

IN THE MATTER OF AN ARBITRATION UNDER
 THE *ARBITRATION ACT*, 1991, 5.0. 1991, c. 17;
 AND
 THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8 (as amended);
 AND
 ONTARIO *REGULATION* 283/95 (as amended)

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

-And-

INTACT INSURANCE COMPANY
 (Nordic Insurance Company of Canada)

Respondent

BEFORE: Fred Sampliner

COUNSEL: Chris Schnarr for the Applicant Insurer
 Peter Durant for the Responding Insurer

HEARING: June 24, 2015 at Victory Verbatim in Toronto, Ontario

DECISION ON A PRELIMINARY ISSUE

Background:

On September 21, 2012, Daniel McLaughlin sustained serious injuries in an automobile accident, while driving a cab for Paul's Taxi. The taxi was insured by an auto policy with Intact Insurance Company (Intact). Mr. McLaughlin also had a personal vehicle that he insured through Economical Mutual Insurance Company (Economical). He applied to Intact for *Statutory Accident Benefits ("SABS")* immediately following the accident. Intact demanded and Economical agreed to accept responsibility for

payment of Mr. McLaughlin's SABS benefits. Economical seeks a determination under the *Arbitration Act* of whether it is entitled to an Order rescinding its agreement to accept responsibility to pay Mr. McLaughlin's SABS benefits on the basis Intact made a material misrepresentation.

Preliminary Issue:

Is Economical entitled to resile from accepting responsibility to pay *Statutory Accident Benefits* to Mr. Daniel McLaughlin?

Result:

Economical can rescind its priority agreement with Intact.

The evidence consists of an Agreed Statement of Facts (Applicant's Submissions), a Joint Document Brief (Ex. 1), the Notice of Dispute Between Insurers (Ex. 2) and the recorded oral testimony of the companies' adjusters.

Law:

The statutory scheme for determining which insurer is responsible for payment of SABS to an injured person following a motor vehicle accident is set out in the *Insurance Act*². The company listing the injured claimant as an insured in a motor vehicle policy is the first insurer responsible for SABS payments. When the claimant does not qualify as a named insured on a policy, the insurer of the automobile the claimant was traveling in at the time of the accident is liable for SABS benefits. Insurers of other automobiles involved in the accident are third in priority. The answer as to which is the first priority insurer is not always abundantly clear and disputes between the insurers arise therefrom.

The process for resolving these disputes between insurers concerning priority for SABS payments is set out in the *Regulations*³ under the *Insurance Act*. The first insurer to receive a completed SABS application is required to commence the adjusting process and payment of benefits to a claimant. If that

¹S.O. 1991, Chapter 17

²R.S.O. 1990, Chapter 1.8.

³*Ontario Regulation 283/95*, 2(1) and 3(1)

insurer has information another company has first liability, it must serve a formal written notice on the carrier(s) it claims are responsible within 90 days of its receipt of the initial SABS application or the company could lose the right to transfer responsibility. These so-called "priority disputes" are usually resolved amicably, but occasionally require a decision by a private arbitrator under the *Arbitration Act*.⁴ This arbitration decision is made under the above legislation and the parties' written agreement.

Both the *Regulations* and the *Insurance Act* are silent on an insurer's right to resile or withdraw from an agreement to accept priority. Five principals have emerged from the arbitration decisions respecting these types of disputes: 1. The statutory scheme is designed to be expedient, simple and efficient in determining the appropriate SABS insurer. 2. Large sophisticated insurers can obtain sound professional advice concerning priority decisions and adjudicators should not easily allow withdrawal from these priority decisions.⁵ 3. The system has little room to carve out exceptions to account for equities in particular circumstances.⁶ 4. Insurers are obliged to investigate and gather the facts on their own before deciding to accept or reject priority.⁷ 5. Honest mistakes or discovery of information acquired post-decision are insufficient reasons to rescind priority undertakings.⁸

In recognition of these principles, arbitrators have applied a high threshold for exercise of equitable relief, limiting rescission to unusual or extreme circumstances.⁹ In the *Aviva v. State Farm* decision, Arbitrator Shari Novick opined she would include an insurer's intentional or knowing misrepresentation of relevant material as an extreme or unusual circumstance.¹⁰

*Black's Law Dictionary*¹¹ defines misrepresentation as, "the act of making a false or misleading assertion about something, usually, with intent to deceive." *Black's* includes a quote from the *Restatement (Second) of Contracts*¹²,

⁵ *Kingsway General v. West Wawanosh*, [2002] 58 O.R. (2d) 251 (C.A.)

⁶ *Kingsway v. West Wawanosh*, *supra*

⁷ *Aviva v. State Farm*, (Shari Novick, March 30, 2012)

⁸ *Motors v. Co-Operators*, (Guy Jones, March 23, 2004), *Enterprise v ING*, (Guy Jones, November 1, 2006)

⁹ *Enterprise v ING*, (Guy Jones, November 1, 2006)

¹⁰ *Aviva v State Farm*, *supra*

¹¹ 9th edition (West)

¹² Subsection 159 cmt. A (1979)

Whether a statement is false depends on the meaning of the words in all the circumstances, including what may fairly be inferred from them. An assertion may also be inferred from conduct other than words. Concealment or even non-disclosure may have the effect of a misrepresentation...." (my emphasis).

Based on the *Black's Law Dictionary* definition and the *Restatement (Second) of Contracts*, I accept Arbitrator Novick's view that an intentional or knowing misrepresentation may qualify as an extreme or unusual circumstance for withdrawal from a priority agreement.

Evidence:

Intact's adjuster initially received notice of Mr. McLaughlin's SABS claim on September 25, 2012, four days after the accident. The day after opening the file, Ms. Shermane Watkin had a telephone conversation with Mr. McLaughlin where he indicated he was driving a taxi cab at the time of the accident. Paul's Taxi owned and insured the vehicles Mr. McLaughlin drove through Intact.

On September 26, 2012, Ms. Watkin sent Economical the form "Notice of Dispute Between Insurers". In it she wrote: "Daniel was the driver of our insured vehicle but has his own insurance with your company." The only other information she included was an Auto Plus report that lists Mr. McLaughlin's history of auto insurance policies. The Auto Plus report and the Notice itself are conspicuously absent of any information concerning Mr. McLaughlin's taxi cab driving or employment with Paul's Taxi.

On October 2, 2012, Paul's Taxi gave Ms. Watkin its statement attesting to Mr. McLaughlin's regular work four days a week at 12 hour shifts. One of the business partners explained that Mr. McLaughlin did not drive company vehicles for his personal use. Paul's considered him a subcontractor. Mr. McLaughlin gave Intact his sworn statement three days later, which confirmed Paul's evidence about his regular work hours and taxi driving on the accident date.

In her evidence, Ms. Watkin stated she had received previous training and experience with priority issues, understood Mr. McLaughlin was in the course of his work duties at the time of the accident, and that Intact was potentially liable as Mr. McLaughlin's SABS insurer. Ms. Watkin said she did not consciously withhold Mr. McLaughlin's work information or the regularity of his taxi driving, but candidly admitted this information was important to Economical's consideration of its responsibility.

Ms. Watkin said the reason she did not reveal Mr. McLaughlin's work and the Intact taxi policy to Economical was because she determined he did not have "regular use"¹³ of Paul's vehicles. However, Ms. Watkin's inability to recall the date when she made her determination on "regular use", the lack of her log reference mentioning her determination and failure to explain how she arrived at her decision refute her assertion. I cannot accept that Ms. Watkin investigated the "regular use" issue.

Ms. Watkin's notes record that she had a telephone conversation on October 31, 2012 with Economical's adjuster, wherein she asserts it verbally accepted priority. Her notes show the name, email, phone number and extension of Economical's adjuster, Ms. Lindsay Silva (aka Brennenam). Ms. Watkin testified Ms. Brennenam offered to send her a confirming letter and requested Intact's accident benefits file. Ms. Watkin's testimony and log notes do not indicate she disclosed Mr. McLaughlin's taxi driving work to Economical during this alleged call.

Ms. Watkin's records after October 31, 2012 reflect her continuing normal claims handling for Mr. McLaughlin until she left the file in late November 2012. During this period, Ms. Watkin's log indicates she did not seek Economical's written confirmation of priority or receive a confirmation letter. Intact's log notes between November 14, 2012 and August 2013 are blacked out. I draw no inference or conclusion from this missing information.

Ms. Brennenam testified she was Economical's adjuster with carriage of the file from the initiating Notice until Economical accepted priority on May 29, 2013. She denies speaking with Intact's representative or accepting priority between those events. Ms. Brennenam's log notes are consistent with her evidence.

I prefer Ms. Brennenam's version of the events between September 2012 and May 2013 over Ms. Watkin based on the implausibility Intact took no action to transfer the file, continued to adjust benefits for over seven months where Intact claims it had obtained Economical's commitment to take priority. I reject Intact's position Ms. Watkin's log and evidence are accurate or reliable. I find Economical did not accept priority on October 31, 2012.

¹³ The parties did not submit the issue of whether Mr. McLaughlin qualified as a named insured having "regular use" of Paul's taxis under section 66 of the *Statutory Accident Benefits Schedule* and subsection 268(2) of the *Insurance Act*.

Intact maintains that notwithstanding the occurrence of the October 31, 2012 call, Economical failed to take any steps to gather facts towards evaluating its priority. Intact argues Economical is not entitled to equitable rescission where it failed to meet its obligation to investigate.

Ms. Brennenam admitted she understood and failed to follow Economical's usual protocol to obtain information from examinations under oath before reaching a decision. She did not request an accident report, employment record or any other information from Intact. Ms. Brennenam admittedly pushed the file aside when she received the initial Notice and did nothing until 2013.

Ms. Brennenam's log record shows she first contemplated the priority question on May 17, 2013. Her query was prompted by a file review with her supervisor for about ten minutes. Economical did not conduct any investigation of its own, but she received authority to accept priority at that time based solely on information supplied in the Notice and Auto Plus report Intact provided in September 2012. Ms. Brennenam conceded she failed to undertake an investigation before Economical's priority decision.

In June 2013 Economical received Intact's adjusting file and almost immediately sought rescission of its May 29, 2013 priority agreement. Economical concedes the sole information it had was the Notice and Auto Plus report Intact provided.

Analysis:

Intact relies on the *Motors v. Co-Operators* case decided by Arbitrator Guy Jones to support of its submission that Economical did not meet its obligation to investigate the priority issue before deciding to accept the SABS responsibility. The *Motors* situation involved the requesting insurer not providing sworn statements that would have impacted on the receiving insurer's priority decision. Arbitrator Jones' opinion that the requesting insurer owed no duty to disclose this information unless asked by the target insurer indicates that each party must conduct its own fact-finding and cannot sit back. Intact submits this is equivalent to Economical's inaction here, and does not support equitable rescission of its agreement. The result in the *Motors* case is similarly supported the Arbitrator Shari Novick in *Aviva v. State Farm*, where she held that the adjuster's inadvertent mistake in accepting priority did not rise to an unusual or extreme circumstance.

I agree with Intact that the principles in the above two cases are applicable, but disagree the *Motors* or *Aviva* facts are analogous to the present situation. The circumstances here are distinguishable because Intact concealed Mr. McLaughlin's taxi driving work at the time of the Notice, admittedly material to Economical's decision.

Intact maintains there is no misrepresentation because Ms. Watkin gave evidence denying she intended to deceive Economical by withholding information. If I accepted her assertion as sufficient, the door to equitable rescission based on a material misrepresentation is clearly shut, absent an open admission of intent.

Intact's position is contradicted by the evidence and law. First, Ms. Watkin's admission she knew at the time of the Notice the information about Mr. McLaughlin's taxi work was material to Economical's decision establishes a reasonable inference she intended to conceal it. Second, concealing or withholding this material information falls within the term "material misrepresentation" according to *Black's Law Dictionary* and the *Restatement (Second) of Contracts*. Third, Ms. Watkin's further admission she understood Intact was the potential priority insurer at the time of the Notice is particularly important in the context of Arbitrator Novick's comments on this issue in the *Aviva* case:

...an insurer should be permitted to withdraw its decision if the first insurer either provides false information in an effort to mislead the other insurer, or intentionally withholds information that is relevant to the priority issue.

Based on the law and Ms. Watkin's admissions, I find that Intact intended to deceive Economical into accepting priority by withholding material information on priority. I further find the evidence demonstrates that Intact's material misrepresentation caused Economical to detrimentally rely on the Notice and Auto Plus report, which resulted in its failure to investigate.

Intact maintains that if Economical's failure to conduct an investigation is condoned, insurers will adopt less caution making priority decisions. This will result in a flood of rescission claims, causing systemic inefficiency.

In my view, there is a proportional balance between promoting incautious behaviour and the consequences of a material misrepresentation going unchallenged. Agreeing with Intact means that the misrepresentation that initially caused Economical's failure to investigate bears no sanction. This has a more certain effect to reduce insurer incentive to accurately disclose information with Notices and will lead to more disputes. The result herein encourages truthful disclosure of material information at the time of Notice as a support for the system's efficiency and expediency.

Conclusion:

I find that Intact made a material misrepresentation in its Notice, upon which Economical relied to its detriment in accepting priority. I conclude these facts establish an extreme and unusual circumstance, supporting equitable rescission of Economical's May 29, 2013 agreement to accept priority for payment of Mr. McLaughlin's SABS claims.

Expenses:

Intact is the unsuccessful party in this case and shall pay the expenses of this arbitration process in accordance with the *Regulations*.¹⁵ A party may request an assessment of the amount.



Date

¹⁵ Section 31 of the *Arbitration Act* S.O. 1991, Chapter 17¹⁵
Subsection 9, *Ontario Regulation* 283/95

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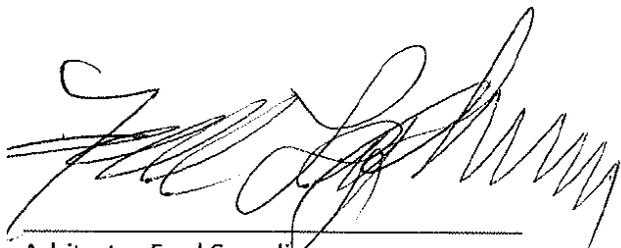
-And-

INTACT INSURANCE COMPANY
(Nordic Insurance Company of Canada)

Respondent

ARBITRATION ORDER

1. Economical is entitled to rescind its agreement with Intact to accept priority and responsibility for payment of Mr. McLaughlin's *Statutory Accident Benefits*.
2. Intact shall pay the costs of this arbitration proceeding.



Arbitrator Fred Sampliker



Date