

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8 as amended,
AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17, as amended**

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY and
UNIFUND ASSURANCE COMPANY

Respondents

**AND IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8 as amended,
AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17, as amended**

AND IN THE MATTER OF AN ARBITRATION

BETWEEN

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

UNIFUND ASSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRIORITY

DECISION WITH RESPECT TO PRIORITY

COUNSEL

Tara Lemke - Nelligan, O'Brien Payne LLP
Counsel for Aviva Insurance Company
hereinafter "Aviva"

Ashleigh Leon – Miller Thomson LLP
Counsel for Economical Mutual Insurance Company
hereinafter "Economical/Perth"

Derek Greenside – Kostyniuk & Greenside LLP
Counsel for Unifund Assurance Company
hereinafter "Unifund"

ISSUES

[1] These inter-company priority disputes initiated pursuant to s.268 of the *Insurance Act R.S.O. 1990 c.1.8*, arise from a motor vehicle accident that occurred on July 3, 2014. At the time of the accident, Barry Clarke was driving a vehicle provided by an auto repair facility while his wife's vehicle was in for repairs. His son Liam Clarke was a passenger in the vehicle. Liam Clarke sustained personal injuries while his father Barry Clarke sustained fatal injuries.

[2] As a result of the accident, applications for accident benefits were submitted to Aviva Insurance Company of Canada, as insurer of the vehicle involved in the accident, on behalf of the Estate of Barry Clarke and Liam Clarke.

[3] Barry and his wife, Hilary, both had personal insurance policies at the time of the accident. Hilary was insured with Unifund and Barry was insured with Economical/Perth. The three parties disagree on the issue of which of them is responsible for the accident benefits payments made on behalf of the Estate of Barry Clarke and Liam Clarke. This determination requires an analysis of the "temporary substitute automobile" and "other automobile" provisions of the standard Ontario motor vehicle policy as well as the "dependency" issue with regard to the claim of Liam Clarke.

[4] As a secondary issue, Aviva claims that Unifund had admitted that either Unifund or Economical/Perth stood in priority to Aviva with regard to Liam's claim and has now resiled from such admission. Unifund denies such admission was ever made.

PROCEEDINGS

[5] The matter proceeded before me on the basis of an Agreed Statement of Facts, written submissions, document briefs and books of authority.

AGREED FACTS

Background

[6] Barry Clarke (date of birth February 19, 1952) and Hilary Anne Clarke were a married couple who lived together with their two children, Liam (date of birth February 25, 2000) and Zoe (date of birth December 6, 2001).

[7] On July 3, 2014 Barry and Liam were involved in a motor vehicle accident while travelling westbound on County Road 6 in Amherstview.

[8] Both Barry and Liam were transported to KGH Kingston General Hospital by ambulance. Barry succumbed to his injuries July 14, 2014. Liam sustained a concussion, fracture to the right eye socket, facial lacerations, broken right index finger, broken right hand, three broken bones in his left foot and a seizure upon his arrival at the hospital. He was treated and released five days following the accident.

Barry and Hilary Anne's Insurance

[9] On the accident date, Barry had a valid policy of insurance with Economical, through one of its subsidiary companies, Perth Insurance Company, being policy number 020037887.

[10] Barry's wife, Hilary Anne Clarke, also had a valid policy of insurance through Unifund Assurance Company, being policy number LM80AF5919. Hilary's policy covered her 2005 Nissan Altima.

Vehicle Involved in the Accident

[11] On the morning of the accident, Hilary and Barry had taken her 2005 Altima to Cornell's Auto Sales and Service for repairs. The garage provided them with a 2003 Chevrolet CSE which was owned by Cornelius Bergholst and insured with Aviva Insurance to use while the Altima was being repaired. Hilary was expecting to return the Chevrolet later that day once her Altima had been repaired.

[12] Cornell's Auto Sales and Service did not request that Hilary and Barry sign any documentation relating to their use of the Chevrolet CSE. There was no rental agreement or insurance forms completed. Cornell's did not take a copy of Hilary's license. Hilary understood the vehicle, which was provided by the garage, to be a courtesy vehicle to use while her Nissan was in for repairs". At the time of the accident, Barry was operating the 2003 Chevrolet CSE.

Accident Benefit Claims

[13] Applications for Accident Benefits were submitted to Aviva, as insurer of the 2003 Chevrolet on behalf of the Estate of Barry Clarke and Liam Clarke. The OCF-1s were dated July 29, 2014 and received by Aviva on August 8, 2014.

Priority Disputes

[14] Aviva sent a Notice to Applicant of Dispute Between Insurers to both Unifund Assurance Company and Perth Insurance Company on August 18, 2014.

[15] On September 25, 2014, after requests from Perth for further documentation, Aviva sent Perth the OCF-1s submitted on behalf of the Estate of Barry Clarke and Liam Clarke. The CD/DVD containing the OCF-1s was received by Perth on September 30, 2014.

[16] On October 15, 2014, Perth wrote to Aviva confirming that it would accept priority from Aviva with respect to the accident benefits claim submitted by the Estate of Barry Clarke.

[17] Perth has indemnified Aviva \$50,665.72 in relation to accident benefits payments made by Aviva in relation to the claim of the Estate of Barry Clarke.

[18] On November 14, 2014, Perth sent a Notice to Applicant of Dispute Between Insurers to Unifund with respect to the claim for benefits made by the Estate of Barry Clarke, alleging that Unifund was higher in priority than Perth for the payment of accident benefits. The Notice to Applicant of Dispute Between Insurers was also provided to the Estate of Barry Clarke on February 26, 2015.

[19] Aviva initiated private arbitration with respect to the accident benefits claim of Liam Clarke as against both Perth and Unifund on April 28, 2015. Aviva did not initiate arbitration proceedings with respect to the accident benefits claim of the Estate of Barry Clarke.

[20] Perth initiated private arbitration with respect to the accident benefits claim of the Estate of Barry Clarke as against Unifund on June 2, 2015.

[21] To date, Aviva has paid \$789.25 in relation to Liam Clarke's accident benefits claim.

[22] To date Perth has paid \$50,665.72 in relation to the claim made by the Estate of Barry Clarke, the particulars of which are as follows:

Funeral Expenses - \$5,665.72

Death Benefits - \$45,000 (\$10,000 to each dependent, Liam Clarke and Zoe Clarke and \$25,000 to Hilary Anne Clarke).

[23] Liam Clarke's accident benefits claim is ongoing at this time. The accident benefits claim for the Estate of Barry Clarke has been closed.

[24] Liam Clarke was equally co-dependent on his parents, Barry and Hilary Anne Clarke, for financial support and care, at the time of the accident.

ANALYSIS AND FINDINGS

[25] This Arbitration involves the issue as to which insurer has priority to pay statutory accident benefits to the claimants Liam Clarke and the Estate of Barry Clarke as result of a motor vehicle accident on July 3, 2014. Barry and Liam Clarke were occupants of a vehicle provided by Cornell's Auto and Service while Barry's wife's vehicle was in for repairs. It was being operated by Barry Clarke with Liam Clarke as passenger. The vehicle in which they

were occupants was insured with Aviva. The personal automobile of Barry Clarke was insured with Economical/Perth while the personal automobile of his wife, which was in for repairs, was insured with Unifund.

[26] Section 268 of the *Insurance Act, R.S.O. 1990, c.1.8*, as amended, sets out the rules or hierarchy for establishing which insurer is liable to pay statutory accident benefits when coverage might be available to a claimant under two or more policies of insurance. Section 268 reads as follows:

Section 268 (2) – Liability to pay – The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

i. The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. If recovery is unavailable under subparagraph 1, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. If recovery is unavailable under subparagraph 1 or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. If recovery is unavailable under subparagraph i, ii, or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

2. In respect of non-occupants,

i. The non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. If recovery is unavailable under subparagraph 1, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

iii. If recovery is unavailable under subparagraph 1 or ii, the non-occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. If recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

(3) Liability – An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.

(4) Choice of insurer – If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.

(5) Same – Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

(5.1) Same – Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her own discretion, may decide the insurer from which he or she will claim the benefits.

(5.2) Same – If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

[27] Both accident benefits claims were initially submitted to Aviva. Benefits with respect to the fatality claim were initially paid by Aviva. Economical/Perth later agreed to indemnify Aviva admitting that they stood higher in priority than Aviva and then commenced this priority dispute as against Unifund on the basis that Unifund stood higher or equal to Economical/Perth in priority. Aviva continues to adjust and pay the accident benefits claims with respect to Liam Clarke and commenced the other priority dispute herein both as against Economical/Perth and Unifund.

[28] Economical/Perth takes the position that coverage is extended to both claimants by reason of the “temporary substitute” and/or “other automobile” provisions of the Unifund policy, thereby making Unifund priority insurer pursuant to s.268(2)(5.2) of the *Insurance Act*.

[29] Section 2.2 of O.A.P. 1 specifically provides for an extension of the coverages for which a premium is paid on the “Described Automobile” to other types of automobiles. The type of automobiles and the types of coverages are set out in the Chart in s.2.2 of O.A.P. 1, as follows:

	Liability	Accident Benefits	Uninsured Automobile	Direct Compensation	Loss or Damage	
Type of Automobile	Newly Acquired Auto (Replacement Auto)	Yes. The replacement auto has the same coverage as the described automobile it replaces, as long as you notify us within 14 days of delivery of the new automobile.			Yes (Conditions Apply)	
	Newly Acquired Auto (Additional Auto)	Yes, if we insure all automobiles you own for the same type of coverage on the day you take delivery and you notify us within 14 days of delivery of the new automobile.			Yes (Conditions Apply)	
	Temporary Substitute Auto	Yes	Yes	Yes	Yes	Yes (Conditions Apply)
	Any Other Auto, including Other Autos that are Rented or Leased	Yes (Conditions Apply)	Yes	Yes	Yes	No
	Owned Trailer (and not described)	Yes, if used in connection with an automobile covered by the policy.			(Conditions Apply)	No
	Non-Owned Trailer	Yes, if used in connection with an automobile covered by the policy.			No	No

[30] In addition, under the *Statutory Accident Benefits Schedule*, an "insured automobile", in respect of a particular motor vehicle liability policy, means "an automobile covered by the policy."

[31] Section 2.2.2. of the O.A.P. 1 states:

Coverage for a temporary substitute automobile is provided under the automobile policy of the owner of the temporary substitute automobile. However, this policy [the Unifund Policy] may also provide coverage.

[32] Section 2.2.3 of the O.A.P. 1, provides coverage to "Other Automobiles" when the "Other Automobile" is being driven by the policyholder or the policyholder's spouse. Specifically O.A.P. 1 states: "*Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you.*"

[33] Arbitration and court decisions have confirmed that despite the fact that an automobile is not a Described Automobile on the policy, Accident Benefits coverage will still be provided under the "Temporary Substitute Automobile" and "Other Automobile" provisions of the policy. The O.A.P. 1 extends coverage in these automobiles.

[34] The decision in *Co-operators General Insurance Co. v. Pilot Insurance Co. (1998) (O.J.) No.5551* involved an occupant of a vehicle, Ms. Capelazo, who was injured when the vehicle in which she was an occupant collided with another vehicle. Ms. Capelazo was not a named insured on any policy, nor a spouse or dependant of a named insured. The vehicle in which she was an occupant, owned by a Mr. Sobka, but being driven with his consent by a Mr. Huard, was uninsured. Mr. Huard, the driver, had a policy insuring his own vehicle with Co-operators Insurance. The second vehicle involved in the accident was insured by Pilot Insurance. The question of which insurer was in higher priority under Section 268 of the *Insurance Act* arose, and Co-operators brought an application seeking a determination of whether it was not the "insurer of the automobile" in which Ms. Capelazo was an occupant. The Court of Appeal concluded that it was. The Court held that from the perspective of the driver of the "uninsured" automobile that "other automobiles driven by him are insured automobiles". The wording of the policy from Section 2.2.2 (now 2.2.3) extended accident benefits coverage to Huard (driver) for automobiles driven by him. By extension, it was concluded that Co-operators was the "insurer of the automobile" in which Capelazo (the passenger) was an occupant.

[35] Two arbitration decisions of Arbitrator Novick have also extended accident benefits coverage to individuals being struck by an uninsured vehicle, driven by an individual who was a named insured on another policy insuring a vehicle that he owned. The two decisions of Arbitrator Novick are as follows:

The Economical Insurance Group v. Her Majesty the Queen in Right of Ontario, represented by the Minister of Finance, Security National Insurance Company and Kingsway General Insurance Company, decision of Arbitrator Shari Novick, dated January 2009.

Perth Insurance Company v. State Farm Automobile Insurance Company and Her Majesty the Queen in Right of Ontario, as represented by The Minister of Finance, decision of Arbitrator Shari Novick, dated May 2009.

[36] In *Royal and SunAlliance Insurance Company v. Zurich Insurance Company* (Arbitrator Bialkowski – February 7, 2011), the claimant was a passenger in a vehicle operated by her brother. The vehicle being operated was a short term rental insured with Zurich. The brother owned a personal automobile insured with Royal. On the basis of the case law set out above it was found that the claimant was an insured under both policies and could elect under s. 268(4). Having applied for benefits to Royal, it was determined that the election had already been made and Royal required to pay ongoing benefits. Unlike our case, the claimant was not a named insured or spouse/dependent of a named insured.

[37] In *State Farm Insurance Companies v. Economical Mutual Insurance Company* (Arbitrator Bialkowski - August 1, 2012), the claimant was a passenger in a vehicle being operated by her boyfriend. The vehicle being operated was a "temporary substitute vehicle" insured with Economical. The vehicle in for repairs and owned by the boyfriend was insured with State Farm. Again, it was determined on the case law aforesaid that the claimant was an insured under both policies and that by reason of s. 268(4) could elect which insurer she wished to pay benefits. However, having made the claim to State Farm it was determined that the election had already been made and State Farm was the priority insurer. Unlike our case the claimant was not an named insured or spouse/dependent of a named insured.

[38] In my view the jurisprudence clearly establishes that insurance coverage, including accident benefits coverage, is extended to "temporary substitute automobiles" and "other automobiles".

[39] Therefore according to Economical/Perth, both Barry Clarke and Liam Clarke are insured persons under the Unifund Policy as spouse of the named insured and dependent of the named insured/spouse respectively. Economical/Perth maintained that the Unifund Policy extended coverage to the Chevrolet pursuant to either section 2.2.2. or 2.2.3. of the O.A.P. 1.

Therefore, Barry and Liam were occupants of a vehicle insured by Unifund at the time of the Accident.

[40] Unifund responded by submitting that none of the authorities above have considered coverage in the context of a temporary substitute where the driver is also a named insured under their own policy which pertains to a vehicle having no relationship to the temporary substitute vehicle. Section 268 (5.2) of the *Ontario Insurance Act* only deems a choice to be made where the claimant is an occupant of an automobile in respect of which they are the named insured or spouse of the named insured. Barry Clarke was the named insured under the Economical/Perth policy and was the spouse of a named insured (Hilary Clarke) under the Unifund policy. Unifund submitted that while sections 2.2.2 and 2.2.3 of the Standard Owners Policy (O.A.P. 1) extends coverage to automobiles other than the described automobile, these sections do not transform Barry Clarke into the named insured or spouse of the named insured under the automobile insurance policy covering that other automobile or temporary substitute automobile (ie. Barry Clarke was not the named insured or spouse of the named insured on the policy covering the Chevrolet CSE he was operating at the time of the motor vehicle accident). Consequently, section 268(5.2) has no application. There is no tie breaking provision in this scenario according to Unifund.

[41] I agree that s. 268(5.2) is not applicable. It would only apply if the claimants were the named insured or spouse/dependent of the named insured of the vehicle in which they were occupants. The vehicle provided by Cornell's Auto Sales and Service was owned by Cornelius Bergholst who had no relationship to either claimant.

[42] On the basis of the submissions of counsel, the wording of the OAP 1 and the jurisprudence outlined above, I am satisfied that the Economical/Perth policy extended coverage to the vehicle being operated at the time of the accident as it was an "other automobile" as described in the standard auto policy and that the Unifund policy extended coverage to the vehicle being operated at the time of the accident as it was a "temporary substitute automobile" as described in the standard auto policy.

[43] The claimants in my view were clearly "insureds" under all three policies. The priority scheme set out in s. 268(2) must be analyzed. The claimants meet the highest level of

priority as set out in s.268(2)(1)(i) with respect to all three policies. The tie-breaking mechanisms are found at s. 268(4) though s. 268(5.2) as set out below.

(4) Choice of insurer – If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.

(5) Same – Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

(5.1) Same – Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her own discretion, may decide the insurer from which he or she will claim the benefits.

(5.2) Same – If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

[44] Subject to the paragraphs which follow s. 268(4), the section itself provides the claimants with discretion as to which insurer is to provide benefits. However s. 268(5) requires a named insured or spouse/dependent of a named insured to claim under such policy where they are a named insured or spouse/dependent of a named insured. Here, Barry Clarke was a named insured under the Economical/Perth policy and spouse of the named insured under the Unifund policy. Liam Clarke was a dependent (details outlined later in this decision) of the named insured under the same two policies. On this basis both Economical/Perth and Unifund would stand in priority to Aviva and both meet the requirements of s. 268(5). In these circumstances s. 268(5.1) again allows the claimant to elect as to which of the two policies he wishes to receive benefits subject to s. 268(5.2). S.268(5.2) requires the claimant to claim against the insurer of the vehicle in which he was an occupant if he was either a named insured or spouse/dependent of the named insured of the vehicle in which he was an occupant. As I have found previously, neither Barry or Liam Clarke was the named insured or spouse/dependent of the named insured (Cornelius Bergholst) of the vehicle they occupied. Accordingly, s. 268(5.2) does not apply and one

must revert to s. 268(5.1) for the tie-breaking mechanism which provides each claimant with discretion as to which insurer they wish to pay benefits.

[45] Unifund has submitted that Economical/Perth, having agreed to indemnify Aviva with respect to the claim of the Estate of Barry Clarke, is evidence of a deemed election or alternatively, represents a concession as to priority. I do not see it that way. Section 268(5.1) provides the claimant with the right to make the election. The claimants elected initially to pursue Aviva for benefits but since Economical/Perth and Unifund stand in priority to Aviva the claimants now have an unexercised discretion to choose which of these two insurers they wish to provide benefits. As for the purported concession of priority, I am of the view that agreeing to indemnify Aviva was appropriate once it was determined that Economical/Perth was higher in priority to Aviva and should be commended. Economical/Perth immediately upon indemnifying Aviva sent Unifund its Notice of Dispute giving rise to the present arbitration. Section 10 of O. Reg. 283/95 provides for a continuance of a priority dispute by a second tier insurer against another insurer that may rank higher in priority for the claim. I therefore find that both claimants be provided with an opportunity to exercise their discretion as to which of Unifund or Economical/Perth ought be responsible for the ultimate payment of benefits.

Dependency

[46] The above finding was premised on a finding that Liam was dependent on his parents for financial support and care at the time of the accident.

[47] Aviva has submitted that priority for Liam's claim should rest with Aviva as there was no evidence that Liam was principally financially dependent on either parent or care. The agreed statement of facts indicates that Liam was equally co-dependent on his parents for financial support and care.

[48] During the course of the arbitration and the numerous pre-arbitration conferences dependency was never discussed as a central issue.

[49] At the time of the accident, Liam was 14 years old (DOB February 25, 2000). He was living with his parents in the family home. He was a full-time student going into grade 9 at Napanee District Secondary School.

[50] Both Hilary and Barry were supporting their children financially. Hilary's income was lower than Barry's and it is not clear who claimed the children as dependents for the purposes of income taxes as this may have varied from year to year.

[51] Aviva has submitted that common sense alone dictates that a 14 year-old child who is about to enter into grade 9, who lives with his two parents in the family home and who has no other identified sources of income is wholly financially dependent on his parents and has been for his entire life. There is no question that he was receiving more than 50% of his financial and care needs from his parents. In fact, Liam was likely receiving 100% of his financial and care needs from his parents.

[52] It is important to note that the Statutory Accident Benefits Schedule (hereinafter SABS) defines "dependent" :

s.3(7) For the purposes of this Regulation,

(b) a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse;

[53] Section 3(7) of the SABS notes dependence in the context of an individual or the individual's spouse. Liam clearly meets this test with respect to each of his parents since he is reliant on each parent. The wording of this section appears to contemplate parents who are spouses of each other being considered together as a whole and not individually. This case is unique in the sense that Liam's parents, who were clearly spouses of each other, had individual policies of insurance with two separate companies.

[54] I am satisfied on the basis of the factual admission in the last paragraph of the Agreed Statement of Facts and in light of s. 3(7) of the Statutory Accident Benefit Schedule, that Liam was dependent on both parents at the time of the accident so far as the s. 268 *Insurance Act* priority analysis.

Is Unifund estopped from disputing priority with Aviva with respect to the claim of Liam Clarke?

[55] Aviva has submitted that Unifund agreed that either Unifund or Economical/Perth would stand in priority to Aviva with respect to the claim of Liam Clarke and cannot withdraw such admission.

[56] I have been provided with copies of the e-mail exchanges between counsel. By e-mail dated November 11, 2015, counsel for Economical/Perth (not Mr. Greenside's counsel for Unifund) advised counsel for Aviva in which it is stated:

"Both Mr. Greenside and I have instructions to concede that either Unifund or Economical stands in priority to Aviva with respect to the claim of Liam Clarke"

In a subsequent e-mail dated March 5, 2016, counsel for Unifund advised the other counsel involved that when the concession was originally made he thought he was dealing with the Estate of Barry Clarke only. In the circumstances, I feel obliged to give counsel for Unifund the benefit of the doubt as to what was discussed between counsel for Economical/Perth and counsel for Unifund at the time of the November 11, 2015 e-mail and consider that there may have been some confusion in the dialogue between them. It is not as if the e-mail and the concession originated from counsel for Unifund. It was a message sent through an intermediary. In any event, the position of Aviva was nonetheless ably argued and Aviva has been held not to stand in priority with respect to either claim.

ORDER

[57] On the basis of the findings aforesaid, I hereby order that both claimants be put to an election as to the insurer, Unifund or Economical/Perth, they wish to pay benefits. I order that the insurer chosen should indemnify any other insurer that has paid benefits and has not

already been indemnified by that insurer together with interest calculated pursuant to the *Courts of Justice Act*.

[58] Aviva has been fully successful in this priority dispute and it is ordered that Unifund and Economical/Perth pay Aviva its partial indemnity costs of this proceeding equally. I invite written submissions if the parties cannot resolve the issue of costs.

[59] It is further ordered that Unifund and Economical/Perth pay the arbitrator's account on an equal basis.

DATED at TORONTO this 24th)
day of May, 2016.)

KENNETH J. BIALKOWSKI
Arbitrator