COURT FILE NO.: 68-CV-369244
DATE: 2009/06/24

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Motors Insurance Corporation	Lee Samis, for the Applicant/Respondent in Appeal
Applicant (Respondent in Appeal)	
- and -	
Old Republic Insurance Company	Mark K. Donaldson, for the Respondent/Appellant in Appeal
Respondent (Appellant in Appeal)	
	HEARD: June 11, 2009

Herman J.

[1] Old Republic Insurance Company appeals from the decision of Arbitrator M. Guy Jones, dated November 24, 2008.

[2] The arbitrator's decision arises out of a motor vehicle accident in which the vehicle that was insured by Old Republic hit the vehicle that was insured by Motors Insurance Corporation. The driver of the Motors' vehicle was seriously injured and Motors continues to pay accident benefits to him. Motors claims indemnification from Old Republic for its payments by way of a loss transfer claim.

[3] Old Republic submits that the arbitrator erred when he decided:

(i) Old Republic had waived its right to dispute its insured's fault for the accident and was estopped from disputing responsibility for Motors' loss transfer claim; and

(ii) Old Republic's insured bore 20% responsibility for the accident.

Background

[4] Motors' loss transfer claim arises from a motor vehicle accident that occurred on March 11, 2005.

[5] On that day, Robert Doiron was operating a tractor-trailer combination owned by the Pepsi Bottling Group and insured by Old Republic. Mr. Doiron was driving westbound on Highway 407.

[6] The Pepsi truck was struck twice by a UPS truck which had moved into its lane.

[7] The second impact caused Mr. Doiron to lose control. The Pepsi truck moved across westbound lanes, through the median and into the eastbound lanes of Highway 407. This resulted in a collision with a vehicle that was driven by Mr. Andrew Leroux and insured by Motors.

[8] As a result of the accident, Mr. Leroux sustained serious and devastating injuries. He applied to Motors to receive statutory accident benefits. Motors paid and continues to pay accident benefits to him.

[9] On June 22, 2005, Motors provided Old Republic with a Notification of Loss Transfer, indicating its intention to pursue indemnification pursuant to the loss transfer provisions. Sedgwick CMS handled the handled the claim on behalf of Old Republic.

[10] On June 29, 2005, Old Republic denied the loss transfer claim.

[11] On or about November 25, 2005, Motors forwarded to Old Republic a Request for Indemnification claiming a total amount of $45,323.50.

[12] By letter dated November 29, 2005, Sedgwick, on behalf of Old Republic, again denied the loss transfer claim.

[13] As a result of the denial, Motors served on Old Republic a Notice to Participate and Demand for Arbitration, dated December 14, 2005.

[14] On March 23, 2006, Motors sent a second Request for Indemnification to Old Republic.

[15] By letter dated April 19, 2006, Mr. Michaud, a claims examiner with Sedgwick, acknowledged that Pepsi would accept Motors' Loss Transfer Indemnity Request from November 29, 2005. He said that they would respond shortly to the second request.

[16] On June 1, 2006, Old Republic issued payment to Motors.

[17] By letter dated July 13, 2006, Louise Rivett, the operations manager at Sedwick, responded to the second Request for Indemnification. She said that Segdgwick would give no

further consideration to Motor's request for payment under the loss transfer provision. She also requested reimbursement of the funds paid on June 1, 2006.

[18] Motors sent two additional Requests for Indemnification to Old Republic in September 2006 and October 2007. As of October 2007, Mr. Leroux had been deemed catastrophically impaired and Motors was continuing to pay accident benefits. Old Republic did not pay anything further.

[19] The parties agreed to the appointment of the arbitrator. The hearing was held on March 25, 2008 and the arbitrator issued his decision on November 24, 2008.

Issues

[20] The primary issue is whether the letter of April 19, 2006 constituted a waiver of Old Republic's right to dispute Motors' loss transfer claim. A secondary issue is the apportionment of fault for the accident as between the driver of the UPS truck and the driver of the Pepsi truck.

Standard of Review

[21] Section 275 (4) of the *Insurance Act*, R.S.O. 1990, c.I.8, provides that if insurers are unable to agree with respect to loss transfer indemnification, the dispute shall be resolved through arbitration. The agreement between the parties provides for full rights of appeal with respect to "all issues, law, and mixed fact and law".

[22] The parties agree that the arbitrator's decision involves mixed fact and law but disagree as to the appropriate standard of review that should be applied. Old Republic submits that the appropriate standard is correctness, while Motors submits that the appropriate standard is reasonableness.

[23] The Supreme Court of Canada reconsidered the standard of review that courts should apply to decisions of adjudicative tribunals in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9. The court determined that there were two standards of review: reasonableness and correctness.

[24] The court's task in each case is to determine which of these two standards to apply. The court is required to undertake a two-step analysis. The first step is to find out whether the jurisprudence has already determined the degree of deference to be given with regard to the particular category of question. If it has, that is the end of the analysis. If it has not, the court then has to examine various factors to help it identify the proper standard of review.

[25] The following factors support a conclusion that the court should give the decision maker deference and apply the reasonableness standard:

(i) the existence of a privative clause;

(ii) a discrete and special administrative regime in which the decision maker has special expertise; and

[26] The correctness standard will be applied if the question of law is of central importance to the legal system and outside the specialized area of expertise of the decision maker (*Dunsmuir v. New Brunswick* at para. 55).

[27] The Ontario Court of Appeal considered the standard of review applicable to an arbitrator under the *Insurance Act* in *Oxford Mutual Insurance Company v. Co-Operators General Insurance Company* (2006), 83 O.R. (3d) 591 (C.A.). The issue before the arbitrator was whether the relationship between the injured person and his mother made him principally dependent upon her for his care. The arbitrator's task was to apply the correct legal principles to the factual findings about the particular circumstances of the relationship. It was therefore a question of mixed fact and law and was closer to a factual determination. Lang J.A. concluded that, given the special expertise of arbitrators in evaluating facts for a determination of dependency for statutory accident benefits entitlement, unless the arbitrator's decision was unreasonable, it was entitled to deference.

[28] There are several decisions of this court, following the decision in *Oxford Mutual*, that consider the application of the standard of review to decisions of arbitrators under the *Insurance Act*. Brown J. conducted a useful review of these decisions in *Zurich Insurance Co. v. Personal Insurance Co.*, [2009] O.J. NO. 2157 (Sup. Ct.) at paras. 25-27, a case involving a priority dispute. He noted that, of the two cases that cited *Oxford Mutual*, the court in *Aviva Insurance Company of Canada v. Royal & SunAlliance Insurance Company*, [2008] O.J. No. 3240 (Sup. Ct.) concluded that the reasonableness standard applied to questions of mixed fact and law while the court in *Lombard Canada v. Royal & SunAlliance* concluded that correctness was the appropriate standard.

[29] After reviewing these various cases, Brown J. concluded at para. 29, that the applicable standard of review of decisions by arbitrators under the *Insurance Act* was that articulated in *Oxford Mutual*: correctness on questions of law; and reasonableness on questions of fact and questions of mixed fact and law.

[30] In my opinion, the issues in this case are ones within the special expertise of the arbitrator: loss transfer claims and apportionment of liability in motor vehicle accidents. I note that in *Aviva Insurance Company of Canada v. Royal & SunAlliance Insurance Company*, Mesbur J. referred to the special expertise of arbitrators in determining issues of loss transfer when she reached her conclusion that the arbitrator's decision should be afforded deference.

[31] I conclude that the appropriate standard of review in the case before me is one of reasonableness.

Waiver and Estoppel

The Arbitrator's Decision

[32] The arbitrator concluded that Old Republic had waived its right to dispute its insured's fault for the accident. He also concluded that Old Republic was estopped from disputing responsibility for Motors' loss transfer claim.

[33] His conclusion rested primarily on his consideration of three pieces of evidence: the letters from Sedgwick of April 19, 2006 and July 13, 2006, and the transcript of the examination under oath of Louise Rivett of Sedgwick.

[34] By letter dated April 19, 2006, Mr. Marcel Michaud, of Sedgwick, wrote Motors in response to Motors' request for indemnification. He stated that "we acknowledge that Pepsi Bottling Group will accept your Loss Transfer Indemnity Request from November 25, 2005". He also indicated that they were reviewing the indemnification request from March 23, 2006 and would be commenting upon it shortly.

[35] On June 1, 2006, Old Republic issued a cheque to Motors in payment of the first indemnity request.

[36] Sedgwick sent a second letter to Motors on July 13, 2006. This letter was from Ms. Rivett, Mr. Michaud's supervisor at Sedgwick. She stated that they had now completed their investigation into the motor vehicle accident. Since the accident was governed by the ordinary rules, they would give no further consideration to Motors' request for payments under the loss transfer provision. Ms. Rivet also indicated that the previous payment that had been made was "on an interim basis pending completion of our investigation". She requested repayment without delay.

[37] The third piece of evidence was the examination of Ms. Rivett. She explained that payment of the first request for indemnification was made because, upon receipt of the notice to participate in arbitration, there was further review and consideration, including receipt of a legal opinion. It was decided at that point "in order to avoid arbitration that they would agree to pay Motors the first subrogation request".

[38] The arbitrator also considered the broader context of loss transfer claims. They are part of a statutory scheme to allow for the relatively quick and efficient transfer of risk between insurers. There is a premium on speed and efficient resolution. The users are sophisticated. The arbitrator noted that, in such a system, it is desirable that parties' agreements be enforced, except in the most extreme circumstances.

[39] The arbitrator's interpretation of Old Republic's conduct was as follows:

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

[40] The arbitrator did not accept Old Republic's position that it had changed its mind because "we have now completed our investigation into the motor vehicle accident", as Ms. Rivett claimed in her letter. Rather, he concluded that, based on the evidence, Sedgwick had changed its mind because another person had reviewed the file, took a different view of the applicability of Rule 12 (4) (the rule that provides that, in certain circumstances, where a car is

over the centre line of the road at the time of the accident, the driver of that car is 100% at fault) and had obtained new counsel.

[41] The arbitrator concluded that the letter of April 16 constituted a clear and unequivocal agreement between the parties so as to constitute a waiver. Furthermore, this was a situation to which estoppel applied in that Motors had acted in reliance on Old Republic's actions.

[42] In the result, Old Republic was not entitled to repayment of the monies it had already paid and it was responsible for the ongoing payment of all reasonable loss transfer claims.

Analysis

[43] A determination of whether there was waiver and estoppel involves questions of mixed fact and law: an application of the law of waiver and estoppel to the facts in this case.

[44] The arbitrator stated that waiver does not require prejudice but does require expressed words and an unequivocal course of action. He applied the criteria in the cases of *Gill v. Zurich* (2002), 156 O.A.C. 390, 35 C.C.L.I. (3d) 239 (O.C.A.) and *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Company*, [1994] 2 S.C.R. 490 (S.C.R.).

[45] In *Saskatchewan River Bungalows*, the Supreme Court stated at para. 20 that waiver will only be found "where the evidence demonstrates that the waiving party had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them".

[46] Given the sophistication of the parties, there can be no doubt that Old Republic had a full knowledge of its rights. What is in question is whether Old Republic had an unequivocal and conscious intention to abandon those rights.

[47] The arbitrator found that the April 2006 letter was written on the basis of an investigation of the facts and a desire to avoid arbitration expenses. Sedgwick had also obtained a legal opinion.

[48] The arbitrator did not accept Sedgwick's claim that its change of position, as reflected in the July 2006 letter, was due to it just having completed its investigation. Rather, Sedgwick changed its mind because someone new had looked at the file and they had obtained new legal counsel. While Ms. Rivet stated in the July 2006 letter that payment had been made to Old Republic on an interim basis, pending investigation, there was no such qualification in Mr. Michaud's April 2006 letter nor was there any qualification when the funds were paid.

[49] Old Republic relied on the decision in *Gan General Insurance Company v. State Farm Mutual Automobile Insurance Company*, [1999] O.J. No. 447. In that case, the vehicle insured by Gan hit several vehicles, one of which was insured by State Farm. State Farm paid out benefits and sought loss transfer against GAN. GAN paid State Farm approximately $11,000 for loss transfer claims. GAN later requested repayment from State Farm saying it had incorrectly applied the fault determination rules and did not owe the money. Pitt J. concluded that the money had been paid in error and should be repaid.

[50] Pitt J. cited *Moore (Township) v. Guarantee Co. of North America* (1991), 1 O.R. (3d) 370 (Gen. Div.) at 378, in which Eberle J. said that money paid because of a mistake of law or fact may be recovered subject to equitable defences, such as, where the payee has changed his position or where the payment was made in settlement of a claim.

[51] The arbitrator distinguished *Gan* from the facts before him because he concluded that Old Republic had made a conscious decision to pay, after an investigation and receiving a legal opinion, and in order to avoid arbitration expenses.

[52] In my opinion, the arbitrator applied the correct legal principles. He considered the broader context of loss transfer claims. His finding that Sedgwick did not make a payment by mistake, but rather, made a conscious decision to pay in order to avoid the costs of arbitration was reasonable given the evidence before him and is entitled to deference. So too, was his conclusion that Old Republic had therefore waived its right to dispute Motors' loss transfer claim. His conclusion was also, in my opinion, correct.

[53] The doctrines of waiver and promissory estoppel are closely related. Both doctrines rest on the principle that a party should not be allowed to go back on a choice where it would be unfair to the other party to do so (*Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Company* at para. 9). The added feature of estoppel is detrimental reliance.

[54] The arbitrator's treatment of the issue of estoppel was brief. He adopted the test for estoppel that was articulated by the Supreme Court of Canada in *Ryan v. Moore*, [2005] S.C.R. 53. However, it is not clear from his reasons how Motors relied on the April 2006 letter to its detriment. While Motors did not proceed with the arbitration at that time, Motors was aware of the change in position three months later and the arbitration did proceed.

[55] I contrast this situation to that in *Kingsway General Insurance Company v. The Personal Insurance Company* (August 2004, Arbitrator G. Jones), a decision of the same arbitrator. In that decision, the arbitrator outlined the ways in which Kingsway had relied on Personal's acceptance of the loss transfer dispute to its detriment. It had, in fact, relied on Personal's position for more than six years. As a result of the time that had passed, Personal was no longer able to conduct a thorough investigation. That situation is very different from the case at hand.

[56] I have some difficulty in concluding that the arbitrator's decision with respect to the application of estoppel is reasonable given the lack of evidence of detrimental reliance. I have, however, concluded that his decision with respect to waiver is both reasonable and correct.

Apportionment of Liability

Arbitrator's Decision

[57] The conclusion on waiver effectively ends the matter, in that the result is that Old Republic is responsible for all reasonable loss transfer claims. However, the arbitrator went on to consider other issues that the parties had raised.

[58] Of these issues, the one that Old Republic now challenges is the arbitrator's apportionment of liability.

[59] Applying the ordinary rules of law, the arbitrator concluded that the action of the UPS truck was the main contributing factor to the accident. The UPS truck struck the Pepsi truck, which caused it to go out of control, cross the median and hit the vehicle driven by Mr. Leroux.

[60] However, the arbitrator also found that the Pepsi truck driver had contributed to the accident. The driver of the Pepsi truck had originally thought that his truck had been struck on the opposite side of the truck than was actually struck. He was talking on his cell phone at the time of the first contact with the UPS truck.

[61] Based on the evidence, the arbitrator found that the UPS truck was 80% at fault for the accident and the Pepsi truck was 20 % at fault.

[62] There was no *vive voce* evidence at the hearing. The evidence before the arbitrator included: various documents (including the accident report); a transcript of the *Highway Traffic Act* trial of the driver of the UPS truck; a transcript of the examination for discovery of Mr. Doiron, the driver of the Pepsi truck; and a video of the accident;

Analysis

[63] Although there was no *vive voce* evidence, the arbitrator had ample evidence before him so as to be in a position to apportion liability.

[64] While the arbitrator concluded that the UPS truck driver was primarily at fault, he found that the Pepsi driver was 20% at fault. The arbitrator noted, in particular, that the Pepsi truck driver thought that his truck had been struck on the opposite side and that he was on his cell phone at the time. In the transcript of his discovery, the driver said that he was concerned about his daughter and had been talking to her to find out how she was. He also indicated that the first time he was aware that something was wrong was when he was hit.

[65] Given this evidence, the arbitrator's conclusion as to the apportionment of fault was a reasonable one to reach and should be accorded deference.

Conclusion

[66] For the reasons set out above, I have concluded that the arbitrator's decision that Old Republic has waived its right to dispute the loss transfer claim is both reasonable and correct. The appeal is therefore dismissed.

[67] I would urge the parties to try to resolve the matter of costs. If they are unable to do so, they may make brief written submissions (no more than three pages in length plus a bill of costs). Motors should provide their submissions within 14 days of the release of this decision. Old

Republic has a further 14 days within which to provide a response.

Herman J.

Released: June 24, 2009