIA of a potential claim on July 11, 2014, when it provided a copy of a statement of claim seeking damages from Mr. Drover because of his failure to provide HSBC with a first mortgage on the St. John's property. With CLIA's consent, it obtained judgment on October 22, 2019, for $442,000 plus interest.

[70] Moore notified CLIA of a potential Claim on April 21, 2015. Moore held a first and second mortgage on the CBS Property. The mortgages fell into arrears and Moore scheduled a power of sale under the first mortgage for late April 2015. Moore canceled this power of sale because of title issues.

[71] The Law Society rectified title by quieting it in September 2016. In December 2016, Moore sold the property under power of sale. It suffered a deficiency. It obtained judgement for $281,936.20 and taxed cost evidenced by a Final Order on May 29, 2020 (*Moore Holdings*).

[72] The power of sale extinguished Modern's and Madden's mortgages on the CBS Property.

[73] CBS Holdings notified CLIA of a potential claim on April 23, 2015. The corporate entity is the owner of the CBS Property. It issued a statement of claim. CLIA's appointed counsel for Mr. Drover filed defence on February 9, 2017. There are no other proceedings since then.

[74] Modern notified CLIA of a potential claim on May 28, 2015. Modern held a second mortgage on the CBS Property. It claims it lost at least its share of the proceeds of the sale of three lots (~$57,000 per lot), which should have closed prior to Moore exercising its power of sale.

[75] Modern issued a statement of claim, and CLIA caused Mr. Drover to file a defence on May 4, 2017. Modern filed notices of intention to proceed on April 30, 2019, and on November 4, 2021. There are no other proceedings since then.

[76] Finally, Madden notified CLIA of a potential claim on August 14, 2015. Madden held a third mortgage on the CBS Property. It makes similar claims to Modern in that it lost at least the proceeds of three sales (~$78,000 per lot), which should have closed prior to the power of sale. It makes claim for other financial losses.

[77] It issued a statement of claim in the matter. CLIA caused Mr. Drover to file a defence on March 3, 2016. There are no other proceedings since then.

[78] Modern and Madden could not have reasonably taken any significant action to advance their claims until the results of Moore's power of sale were known. It was only then that their loss crystalized. This explains their delay to the end of 2017.

[79] CLIA took this application on May 2019, seeking to advance an interpretation of the contract that could limit recovery of any damages by the unresolved Claimants. It settled with HSBC five months later. Because of COVID-19 and other internal court scheduling matters, I did not hear this Application until April 2023.

[80] Modern and Madden then understandably took no action to pursue their Claims after the date of the application. There is no suggestion that HSBC did not act diligently even though it appears to have taken no action to settle its claim until *after* CLIA filed this application, when it filed a consent judgment presumably because CLIA did not contest its claim.

[81] It is therefore difficult to conclude that Modern, Madden and CBS Holdings failed to act diligently. They knew that CLIA advanced a position that, if accepted, could affect their ability to recover their losses. I find that their decision to await the outcome of this application was prudent.

[82] I find that all the Claimants pursued their Claims with due diligence. I consider this factor to favour *pro rata* distribution.

How Long will it take for the Unresolved Claims to be Adjudicated and whether the Unresolved Claims involve Denial of Liability or Simply a Dispute on Quantum?

[83] There is no substantial issue on whether Mr. Drover was negligent when he certified title to the CBS Property.

[84] In *Moore Holdings*, Justice Handrigan found, at paragraph 29, "Mr. Drover was clearly and admittedly negligent in failing to provide the valid and enforceable title that Moore Holdings required for its power of sale [to the CBS Property]."

[85] This issue is *res judicata.* It is difficult for CLIA to deny this finding in any subsequent litigation with the unresolved Claimants. The issue with the unresolved Claimants is damages. In particular:

(a) Can Madden and Modern claim damages when the first mortgage power of sale extinguished their mortgages? and

(b) Was CBS Holdings aware of the title defect to the CBS Property when it purchased it?

[86] The parties should be able to resolve these issues on an expedited basis. I consider this factor to favour *pro rata* distribution.

Does CLIA Know of All the Claimants Under the Policy?

[87] These are the only remaining Claimants under the Policy during this Policy Period. It is almost eight years since the end of the Policy Period. As this is a "claims-made" policy, it is unlikely that new claims will arise. I consider this factor to favour *pro rata* distribution.

Conclusion on Pro Rata Distribution

[88] I order distribution on a *pro rata* basis. I will not order recovery on a first-past-the-post basis. While the latter can encourage resolution and allow CLIA to settle with claimants and cap its liability earlier than might otherwise be the case, none of these factors are significant here.

[89] Here, CLIA knows of all Claimants. It now knows its liability cap. No one seriously contests the underlying error. In these specific circumstances, first-past-the-post distribution allows CLIA to settle matters as its sees fit in a manner that may benefit it, to the detriment of unresolved Claimants. This is inconsistent with the purposes of this insurance.

[90] The *Law Society Act, 1999,* S.N.L. 1999 c. L-9.1, provides that the benchers may "establish and operate compulsory or voluntary professional liability insurance

programs for the benefit and protection of members, professional law corporations and the public and to provide for the recovery of the costs from members…[6]".

[91] I consider this a factor to favour *pro rata* distribution. The Law Society requires that all practicing lawyers take advantage of the Policy. It does so to protect the public from the financial consequences of lawyers' negligent acts.

[92] I will now consider how I will provide direction to facilitate this *pro rata* distribution.

Orders to Facilitate Pro Rata Distribution

[93] I order that CLIA pay Claimants on a *pro rata* basis. To facilitate this *pro rata* distribution:

(a) CLIA may apply to this Court for an early advance of funds to Claimants as their Claims are resolved;

(b) CLIA shall notify all Claimants of this application;

(c) Within 30 days after receiving notice of the application, a Claimant with unresolved Claims may provide sworn detailed statement of their Claim;

(d) Within 30 days after receiving these statements, CLIA shall file with the Court and the Claimants, recommended interim payments. It will account

[6] Section 18(2)(w).

for its $2 million policy limit, the amount described in paragraph 97, and reasonable estimates for CLIA's legal fees and unresolved Claims; and

(e) Immediately thereafter, CLIA shall request a Case Management Meeting where the parties will discuss a timetable to resolve interim payments and the unresolved Claims.

COSTS

[94] Everyone asked for costs if they were successful. CLIA asked that I award costs to it on Issues 1 and 2 against those advocating an adverse position to it because it says these Claimants did not provide any evidence to support their position.

[95] All parties were entitled to take the positions they did in this Application. The issues are complex and each party's position could have prevailed. There was sufficient uncertainty in the interpretation of the Policy that made this application reasonable.

[96] I would be inclined to order that all parties are entitled to their costs, but I am mindful this has the effect of making CLIA liable for everyone's costs. Therefore, I will not order costs and each party will bear their own.

OTHER MATTERS

[97] In 2015, CLIA paid two Claims, and incurred defence costs of about $15,520 and $18,294. The Parties agree that these Claims are properly paid. These Claims will remain paid, will not be pro-rated and will be included in calculation of the policy limits and the *pro rata* distribution to Claimants.

DISPOSITION

[98] I hereby order that:

(a) Each of the Claims constitutes a separate Occurrence under the terms of the Policy;

(b) all of the Occurrences were in the Policy Period;

(c) CLIA will make any payments to the Claimants on a *pro rata* basis. To facilitate this *pro rata* distribution:

(i) CLIA may apply to this Court for an early advance of funds to Claimants as their Claims are resolved;

(ii) CLIA shall notify all Claimants of this application;

(iii) Within 30 days after receiving notice of the application, a Claimant with unresolved Claims may provide sworn detailed statement of their Claim;

(iv) Within 30 days after receiving these statements, CLIA shall file with the Court and the Claimants, recommended interim payments. It will account for its $2 million policy limit, the amount described in paragraph 97, and reasonable estimates for CLIA's legal fees and unresolved Claims; and

(v) Immediately thereafter, CLIA shall request a Case Management Meeting where the parties will discuss a timetable to resolve interim payments and the unresolved Claims; and

(d) each party will bear their own costs.

_____

ALEXANDER MACDONALD
Justice