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Iroquois Falls Community Credit Union Ltd. v. Co-operators General Insurance

Heard: November 4, 2008; Judgment: May 4, 2009

Ontario Court Of Appeal Reverses Motion for Summary Judgment Against Fidelity Bond Insurer But Proceeds To Interpret Portions Of The Bond Dealing With Coverage In The Process

The subject of the motion in the Ontario Superior Court of Justice was whether or not losses due to an employee's misconduct were covered by a fidelity insurance bond. That motion was granted in favour of the insured, Credit Union, totalling (CDN) \$1.8 million dollars. Though the Appeal Court ultimately set aside the summary judgment in its entirety, it disagreed with the insurer that the motion judge should have left the interpretation of the bond to the trial judge. Indeed, the Appeal Court deemed it favourable to provide interpretations for many key aspects of the bond wording as a means of contributing to greater trial efficiency.

In particular, it analyzed the "Dishonesty" coverage clause which contained four requirements; namely: the insured must sustain a direct loss of property; the direct loss must result from the dishonest or fraudulent act/s of an employee; the employee must have committed the dishonest act/s with 'manifest intent' to cause the insured to sustain a loss and the employee must have committed those dishonest acts with 'manifest intent' to obtain a financial benefit for any person, entity or oneself.

As to the direct loss of property, the employee removed money from the treasury and applied it to various accounts within the credit union. The Court disagreed with the insurers denial in having regarded this as an indirect loss because 'no money went out the door.' It held that the insured sustains a loss when money is improperly removed. Focussing on the insureds ability to recover that money after the fact ignores that the loss itself is what triggers the coverage clause. As to whether such acts are to be construed as 'dishonest,' as the policy did not provide a definition, the Court looked at the word's ordinary meaning. The actions of the employee here, in improperly taking the funds and concealing her actions after the fact provided clear evidence of dishonesty. Whether the employee's dishonesty was part of a larger scheme was left to be decided at trial, but the Court found that there was ample evidence that the acts here were a direct cause of the loss suffered by the insured.

As to the employee's manifest intent to cause a loss to the insured and to obtain a financial benefit to herself or others, the Court considered the setting of these words within the bond, noting that 'manifest' modifies the meaning of 'intent,' such that the intent should be "clear or obvious." Further, the employee's manifest intent "may be

established by the employee's admission as to his or her intent." To clarify, the Court said that "the focus of the analysis should be placed on the employee's intent in performing the very act that caused the loss, and not on some act the employee performs or plans to perform later." In this case, though the employee stated a long term intent to help members of the Credit Union go through difficult times, her admission in the immediate, to taking unauthorized funds and concealing it after the fact was sufficient to prove manifest intent, as it reflected her intent at that moment. The Appeals Court left interpretations as to various other exclusions and conditions of the policy for trial.