

COURT FILE NO.: CV-09-383548
DATE: 20100415

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Allianz Insurance Company of Canada, Applicant/Appellant

v.

Lombard Insurance Company of Canada, Her Majesty the Queen, as
Represented by the Minister of Finance, Respondents

BEFORE: Justice L.A. Pattillo

COUNSEL: Mark K. Donaldson, for the Applicant/Appellant

Harry Brown, for the Respondent Lombard Insurance

DATE HEARD: April 13, 2010

ENDORSEMENT

[1] Allianz Insurance Company of Canada ("Allianz") appeals by way of application from the decision of Arbitrator Guy Jones dated June 23, 2009, which concluded that the vehicle operated by Mr. Timothy Klue, which struck Ms. Karla Merino on September 12, 2002 in Windsor, Ontario, was not covered by a policy of insurance issued by Lombard Insurance Company of Canada ("Lombard") to Phasecom/MasTec Ltd. ("Phasecom").

[2] The dispute between the parties is a coverage dispute involving accident benefits. It is governed, in part, by an Arbitration Agreement between the parties dated June 4, 2008, which provides for an appeal to a judge of the Ontario Superior Court of Justice "on a point of law or on a point of mixed fact and law". The parties are in agreement that the standard of review on this appeal is one of correctness. I agree and adopt the reasoning of Strathy J. in that regard in *Lombard Canada Ltd. v. Royal SunAlliance Insurance Co.*, (2008) 94 O.R. (3d) 62 (S.C.J.).

[3] Allianz raises three grounds of appeal.

[4] First, Allianz submits that the arbitrator erred in holding that only special condition 6 of s. 2.2.3 of OAP-1 was applicable to the facts as he found them. Allianz submits that special condition 6 must be read together with special condition 5 such that condition 6 would not apply to accident benefits coverage.

[5] Section 2.2.3 of OAP-1 deals with coverage for driving "other automobiles". The section lists 6 "special conditions" that deal with various circumstances which must be met in order for there to be coverage for driving other automobiles. They are each separate and distinct. There is nothing in the wording of the section or the conditions themselves that leads to the conclusion that any of the special conditions must be read together. This is specifically so with respect to special conditions 5 and 6. Special condition 5 provides that it applies to all coverages "except accident benefits". That exception is not provided for in special condition 6. In the absence of specifically excluding any coverage by its wording, special condition 6 applies to all coverages, including accident benefits.

[6] The arbitrator held that "special condition 6 is the applicable section given our fact situation". He further held, having regard to the facts and the wording of special condition 6, that there was no coverage of Mr. Klue under the "other automobile" provisions of OAP-1. In my view, having regard to the facts as he found them and the wording of s. 2.2.3 of OAP-1, the arbitrator was correct.

[7] Second, Allianz submits that the arbitrator erred in failing to consider the evidence of Mr. Greg Kellawan, an executive underwriter with Lombard who testified that under the Lombard policy, Mr. Klue, as an employee of Phasecom was entitled to the same coverage as the named insured or any person added as an additional insured. As a result of such admission, Allianz submits that Mr. Klue's insurance could only be cancelled upon notice from Phasecom to Lombard. As no notice was provided prior to the accident on September 12, 2002, it is Allianz's submission that Mr. Klue's insurance coverage remained in place at the time of the accident.

[8] In support of its position, Allianz relies on the decisions of *Progressive Casualty Insurance Company of Canada v. State Farm Mutual Automobile Insurance Company*, a decision of Arbitrator Bruce R. Robinson dated September 26, 1997 and *The Co-operators v. Wawanesa Insurance Company*, a decision of Arbitrator Kenneth Bialkowski dated August 18, 2002, confirmed on appeal, [2004] O.J. No. 4588 (S.C.J.). Those decisions establish that where an individual is named as an insured under an automobile policy, the insurer is required to follow the provisions of the statute and provide the required written notice of termination.

[9] In his decision, the arbitrator addressed the issue of whether Mr. Klue was a listed driver under the policy as submitted by Allianz. After reviewing the documents and the evidence of Mr. Kellawan, which he accepted, the arbitrator concluded that Mr. Klue was not a listed driver under the policy and therefore notice of termination was not required. In my view, the arbitrator was correct.

[10] Allianz's submission that the above noted evidence of Mr. Kellawan gives rise to a requirement that Phasecom must give notice to Lombard of the termination of Mr. Klue's insurance is not tenable having regard to the coverage provided to Mr. Klue pursuant to the Lombard policy as found by the arbitrator.

[11] The policy issued to Phasecom was an OAP-1 which was modified by the OPCF-21B2 endorsement (Blanket Fleet Coverage) for all automobiles licenced in Ontario owned or leased by Phasecom. This coverage was for in excess of 200 vehicles, one of which was the company

vehicle Mr. Kluc operated as an employee of Phasecom with its consent. The coverage lasted as long as Mr. Kluc was an employee. There is no provision in the policy or otherwise that requires Phasecom to provide notice to Lombard when an employee covered under the Blanket Fleet Coverage leaves or is terminated from its employ. Nor was there any evidence that the parties governed themselves in that way in the operation of the policy.

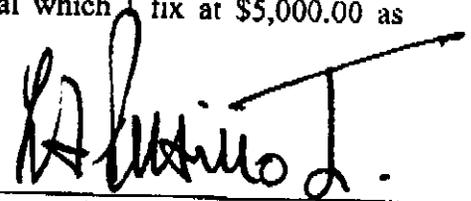
[12] The above noted authorities relied upon by Allianz are of no assistance to Allianz in its submission. As noted, they involve circumstances where the individuals entitled to notice were named insureds under the policies. Mr. Kluc was not a listed insured under this policy.

[13] The arbitrator reviewed the provisions of the policy and concluded that Mr. Kluc's insurance pursuant to it was totally dependent upon his employment with Phasecom and that it terminated when his employment was terminated for cause prior to the accident.

[14] Finally, Allianz submitted in its factum that the arbitrator erred in holding that s. 66(1)(a) of the Statutory Accident Benefits Schedule did not apply to deem Mr. Kluc a named insured at the time of the accident. In argument counsel for Allianz conceded that in light of the decision of *ACE INA Insurance v. Co-operators General Insurance*, [2009] O.J. No. 1276 (S.C.J.), per Belobaba J., this ground of appeal was no longer viable and Allianz was not pursuing it.

[15] In the result therefore and for the reasons stated, Allianz's application/appeal from the decision of Arbitrator Jones dated June 23, 2009 is dismissed.

[16] Lombard is entitled to its costs of the application/appeal which I fix at \$5,000.00 as agreed to by the parties at the conclusion of the argument.



L.A. Pattillo J.

DATE: April 15, 2010