CITATION: Zurich Insurance Company Ltd. v. Scottish & York Insurance, 2020 ONSC 7084
COURT FILE NO.: CV-19-631031
DATE: 20201119

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Zurich Insurance Company Limited, Applicant/Moving Party

AND:

Scottish & York Insurance Company Ltd, Belair Direct Insurance Company/Nordic Insurance Company, Respondents

BEFORE: Pollak J.

COUNSEL: *Alon Barda*, for the Plaintiff/Moving Party

Derek Greenside, for the Respondent Scottish & York Insurance Company

Leanne Zawadzki, for the Respondents Belair Direct/Nordic Insurance

HEARD: September 16, 2020

ENDORSEMENT

[1]In a priority dispute arbitration proceeding pursuant to section 268 of the *Insurance Act*, R.S.O. 1990 c. I.8 (the *Act*) and *Ontario Regulation Act* 283/95 (the *Regulation*), between the Moving Party Zurich Insurance (Zurich) and the Respondents Scottish & York (S&Y) and Belair Direct Insurance Company/Nordic Insurance Company, (Belair), Zurich brought a motion in-writing asking for production of the communications between S&Y and Belair with respect to the s .10 notice delivered by Belair to Zurich. Zurich appeals the Arbitrators decision on that motion.

[2]The evidence before the Arbitrator was that S&Y believed that Belair insured the owner of the car that the claimant was in. It was later discovered that at the time of the accident, Belair did not insure the owner of the car and it subsequently put Zurich on notice pursuant to s.10 of the *Regulation*. 283/95.

[3]The question before the arbitrator on that motion, was whether or not the productions requested by Zurich were relevant in the arbitration proceeding between the parties.

[4]The first insurer to receive a completed Application for Accident Benefits has the obligation of administering the accident benefit claim, and paying all eligible accident benefits, if there is some potential liability between the claimant and that insurer.

[5]An Arbitration between S&Y and Belair was commenced before Zürich was given the S.10 notice pursuant to the Regulation and joined, in the arbitration.

[6]It was Zurichs submission in its in-writing motion for production, that the s.10 notice delivered by Belair to Zurich is invalid because Belair has no priority rank based on s.268 of the *Act.* as it does not insure the owner of the car and can therefore not dispute its obligation (because there is none) to pay benefits on the ground that Zurich is equal or higher to in priority under section 268 of the Act.

[7]Zurich alleges that Belairs s. 10 notice is an attempt by S&Y to circumvent the S. 3, 90-day notice requirement in the *Act.*

[8]Zurichs theory is that the s.10 notice delivered by Belair to Zurich is invalid because of possible inappropriate cooperation between S&Y and Belair. Zurich submits that Belair knew that it was not a priority insurer and did not deliver its S. 10 notice to Zurich until S&Y convinced it to do so to attempt to cure S&Ys failure to provide Zurich with a S3 notice. Zurich argued that it requires these productions to assess whether the s.10 notice delivered by Belair is part of a greater scheme to circumvent the 90 day notice provisions of the *Act* and to determine the details of that scheme.

[9]S&Y emphasizes that although Belair disputes priority because it did not insure the car at the time of the accident, it also disputes priority as Zürich being the insurer has a higher priority status than S&Y or Belair. The Respondents submit that the Appellant is trying to introduce irrelevant requirements for the validity of a S. 10 Notice. The fact is, Zürich is the insurer highest in priority. The Respondents, therefore, request that this Appeal be dismissed with costs.

[10]Zurich submits that the Arbitrator erred in law and committed palpable and overriding errors in failing to accept their reasons raised for the relevance of the productions and finding that the communications between counsel for Belair and counsel for S&Y regarding the s.10 notice, were not required to be produced.

[11]Zurich agrees that as the appeal issues raise questions of mixed fact and law and the **test for review of the Arbitrators ruling is palpable and overriding error.**

[12]Zurich asks this court to set aside the ruling and to substitute an order for production of the communications between S&Y and Belair respectively, including communications between counsel with respect to the notice delivered by Belair to Zurich. Zurich further asks for an Order referring the matter back to the Arbitrator for determination of the remaining issues in the priority dispute arbitration proceeding.

[13]The Arbitrator found that there was no evidence that the notice of S&Y to Belair was not proper and in good faith as part of a greater scheme to circumvent the 90 day notice applicable to S&Y. He found that S&Y in good faith thought that Belair was an insurer based on the information it had received.

[14]To determine whether this appeal should be granted, the Arbitrators reasons for his findings must be considered as a whole in the context of the Arbitrators analysis, rather than isolating certain phrases. In my view, the underlined portions of the reasons below, demonstrate that the Arbitrator made no errors as alleged by the Appellant. I find that the reasons properly summarize Zurichs argument and clearly identify the relevant issues to be considered and the reasons for the conclusions reached on the basis of evidence before him. He was entitled to make the findings he

made and I cannot find any bases to conclude that the Arbitrator made a palpable and overriding errors. The reasons below are as follows:

> With the backdrop of this jurisprudence, I must determine whether communications between the solicitor for S&Y and the solicitor for Belair are relevant to the issues before me. I find on the facts before me that they are not and I am not prepared to order their production. I am satisfied that the notice by S&Y to Belair was proper and in good faith. The information provided by the operator of the taxi was that it was owned by Ataur Rahman. An Autoplus search conducted by S&Y showed that he was insured by Belair. It was only when advised by counsel for Belair that Belair did not insure taxis that further investigation was conducted by way of a Freedom of Information Request of the City of London, which showed Zurich as insurer of the taxi and although Ataur Rahman was the plate lessor, the taxi was actually owned by 1874676 Ontario Inc. This, in my view, was not part of a greater scheme to circumvent the 90 day notice applicable to the first insurer to have received a completed application for benefits. S&Y in good faith thought that Belair was the insurer based on the information provided by the operator of the taxi and an Autoplus search.
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> There is merit to the argument advanced by Zurich that it would be wrong for an insurer to deliberately place an unrelated (but friendly) insurer on notice of a priority dispute within 90 days, knowing the friendly second tier insurer has the ability to place third tier insurers on notice without a time limitation, while it completed an investigation that ought to have been completed within 90 days. On different facts, the communications in issue may be relevant in circumstances where there is no valid nexus between the first and second tier insurers. For example, a company that markets insurance under several different corporate entities had a scheme to simply put a brother company on notice where an adjuster had neglected to complete a proper investigation within 90 days, so as to avoid a notice limitation. Such circumstances wold likely be dealt with by application of an arbitrators jurisdiction for equitable remedies as set out in s. 31 of the *Arbitration Act* and find such notice invalid as an abuse of process. The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute. I find that there was nothing of the sort here. S&Y had a valid reason to put Belair on notice. I do not believe that the motivation of Belair putting Zurich on notice is relevant, given the jurisprudence set out above and the communications sought by Zurich are not relevant, given the jurisprudence set out above and therefore no requirement for the communications to be produced.

In *Wawanesa v. Peel Mutual and Economical Mutual Insurance Company* (Arbitrator Samis January 28, 2011 and June 21, 2011) Arbitrator Samis wrote:

> To apply the section 3 provisions to second tier insurers would give rise to the injustice, **ultimately resulting in the payment of benefits by the wrong insurer. The regulation is designed to facilitate a process that will lead to the cost of the**

claim being visited upon the correct insurer, without burdening the insured person with prosecution of the priority dispute issues. It would be abhorrent to interpret the regulation in any manner which has the opposite result unless that outcome is required by the clear and specific language of the regulation. The language of that regulation does not have that clarity.

I am of the view that the importance of identifying the correct priority insurer is more important than applying a time requirement for notice not specified in clear and specific language in Section 10 or, as is the case here, exploring the rationale of a second tier insurer putting a third tier insurer on notice pursuant to Section 10, provided there was a *bona fide* basis for the first tier insurer putting the second tier insurer on notice. As I have indicated, I do not believe that on the existing jurisprudence the communications between counsel for S&Y and Belair are relevant to the priority dispute here and therefore need not be produced.

[15]Specifically, Zurich submits that the Arbitrator erred in law and committed palpable and overriding errors by:

- failing to properly consider the issue before him, being the request for production of the communications between the Respondents either directly or through counsel, regarding the delivery of notice of the priority dispute to Zurich. I find that the issue is clearly identified in the Reasons and properly considered by the Arbitrator.

- At paragraph 20 of his decision, the Arbitrator summarizes Zurichs position as:

  > Zurich submitted that the communications between counsel for S&Y and counsel for Belair (and communications between their respective principles), which lead to the delivery of Belairs notice to Zurich are relevant to the dispute regarding the validity of Belairs notice as those communications will inform the tribunal regarding: the basis of Belairs dispute of its obligation to pay benefits; the source of the information leading to the delivery of Belairs notice; Belairs motivation to avoid injustice (or otherwise); and whether Belairs notice is part of a greater scheme to assist S&Y in avoiding its 90 day notice requirement. Zurich therefore has sought production of such communications and its costs of this motion.

- making a decision on the substantive issue of the validity of the notice provided by Belair to Zurich, rather than determining if the documents sought to be produced were relevant to the issue of validity of the notice, which was the issue of the motion before him. The Arbitrator decided whether the communications were relevant, as he was required to do. He could not make a ruling on the relevance of the documents any other way. I find that he did not purport to make, or make any rulings on the merits of the requirements for a S. 10 notice.

- misapprehending the issue and misstating the arguments and positions advanced by Zurich in regards to the relevance of the documents sought to be produced and the issue of validity of Belairs notice to Zurich. I disagree and refer to his reasons wherein he referred to and analyzed the parties arguments as well as refering to and considering the jurisprudence relied on by the parties to arrive at his decision on relevance, without erring in law as alleged.

- applying the decision in *Co-operators General Insurance Company v. Intact Insurance Company, Northbridge General Insurance Corporation*, 2018 CarswellOnt 877 (*Co-operators v. Intact)*, despite clear differences in the facts, the arguments advanced and the relief sought in the motion before him. The analysis of the Arbitrator is clearly set out inn his reasons. I can find no errors as alleged.

- finding the decision in *Co-operators v. Intact* binding upon him in regards to the issues in dispute in the motion. I find no error in this regard.

[16]As a result of these findings, there is no need to consider the alternate argument regarding Solicitor-Client and Litigation Privilege. I therefore, dismiss this Appeal.

Costs

[17]The parties have reached an agreement on costs to be awarded on a partial indemnity basis of $5,000, to the successful parties on this Appeal at the hearing of this matter. The successful parties, the Respondents, are therefore awarded costs on a partial indemnity basis of $5,000, in accordance with the agreement of the parties.

Pollak J.

Date: November 19, 2020