Ontario Court of Appeal considers right to proceeds of "after the event" insurance

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In the recent decision of *Peter B. Cozzi Professional Corporation v. Szot*, 2020 ONCA 397, the Ontario Court of Appeal considered the entitlement to proceeds of “after the event” insurance in the context of a claim involving a plaintiff under a disability.

After the event insurance (also known as “adverse costs insurance”) insures a plaintiff against the risk of an adverse costs award if a plaintiff loses their personal injury claim or provides coverage for legal expenses incurred by a plaintiff’s lawyer.

Background

In the absence of his litigation guardian, the plaintiff entered into a contingency fee agreement (CFA) with his lawyer, the appellant. Under the terms of the CFA, the plaintiff was required to pay all disbursements incurred by the appellant on the plaintiff’s behalf without regard to the success of his claim. Furthermore, he assigned all proceeds from his litigation protection insurance to the appellant as security for those disbursements. The plaintiff also signed a Retainer Agreement Addendum authorizing the appellant to provide information about the matter to DAS Legal Protection Insurance Company Limited (DAS) and to act as DAS’ insurance intermediary. On the appellant’s advice, the plaintiff purchased “After the event” insurance policy from DAS (the ATE Policy).

Following a trial, the plaintiff was ordered to pay costs to the defendant, in excess of the $100,000 ATE Policy limits. A dispute subsequently arose between the appellant and the defendant’s insurer as to which of them should receive the proceeds of the ATE Policy. The appellant brought an application and the insurer brought a cross-application seeking entitlement to the proceeds (2019 ONSC 1274).

The application judge held that, because the plaintiff was a person under disability represented by a litigation guardian, the CFA required court approval pursuant to the *Contingency Fee Agreements* Regulation under the *Solicitors Act*, which the appellant had not obtained. Therefore, the CFA was unenforceable. As for the insurer, the judge ruled that it was neither a party to the ATE Policy nor a named beneficiary and, therefore, it was not entitled to the proceeds. Rather, the plaintiff alone was entitled to the proceeds. The application and cross application were dismissed.

The appellant moved before the application judge for a charging order over the proceeds of the ATE Policy to secure his outstanding legal fees and disbursements (2019 ONSC 5071). The application judge dismissed the motion as an “impermissible collateral attack” on her earlier decision given that the appellant was essentially seeking the same relief as his application. As his client did not recover anything at trial, there were no "fruits of litigation" that the appellant could claim a charging order. The application judge held the appellant did not meet the test for a charging order as the appellant was not “instrumental” to the “recovery or preservation” of the proceeds and should not be rewarded for simply acting as an “insurance intermediary”. The motion was dismissed.

Outcome

On appeal, the Court upheld the judge’s decision that the CFA was unenforceable. The appellant did not comply with the *Contingency Fee Agreements* Regulation, which required the appellant to apply to a judge for approval of the CFA. Further, the Court held the CFA was not “fair and reasonable” as the plaintiff’s litigation guardian was not present when he entered into it.

Moreover, the Court agreed with the application judge that the appellant had failed to meet the test for the charging order. To obtain a charging order, a lawyer must demonstrate that: (1) “the fund or property is in existence at the time the order is granted”; (2) “the property was recovered or preserved through the “instrumentality” of the solicitor”; and, (3) “there must be some evidence that the client cannot or will not pay the lawyer’s fees”. The Court found no error in the judge’s reasoning that there were no “fruits of litigation” over which the appellant could claim a charging order and that the appellant was not “instrumental” in the recovery of the proceeds as he was simply an “intermediary” in selling the ATE Policy. Additionally, the Court held it would “offend the principles of fairness and justice” to reward the appellant for entering into the CFA knowing that the plaintiff had a litigation guardian from whom the appellant ought to have taken instructions. The appeal was therefore dismissed.

Takeaway

ATE insurance is now commonplace in personal injury actions in Ontario. This is the first reported Court of Appeal decision that has considered entitlement to an ATE policy. However, the cross application brought by the insurer for entitlement was not appealed to the Court of Appeal. While these entitlement disputes will turn on the language in the policy, there is currently no law in Ontario to suggest that defendants or insurers of defendants have any entitlement to a plaintiff’s ATE insurance policy proceeds, even if the defendant has an adverse costs award against the plaintiff.

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