MVACF v. Kingsway and RSA

(Fund's transcription of hand written endorsement)

This is an appeal from the decision of an arbitrator under O. Reg. 283/95 holding a priority arbitration in abeyance pending a determination of an entitlement issue under section 281(2) of the Insurance Act.

In this case, the Fund happened to be erroneously the "first insurer" that received a completed application for benefits under section 268 of the Insurance Act. Under O. Reg. 283/95 sections 1 and 2, it became responsible for the paying of benefits to the insured claimant, Carr. Both Kingsway and Royal had insurance policies on vehicles allegedly implicated in the "accident". If anyone is liable to pay benefits in this case, it is agreed it will not be the Fund. It will either be Kingsway or Royal. In this case, the Fund, as the first insurer to receive the claim, however, adjusted the claim in part in reliance on information from Kingsway. The Fund has taken the position that the claimant, Carr, must prove its entitlement to benefits in an arbitration or proceeding before the F.S.C.O.

The arbitrator held that the priority dispute between, effectively, Kingsway and Royal, be held in abeyance until the Fund, which everyone agrees has no possible liability for the payment of benefits, conducts the entitlement hearing against Carr. It is also acknowledged that the Fund may well have no way of recovering its costs of that arbitration, whatever the result. All parties agree that the standard of review is

correctness. Accordingly, the arbitrator must be right in her interpretation of the statutory scheme. There is no entitlement in this case to deference.

In my view, the arbitrator erred in her interpretation of O. Reg. 283/95 and the relevant provisions.

Section 2 of O. Reg. 283/95 provides that in this case, the Fund is "responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act." The provision does not say pending a determination of the insured's entitlement to benefits in the court or before the FSCO.

The regulatory scheme gives to the Fund, in this case, the responsibility to pay benefits initially, but provides the Fund with the right to an arbitration to decide which of the insurers will have to pay ultimately. In this case, under no scenario will it be the Fund. Section 2 makes it clear that the insured must respond because there had been an application not because there has been a determination of entitlement. The intent of the arbitration under O. Reg. 283/95 is to decide which insurer is responsible to pay regardless of whether the claimant is able to prove entitlement to SABs. There is simply no basis under O. Reg. 283/95 for placing the arbitration in abeyance. In my view, the arbitrator erred in jumping to policy considerations before engaging in the more immediate and important exercise of statutory interpretation.

In my view, the statutory scheme gives the Fund the right to initiate the priority arbitration and does not enable the arbitrator to deny the Fund the right until after the claimant has proved his entitlement to benefits.

I also disagree with the arbitrator's analysis of the policy issues. In my view it makes the most sense to enable the insurer liable to pay to have carriage of the entitlement hearing. This is the party with the greatest (or more precisely, the only) interest in the entitlement proceeding. It makes no sense, in my view, to place carriage of the entitlement hearing in this case on the one party that has absolutely no interest in the outcome.

I rely in part as well on the analysis of Pitt J. in Lombard Canada v. Kent & Essex Mutual Insurance Co. [2008] O.J. No. 4314 in paras. 2 & 3. Although the facts are different, the approach and analysis are equally applicable and informative.

Accordingly, I would respectfully disagree with the arbitrator and set aside her order holding the priority arbitration in abeyance. That arbitration should proceed in the ordinary course.

Because this appears to be a novel one, I make no order as to costs.

Penny J.

June 14, 2010

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO **- and -** **KINGSWAY GENERAL INSURANCE COMPANY. et al**
as represented by the MINISTER OF FINANCE
Appellant

Respondents
Court File No. CV-10-397694

June 14, 2010

R Kerkmann for the appellant

F Rogowski for Royal Sun Alliance

R. Sethi for Kingsway

This is an appeal from the decision of an arbitrator under O.Reg. 283/95 holding a priority arbitration in abeyance pending a determination of an entitlement issue under section 28(2) of the Insurance Act.

On this case, the Fund happened to be erroneously, the "first insurer" that received a completed application for benefits under section 26 of the Insurance Act. Under O.Reg 283/95 sections 1 and 2 it became responsible for the paying of

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Toronto

APPEAL RECORD

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benefits to the insured claimant, Carr. ~~King~~
Both Kingsway and Royal had insurance policies on vehicles allegedly implicated in the "accident". If anyone is liable to pay benefits in this case, it is agreed it will not be the Fund. It will either be Kingsway or Royal. In this case, the Fund, as the first insurer to receive the claim, however, adjusted the claim. On part in reliance on information from Kingsway, the Fund has taken the position that the claimant, Carr, must prove its entitlement to benefits in an arbitration or proceeding before the F.S.C.O.

The arbitrator held that the priority dispute between, effectively, Kingsway and Royal, be held in abeyance until the Fund, which eventually will, has no possible liability for the payment of benefits, conducts the entitlement hearing against Carr. It is also acknowledged that the Fund may well have no way of recovering its

costs of that litigation, whatever the result.

All parties agree that the standard of review is correctness. Accordingly, the arbitrator must be right in her interpretation of the statutory scheme. There is no entitlement in this case, to deference.

In my view, the arbitrator erred in her interpretation of O. Reg 283/95 and the related provisions.

Section 2 of O. Reg. 283/95 provides that in this case, the Fund is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act. The provision does not say pending a determination of the insured's entitlement to benefits in the courts or before the FSCO.

The regulatory scheme gives to the Fund, in this case, the responsibility to pay benefits initially, but provides the Fund with the right to an arbitration to decide which of the insurers will have to pay ultimately. In this case, under no scenario will it be the Fund. Section 2 makes it clear that the insured must respond because there has been an application not because there has been an entitlement. The intent of arbitration, under O. Reg 283/95 is to decide which insurer is responsible to pay regardless of whether the claimant is able to prove entitlement to SABS. There is simply no basis under O. Reg. 283/95 for placing the arbitration in abeyance. In my view, the arbitrator erred in jumping to policy considerations before engaging in the more immediate and important exercise of statutory interpretation.

In my view, the Statutory scheme gives the Fund the right to initiate the priorities arbitration and does not enable the arbitrator to deny the Fund that right until after the claimant has proved his entitlement to benefits.

I also disagree with the arbitrator's analysis of the policy issues. In my view it makes the most sense to ~~enable~~ the insurer liable to pay to have carriage of the entitlement hearing. This is the party with the greatest ~~or~~ (or more precisely, the only) interest in the entitlement proceeding. It makes no sense, in my view, to place carriage of the entitlement hearing in this case on the one party that has absolutely no interest in the outcome.

(A) Accordingly, I would respectfully disagree with the arbitrator and set ~~be~~ aside her order holding the

priority ~~of arbitration~~ in abeyance that arbitration should proceed in the ordinary course.

(A) I rely in part on well on the analysis of Pitt J in Lombard Canada v. Kent & Essex Mutual Insurance Co. [2008] O.J. No 4314 in paras 2&3. Although the facts are different, the approach and analysis are ~~are~~ equally applicable and informative.

Because this point appears to be a novel one, I make no order as to costs.

Penny J.