IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, s.275, and ONTARIO REGULATIONS 664 and 668, R.R.O. 1990

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

MOTORS INSURANCE CORPORATION

Applicant

- and -

OLD REPUBLIC INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Lee Samis for the Applicant

J.C. Rioux for the Respondent

ISSUES:

1. Has Old Republic waived its right to dispute its insured's fault for the purposes of loss transfer?
2. Does Rule 12 of the Fault Determination Rules apply in this case?
3. If not, pursuant to the ordinary rules of law, what is the fault of the various participants in the accident?
4. Is Old Republic entitled to repayment of the loss transfer funds that it paid to Motors?

DECISION:

1. Old Republic has waived its right to dispute its insured's fault for the purposes of loss transfer.
2. Rule 12 of the Fault Determination Rules does not apply.
3. Under the ordinary rules of law, the insured of Old Republic Insurance Company was 20% at fault, and the driver of the UPS vehicle was 80% at fault.
4. Old Republic is not entitled to repayment of the loss transfer funds that it paid to Motors.

HEARING:

The hearing in this matter was held in the city of Toronto, in the province of Ontario on, March 25, 2008. No viva voce evidence was called and the matter proceeded on the basis of documents filed at the hearing.

FACTS & ANALYSIS:

This loss transfer arbitration arises out of a motor vehicle accident that occurred on March 11, 2005. On that date a heavy commercial vehicle, owned by Pepsi Bottling Group (Canada) and insured by Old Republic Insurance Company ("Old Republic") was travelling westbound on Highway 407. A United Parcel Service truck (UPS), insured by Liberty Mutual Insurance Company ("Liberty") was also travelling westbound on the 407 when it struck the rear side of the Pepsi truck. The Pepsi truck lost control, crossed the centre median dividing westbound and eastbound 407 traffic and struck an eastbound vehicle driven by a Mr. Andrew Leroux, which was insured by the applicant, Motors Insurance Corporation ("Motors").

Mr. Leroux suffered significant injuries in the accident and applied for and received statutory accident benefits from Motors. Motors, on June 22, 2005 provided Old Republic with a Notification of Loss Transfer indicating that it was relying on Rule 12 (4) to establish that Old Republic's insured was 100% at fault.

PRELIMINARY ISSUE:

Motors has raised a preliminary issue that Old Republic has waived its right to dispute Pepsi's fault for the accident and that Old Republic is also now estopped from resisting Motors claim for loss transfer. In order to determine this preliminary issue it is first necessary to review some of the facts involved in the handling of the loss transfer request by the parties.

As previously noted, Motors sent a Notification of Loss Transfer to Old Republic on June 22, 2005 and relied on Rule 12 (4) to assert that Old Republic's insured was 100% at fault. Sedgwick CMS Canada Inc ("Sedgwick") notified Motors that it was handling the claims on behalf of Old Republic.

Upon receipt of the first loss transfer request for indemnity, Sedgwick, on June 22, 2005 denied the loss transfer, taking the position that there was no negligence or liability on the Pepsi truck.

A further loss transfer request for indemnification form was sent to Old Republic on November 25, 2005 covering payments from March 11, 2005 and October 31, 2005, claiming $45,323.50. Sedgwick again denied the claim. As a result, Sedgwick served Old Republic with a Notice to Participate and Demand for Arbitration, dated December 21, 2005. Old Republic then retained counsel to deal with the demand for arbitration.

On March 23, 2006 Motors sent a third loss transfer request for indemnification covering the period March 31, 2005 to March 9, 2006. The Demand for Arbitration and request for indemnification resulted in Old Republic obtaining a legal opinion as to the applicability of Rule 12 (4), and as a result on April 19, 2006, Sedgwick, on behalf of Old Republic wrote Motors and stated, in part:

> "Upon review of the file information and our investigation, we acknowledge that Pepsi Bottling Group will accept your loss transfer indemnity request from November 25, 2005….reimbursement in the sum of $44,120.79 therefore follows shortly to your office under separate cover.

> We are reviewing your latest indemnification request from March 23, 2006 and shall comment on it shortly."

It was the evidence of Louise Rivett, the representative of Sedgwick who gave testimony at the examination for discovery, which transcript was filed at the hearing, that one of the reasons for paying the loss transfer request was the arbitration proceedings and associated cost.

In any event, Sedgwick, on July 13, 2006 wrote Motors and stated:

> "We have now completed our investigation into motor vehicle accident.
>
> The accident as a whole including the collision between your insured and our insured is governed under Section 5, the ordinary rules of law. Accordingly we will give no further consideration to your request for payments under loss transfer provision of our insured's policy.
>
> A payment in the amount of $45,323.50 was made to your on an interim basis pending completion of our investigation, and we formally ask for repayment of these funds without delay.
>
> We are prepared to arbitrate this matter and shall proceed should we not receive a favourable response from your office within 14 days."

It would appear that at or about this time Old Republic had retained new counsel and by letter of September 26, 2006, the new law firm indicated its intention to dispute Old Republic's loss transfer obligations.

It is with this background that Motors takes the position that Old Republic waived its right to dispute its insured's fault for the accident. It further argues that Old Republic is estopped from resisting Motors's loss transfer claim.

Old Republic relies upon the decision that Mr. Justice Pitt in GAN General Insurance Company vs. State Farm Mutual Automobile Insurance Company [1999] O.J. No 447. In that case, a heavy commercial vehicle insured by GAN hit a number of vehicles including the one insured by State Farm. State Farm paid out statutory accident benefits and sought loss transfer against GAN. GAN subsequently paid out approximately $11,000.00 for loss transfer claims. GAN subsequently requested repayment from State Farm saying it had incorrectly applied the fault

determination rules and did not owe the money. The court held that GAN had made the payment not " in satisfaction of an honest claim" but pursuant to a statutory scheme and it did so in error. GAN was therefore allowed to recover the funds it paid to State Farm.

There is little doubt in my mind but that Old Republic, after conducting an investigation of the facts, and obtaining an legal opinion, made a conscious decision to pay the loss transfer request and it did so for these reasons and the desire to avoid arbitration expenses.

I do not accept that Sedgwick changed its mind because "we have now completed our investigation into the motor vehicle accident". Based on the evidence, it changed its mind because another person at Old Republic, subsequent to the payment, reviewed the file and took a different view of the applicability of Rule 12 (4) and obtained new lawyers. I note that in Sedgwick's letter of April 19, 2006 it states that as a result of its investigation it was paying the loss transfer. It said nothing of a further or ongoing investigation.

Loss transfer is a statutory scheme created to allow for the relatively quick and efficient transfer of risk between insurers when there are collisions between certain types of vehicles. The scheme puts a premium on speed and efficient resolution of loss transfer matters. The users of the system, as both arbitrators and the courts have noted, are sophisticated in litigation. In such a system it is desirable, once an agreement has been reached, that it be enforced, except in the most extreme circumstances. Here there had been a clear and unequivocal agreement between the parties. The decision by Old Republic to accept the loss transfer liability was made after obtaining a legal opinion and in the course of litigation. It was not a payment made by mistake or oversight. Old Republic made a deliberate decision after considering all relevant factors.

Waiver does not require prejudice but needs expressed words and a course of action that is unequivocal. That is what occurred in this case. In my view the situation here mounts to waiver in keeping with the criteria set out in cases such as Gill vs. Zurich (2002) 156 O.A.C 390, 35 C.C.L.I. (3rd) 239 (Ont. C.A.) and Saskatchewan River Bungalows Ltd. vs. Maritime Life Assurance Company (1994) 20 Alta. L.R (3rd) 296;2 S.C.R. 490.

Furthermore, I am the view that this is a situation where conventional estopped applies. The parties dealings were based on a shared assumption of fact or law, the parties conducted themselves in reliance on those assumptions resulting in a change of its legal position. In terms in whether it would be unjust or unfair to allow one party to resile from this position, I think it is important to consider the context in which the agreement took place. As noted above, loss transfer is a statutory scheme that to some extent trades off precision and detail for certainty and efficiency of resolution. The insurers that use this regulation are sophisticated litigants. Accordingly it is only in the rarest of circumstances that an insurer, in loss transfer, ought to be able to resile from their agreement.

While this decision may, strictly speaking, end the issue, because the parties raised other issues, I will deal with them at this time.

Does Rule 12 (4) Apply?

The applicable part of Rule 12 (4) of the fault determination rules states:

> 12. (1) This section applies when automobile "A" collides with automobile "B", and the automobiles are travelling in opposite directions and in adjacent lanes.
>
> (4) If automobile "B" is over the centre line of the road when the incident occurs, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

At first blush, it would appear that Rule 12 (4) applies. The Pepsi truck was clearly over the centre line when the accident occurred. Old Republic, however, argues that Rule 12 does not apply as the UPS truck was "involved" in the incident in that it hit the Pepsi truck causing it to loose control and cross the centre line. Whether the UPS truck was "involved" in the accident, for the purposes of loss transfer dispute is a factual question. Based on all the evidence before me, including the video of the accident, it is clear to me that the UPS truck was involved in the incident. Arbitrator Samis, in Dominion of Canada vs. Kingsway Insurance (unreported decision released January 11, 2000), set out criteria to be used to when determining if a vehicle was "involved" in the incident. Those were:

(a) Whether there was contact between the vehicles;

(b) The physical proximity of the vehicles;

(c) The time interval between the relevant actions of the two vehicles;

(d) The possibility of a causal relationship of the actions of one vehicle and the subsequent actions of another; and

(e) Whether it was foreseeable that the actions of one vehicle might directly cause harm or injury to another vehicle and its occupants.

Applying these criteria, it is clear that there was contact between the UPS truck and the Pepsi truck. In terms of the second criteria, proximity, the UPS truck seems to have stayed in contact with the Pepsi truck right up to the subsequent collision and injury of Mr. Leroux. In terms of the third criteria, time, the incident occurred in a very short period of time. The UPS truck struck the Pepsi truck, which then went out of control and hit Leroux. In terms of the causal relationship, counsel for Motors has suggested that the driver of the Pepsi truck was in inattentive, speeding and speaking on his cell phone at the time. This may well be the case, however, there is no doubt but that the actions of the UPS truck in striking the Pepsi truck was a direct cause of the subsequent accident and accordingly I find this criteria was satisfied. Turning to foreseeability I find that it was foreseeable that when the UPS truck struck the moving Pepsi truck it could go out of control, cross the median and strike an oncoming vehicle. All criteria having been satisfied, and accordyingly, I find that the UPS truck was "involved in the incident."

This then turns us to the question whether Rule 12 (4) applies. Mr. Justice Newbould in Lombard Canada Insurance Company vs AXA Insurance and Pilot Insurance Company [2007] O.J. No. 601, dealt with a similar issue. In that case the arbitrator held that there were three vehicles involved in the incident. On appeal Mr. Justice Newbould agreed with the arbitrator that Rule 12 envisages only 2 vehicle situations and since 3 vehicles were involved in the incident, Rule 12 did not apply and accordingly the ordinary rules of law applied. I am in agreement with the approach of Mr. Justice Newbould and having found that 3 vehicles were involved incident, Rule 12 (4) does not apply. Accordingly the ordinary rules of law apply.

Turning to the facts of the accident, it is clear, on all the evidence, that the main contributing factor to the accident was the action of the UPS truck. It struck the Pepsi truck, which caused it to go out of control, cross the median and hit the Leroux vehicle. Counsel for Motors submitted that he actions of the Pepsi truck driver contributed to the accident. He points to the fact that the driver originally thought that the truck had been struck on the opposite side of his truck than actually was the case. In addition the driver of the truck was talking on his cell phone at the time of the original collision and the driver threw the phone aside after that collision in order to properly handle the situation. In all the evidence I find that the UPS truck was 80% at fault for the accident and the Pepsi truck was 20% at fault.

Joint and Several Liability

Counsel for Motors submitted that there is joint and several liability in loss transfer and that the one percent rule applies and since the Pepsi was at least one percent at fault, Motors could recover all of its loss transfer. I do not agree. There have been a number of decisions on this point, the most recent being my decision in Aviva Insurance Company of Canada vs Royal & SunAlliance Insurance (unreported decision released February 2006) upheld on appeal, 2008 CAN LII 41817 (On. S.C). On appeal, Justice Mesbur confirmed that there is no joint and several liability in loss transfer and the one percent rule does not apply.

Before closing, I will deal briefly with one evidentiary issue raised by the parties. The driver of the UPS truck, Tina-Marie Painter, was charged with careless driving and convicted, in absentia, after a court heard evidence from the driver of the Pepsi truck, a witness and the investigating police officer. Counsel for Old Republic submits that I should be bound by the findings of the Justice of the Peace who heard the case. He submits that it would be an abuse of process for the arbitrator in this matter to make different findings of fact than were made by the Justice of the Peace. In support of this position he relies upon the case of Polgrain vs Toronto East General Hospital [2007] CAN LII 41437 (On. S.C). In that case the plaintiff sued the hospital where she alleged she had been sexually assaulted. There had been a previous criminal hearing and the hospital moved to have the civil action dismissed as an abuse of process based on the proposition that the civil action sought to relitigate a determination already made by a court. The court

dismissed the civil action as an abuse of process. In rendering its decision, however, the court noted that it would do so only in the rarest of circumstances. It noted that:

> " Judges have an inherent and residual discretion to prevent an abuse of the court's process. The concept of abuse of process was described at common law as proceedings " unfair to the point that they are contrary to the interests of justice".

It quoted with approval, Madame Justice McLachlin, of the Supreme Court of Canada, in R.v. Scott [1990] 3 S.C.R 979, where she stated:

> "…abuse of process may be established where: (1) the proceedings are oppressive or vexatious and, (2) violates the fundamental principles of justice underlying the community's sense of fair play and decency. The concept of oppressiveness and vexatiousness undermines the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and proper administration of justice."

I do not agree with counsel for Old Republic's position that I should be bound by the Justice of the Peace's findings in this matter. The Provincial Court hearing was held in absentia, with the accused not present and accordingly did not testify. The witnesses that did testify were not cross-examined. The Provincial Court did not question the extent of the Pepsi truck driver's involvement in the accident. Furthermore, the Provincial Court did not have all available evidence before it. For example, the video of the accident was not show to the Justice of the Peace when he made his findings.

Accordingly, I am satisfied that it would not be an abuse of process to hear all the evidence relating to the accident for the purpose of determining fault in the loss transfer case and accordingly I have considered all the evidence before me and come to an independent decision.

In light of the above, Old Republic is not entitled to repayment of the monies already paid and is responsible for the payment of all reasonable loss transfer claims in this matter.
In the event that the parties are unable to agree with regard to the issue of costs I may be spoken to.

Dated at Toronto, this _____ November 2008.

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M. Guy Jones

Arbitrator