

IN THE MATTER OF the *Insurance Act* R.S.O. 1990, c. I.8, section 275 and Regulation 664 as amended

AND IN THE MATTER OF the *Arbitration Act, S.O. 1991, c. 17*

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

- and -

ECONOMICAL INSURANCE

Respondent

AWARD

COUNSEL

Michael W. Chadwick, counsel for the Applicant, Aviva Insurance Company of Canada (hereinafter called Aviva).

Earl Murtha, counsel for the Respondent, Economical Insurance (hereinafter called Economical).

INTRODUCTION

This matter comes before me pursuant to s. 275 of the *Insurance Act* and Regulation 664 as amended. This is a dispute between two automobile insurers with respect to a claim for loss transfer arising out of an accident that occurred on July 6, 2020.

Counsel, on consent, appointed me as an arbitrator pursuant to s. 275(4) of the *Insurance Act* and Regulation 664 and the *Arbitration Act*. This was set out in an Arbitration Agreement signed by the parties dated January 19, 2024.

By way of background, on July 6, 2020 JD was proceeding northbound on Islington Avenue intending to continue northbound crossing over the intersection at Springbrook. A Purolator truck was proceeding in a westerly direction intending to make a lefthand turn to go south on

Islington. The Purolator truck had a stop sign. While attempting the left turn, the Purolator truck collided with JD's car. JD sustained various injuries and applied to Aviva, the insurer of her personal vehicle, for statutory accident benefits.

At the time of the hearing, approximately \$55,000 had been paid to JD in accident benefits by Aviva.

Economical insured the Purolator truck. Aviva took the position that loss transfer under s. 275 was applicable and put Economical on notice.

There is no dispute that the Purolator truck was 100% responsible for this accident under Fault Determination Rule 14(2). It is what occurred after Aviva put Economical on notice of the loss transfer that gives rise to this dispute.

Aviva argues that Economical accepted loss transfer and made one payment by way of reimbursement. Economical then sought to retract its acceptance of loss transfer. Aviva takes the position Economical cannot resile from their position on loss transfer while Economical argues that its acceptance of loss transfer did not constitute a waiver of its rights in loss transfer and in the circumstances of this case it has the right to resile from its acceptance of loss transfer.

PROCEEDINGS

This hearing was conducted in writing. Counsel submitted Factums, a Joint Book of Documents as well as case law. The Joint Document Brief included various letters and emails and relevant loss transfer documents exchanged between Economical and Aviva over the relevant time. In addition, there was a copy of the OCF-1 and OCF-3 relating to the underlying accident benefits claim. I also reviewed a copy of the Motor Vehicle Accident Report and an MTO plate search July 6, 2020. There was no oral evidence nor were there any transcripts of examinations under oath of any representatives of the parties nor were there any statements filed.

ISSUE FOR DETERMINATION

The Arbitration Agreement sets out the issue for my determination in very broad terms. Having reviewed all the materials, that issue can be narrowed down to the following:

Has Economical waived its right to deny and dispute loss transfer following its acceptance of loss transfer on November 20, 2020 and its subsequent payment of indemnity in the amount of \$4,136.23 on February 5, 2021?

AWARD

I conclude that Economical has waived its right to deny and dispute loss transfer with respect to the claim for Aviva arising out of the accident of July 6, 2020 and that subject to any arguments with respect to quantum, Economical has an ongoing obligation to reimburse Aviva for

reasonable statutory accident benefits paid to JD.

FACTS

On July 6, 2020 JD was driving a 2016 Audi Q3 passenger car insured by Aviva. She was northbound on Islington when a 2009 Ford SC commercial truck owned by Purolator and insured by Economical attempted to make a left turn from Springbrook Gardens onto Islington Avenue to head southbound.

When the Ford truck attempted to make the left turn it collided with JD's vehicle resulting in various injuries to JD.

On July 16, 2020 JD submitted an OCF-1 to Aviva.

On September 25, 2020 Aviva sent a Notice of Loss Transfer to Economical by fax.

The fax shows that the subject line was "Loss transfer - policy no. 64017544". This is the Economical policy number.

The fax indicates that there are three documents enclosed. The OCF-1 is included. There is also a Toronto Police Service Motor Vehicle Accident Report - Driver Copy.

That document provides the name of the driver of the Purolator truck together with his driver's licence number. It provides the plate number of the truck 1807XZ and also the VIN number 1FCHE39L89DA62870. The document also identifies that the truck involved is a 2009 white Ford. Finally, the accident report indicates that the owner of the truck is Purolator Inc. and provides an address.

Also attached to the fax is an Ontario Ministry of Transportation plate/VIN search that was conducted on September 10, 2020. The search however specified a request to identify the relevant information effective July 6, 2020.

This document was a search with respect to the Ford truck. It confirmed that the owner was Purolator and again provided the address. It identified the VIN number and described the vehicle as commercial Ford 2009 white. Its empty weight was noted to be 2,943 kg and its gross weight was 4,082 kg.

Also included with this fax was Aviva's Notice to Economical of Loss Transfer. That document sets out the details of the first party insurer (Aviva), the second party insurer being Economical and again the owner of the vehicle, Purolator, and the policy number is clearly identified. The notification indicates that Aviva is claiming loss transfer based on Rule 14.2. The name of the driver is also provided.

An October 15, 2020 the assigned adjuster for Economical sent a letter via email to the adjuster at Aviva. In this letter, Economical acknowledged receipt of the Notice of Loss Transfer. They also asked for further information as set out below:

“Our investigation into this loss is currently ongoing. As part of our investigation, please provide us with the following:

- A copy of the complete Police Report (we received the Motor Vehicle Accident Report);
- A copy of your insured’s Certificate of Insurance including all vehicles listed on the policy;
- A copy of your insured’s OCF-3”

The letter goes on to say “Once we have completed our investigation we will provide you with our position on loss transfer.”

There are some relevant log notes from Economical in or around the time this letter was sent to Aviva. In a log note of October 15, 2020 the adjuster sets out details with respect to the Purolator policy. She notes the following: “UW notes: reviewed, no concerns ... underwriting satisfied with hiring practices of Purolator. RBD confirmed that there are no excluded drivers on this policy. Therefore, loss transfer will apply. Vehicle (listed on policy): 2009 Ford VIN no. 1FCGE39L89DA62870, the vehicles are not individually listed on the fleet schedule.”

There is a further log note from the same adjuster on the same date indicating that Notice of Loss Transfer had been received from Aviva, “With a copy of their claimant’s OCF-1 and the Motor Vehicle Collision Report.” There does not appear to be a reference in the log note to the MTO plate/VIN search that had been included. The log note summarizes the information from the OCF-1 and from the Notification of Loss Transfer. It also reviews the Motor Vehicle Accident Report, again noting the vehicle description and VIN number. There is no reference to a review of the MTO plate/VIN search which set out the weight of the vehicle of their insured.

In response to Economical’s letter of October 15, 2020 Aviva emails them on October 22, 2020 enclosing a copy of the OCF-3, policy verification with respect to the Aviva policy and also providing copy of an email from SCM, an independent adjuster who had been retained on behalf of Purolator and Economical with respect to the accident of July 6, 2020. It appears that SCM had been retained on the tort side.

This email again identifies the driver of the Ford truck, his driver’s licence number, the vehicle itself with the VIN number, a plate number, a policy and a claim number and notes “Please note that our driver was 100% at fault and you can proceed DCPD.”

The adjuster at Economical notes receipt of this correspondence from Aviva in a log note of November 20, 2020. The log note indicates “Rec’d correspondence from Aviva with a copy of T/P’s policy verification, vehicle verification and OCF-3. Aviva advised this is the only vehicle and

driver listed on the policy.”

The adjuster then goes on in the log note to review the documents provided and then under loss transfer notes the following:

“- Investigation now completed.

Our driver had a stop sign. Our driver made a left turn to go southbound on Islington and hit TP who was on Islington.

Our insured was driving a 2009 Ford Curbside E350.

- In accordance with FDR14(2) our driver is 100% at fault, loss transfer applies.”

Following up from this entry the adjuster at Economical sends a letter to Aviva dated November 20, 2020 in which Economical states:

“We have completed our investigation and are now able to accept loss transfer in accordance with Fault Determination Rule 12(4).

Please forward your request for indemnification to the undersigned on a regular basis. Please ensure you provide supporting documentation.”

Loss transfer having now been accepted by Economical, Aviva sent out its first loss transfer request for indemnification on February 4, 2021 in the amount of \$4,136.23. This represented payments of \$6,136.23 with the deductible of \$2,000 applied.

Economical paid the full amount of the request for indemnification by cheque dated February 5, 2021. This activity is noted in a log note from the same adjuster at Economical dated February 5, 2021.

On April 12, 2021 the Economical adjuster received an email from SCM. This email indicated the following:

“Our BI adjuster secured a copy of the insured vehicle ownership and I also confirmed with the VIN - this unit may not be of sufficient weight for loss transfer to apply. VIND codes to a GVW range of 3,629 to 4,082 kg.”

On April 13, 2021 the adjuster for Economical sent an email to her contact at Purolator indicating that she needed to confirm the gross weight of the vehicle at the time of the accident. She provided the relevant information with respect to the vehicle.

On April 12, 2021 a team leader at Economical conducted a review of the loss transfer file. This email indicated that the adjuster had now confirmed that the Economical vehicle involved in the MVA did not meet the weight requirements for the purposes of loss transfer as the total GVW was 4,082 with cargo. The team leader noted that loss transfer had been accepted on November 30, 2020 and there had been indemnification. The adjuster was directed to send a letter to Aviva to advise that they had received additional information pertaining to the car

involved in the accident and that that vehicle did not meet the gross weight requirement and therefore they are rescinding their acceptance of the loss transfer and want the funds repaid.

In the meantime, a further request for loss transfer indemnification was sent by Aviva to Economical dated May 5, 2021 in the amount of \$8,733.38.

The Economical adjuster responded by letter to Aviva dated May 5, 2021 in which she advised that the Economical-insured vehicle did not meet the weight requirements for a heavy commercial vehicle and therefore loss transfer did not apply and they were rescinding their acceptance of loss transfer. The letter also stated, "Enclosed for your reference is a copy of our insured's ownership which confirms that the registered gross vehicle weight is 4,082 kg." The adjuster also requested a repayment of funds.

Aviva responded by way of an email of May 10 noting that Economical had already accepted loss transfer. Aviva also requested a copy of the logbook and the vehicle weight when the Purolator truck left the yard and the run was dispatched on the date of the accident. The email requested payment of their second loss transfer notification.

In a log note of September 6, 2021 the Economical adjuster notes that she spoke to her contact at Purolator and he advised that the vehicles are not weighed before leaving the yard and that they do not have a logbook for their smaller vehicles.

Having received this information, Economical wrote to Aviva on June 9, 2021 advising of what Purolator told them and maintaining their position that they had rescinded the acceptance of loss transfer and that no further indemnifications would be made.

On May 30, 2022 Aviva issued a Notice Demanding Arbitration to Economical and ultimately the matter made its way to me for determination.

Since June 9, 2021 further requests have been made for indemnification from Aviva to Economical: June 23, 2023 \$34,752.38 and January 10, 2024 \$12,343.36. As of the hearing, the present amount of indemnification requested net of the deductible is \$55,828.74.

POSITION OF THE PARTIES

Aviva

Aviva submits that Economical had full knowledge of its rights at the time it accepted loss transfer including the fact that the registered gross vehicle weight of their insured vehicle was 4,082 kg which would not have qualified the vehicle for loss transfer. Aviva says that Economical's acceptance of loss transfer on November 20, 2020, after conducting investigations, was clear and unequivocal and was later even further confirmed by making a payment towards the loss transfer indemnification in February of 2021.

Aviva acknowledges that for a commercial vehicle to qualify as a heavy commercial vehicle for the purposes of loss transfer it must have a gross vehicle weight greater than 4,500 kg per Regulation 664, s. 9(1).

Aviva submits that there was no change in circumstances to justify Economical's unilateral attempt to rescind their acceptance of loss transfer other than the fact that the file was reviewed by a team leader who concluded that a mistake had been made.

Aviva notes that Economical on September 25, 2020 received the licence plate search from Aviva which clearly set out the empty weight and registered gross weight of their vehicle and that the information later secured through SCM was not new information that would justify the finding. Aviva submits that the loss transfer scheme under s. 275 of the *Insurance Act* is one designed to allow for a relatively quick and efficient transfer of risk between two insurers. The users of this system are sophisticated and it is desirable that parties' agreements under such a system be enforced other than in the most extreme circumstances.

In its position, Aviva relies mainly on two decisions. The first is *Motors Insurance Corporation v. Old Republic Insurance Company*, 2009, CanLII 37707 ONSC. This was a decision of Justice Herman hearing an appeal from Arbitrator Guy Jones in a case somewhat similar to the one before me. Arbitrator Jones in that case had concluded that Old Republic had waived its right to dispute its insured's fault in the accident. He noted that Old Republic had conducted an investigation of the facts, obtained a legal opinion and had made a conscious decision to pay the loss transfer request. The arbitrator did not accept Old Republic's position that the insurer had changed its mind because of an investigation having been completed into the nature of the motor vehicle accident. He concluded on the evidence that the reason for the change in position was another individual had reviewed the file, had taken a different view of the applicability of the Fault Chart and on that basis had sought to now dispute the loss transfer claim.

Justice Herman upheld Arbitrator Jones's decision. Aviva notes the following to be drawn from that case:

1. A waiver does not require prejudice but does require express words and an unequivocal course of action.
2. Where an insurer had an unequivocal and conscious intention to abandon those rights and had full knowledge of its rights, waiver is not applicable.

Aviva also relied on the decision of the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Company*, [1994] 2 S.C.R. 490. In that case, the Supreme Court of Canada laid down the essential criteria for a waiver. Aviva notes the following (page 499 to 500):

"The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention

may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

Waiver will be found only where the evidence demonstrated that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.”

Aviva submits that Economical:

1. Had full knowledge of rights; and
2. Showed an unequivocal and conscious intention to abandon them.

Therefore waiver is applicable.

Economical

Economical does not dispute that in the letter of November 20, 2020 it waived its right to dispute loss transfer. Its position is that it should be permitted to retract its waiver in the circumstances of this case.

Economical points out that it made one payment before it discovered that the vehicle was under 4,500 kg and that loss transfer was not applicable. It notes that there is no dispute that but for that error leading to Economical providing a waiver, it would have no statutory responsibility to indemnify Aviva.

Economical submits that the central question is whether it ought to be held to its adjusting error despite the merits of the underlying issue which would result in a windfall for Aviva. Economical states that a waiver can be retracted where it would not be unfair to allow a party to do so.

Economical submits that the statutory framework of loss transfer as opposed to priority statutory framework does not in fact place a premium on efficiency over merit and fairness.

Economical in its position also relies on *Saskatchewan River Bungalow (supra)*. It notes the Supreme Court in that case held that the doctrine of “retraction” that would allow an insurer to retract a waiver is applicable if reasonable notice is given to the party in whose favour it operates. Further, a party should be allowed to go back on a choice where the party making the waiver did so by mistake and that it is not unfair to the other party to allow that waiver to be retracted.

Economical submits that it provided reasonable notice of its request for retraction. It submits that it provided Aviva with notice within 166 days after the waiver was first made. Economical

also submits that arguably notice is not required where there is no evidence that Aviva relied on the waiver.

Economical distinguishes the decision of Justice Herman in *Motors v. Old Republic (supra)*. Economical points out that in the *Motors* case the decision to provide a waiver was not an error or a mistake. Rather, it was a conscious decision on the part of Old Republic, after investigation and receiving a legal opinion, and after arbitration had been initiated. The decision to provide a waiver was in order to avoid arbitration expenses. Economical notes that that is not the case here.

Economical points to two other decisions in support of their position. The first is *GAN General Insurance Company v. State Farm Mutual Insurance Company*, [1999] OJ No. 4467. This is a decision of Justice Pitt on appeal from an arbitrator with respect to the determination on a loss transfer matter.

In that case, State Farm sought loss transfer from GAN. GAN paid approximately \$11,000 to State Farm, having accepted the loss transfer. Later, GAN requested these monies be repaid taking the position it had incorrectly applied the Fault Determination Rules and that the money was not owing. Justice Pitt concluded that GAN had paid the monies in error to State Farm. He concluded that State Farm was enriched by mistake at GAN's expense and that there was no equitable basis for State Farm to retain the monies.

Economical also relies on the decision of Arbitrator Samis in *Waterloo Insurance Company v. ACE INA Insurance Company*, decision of April 19, 2018. In that case, an accident took place involving a heavy commercial vehicle and a pedestrian. ACE accepted loss transfer initially but two months later retracted the acceptance as it had discovered that the accident involved a pedestrian and therefore loss transfer did not apply. Arbitrator Samis allowed the retraction due to the error.

Economical points to Arbitrator Samis's comments that to allow retraction in the circumstances of this case would not result in uncertainty and a lack of finality in loss transfer matters. Economical notes the following comments:

“The legislature has shown no interest in how these disputes are handled. Unlike priority disputes, where there have been repeated regulation reforms to streamline or otherwise alter the handling of these disputes, the legislature has done nothing with respect to loss transfer. There is no early notice requirement. There is no timeline for a hearing. ... I would be concerned that a rule that limits retractions is actually more likely to delay and complicate matters. In an environment where retraction is possible, it is easier for an insurer to act quickly in an environment where an ill-advised communication by persons in low authority levels might have major uncorrectable consequences, insurers will be incented to act more slowly. That approach will require that insurers move with more deliberation.”

Economical therefore submits that the doctrine of retraction of waiver is applicable. An error

was made by Economical resulting in accepting loss transfer where loss transfer was not applicable. It submits there is no evidence of an unequivocal and conscious intent to abandon its rights. It submits that the waiver has been retracted on reasonable notice and it would be unfair to Economical not to allow the retraction and in fact would result in a windfall to Aviva.

Reply Aviva

Aviva takes the position that Economical had full knowledge of its rights and that an overly-broad interpretation of waiver would undermine the requirement of contractual reconsideration. Aviva submits that notice requirements should not be imposed as suggested by Economical where reliance is not an issue. In this case, Economical accepted loss transfer on November 20, 2020, paid the first request February 5, 2021 and did not attempt to resile until May 5, 2021, some five-and-a-half months after accepting the loss transfer.

Aviva also distinguishes the *Waterloo v. ACE INA* case (*supra*), noting that in that case only a couple of months had passed between the acceptance of the loss transfer and the purported retraction and further no payments have been made by Waterloo to ACE INA. Aviva submits that in this case there was contractual consideration of acceptance of the loss transfer as evidenced by the request for indemnity and its payment, and that distinguishes it from *Waterloo*.

ANALYSIS AND DECISION

Loss transfer is a creature of statute. It is created by s. 275 of the *Insurance Act* supplemented by Regulation 664. Case law is clear that equity does not apply to statutory relief for loss transfer.

This was clearly established in the Court of Appeal in the decision of *Intact Insurance Company of Canada v. Lombard General Insurance 2015 ONCA 764*. That was the case in which the court determined that the defence of laches cannot be evoked in response to a loss transfer claim under section 275. The appeal upheld Justice Chiappetta's decision wherein she concluded at paragraph 7:

“The right to loss/transfer indemnity is purely statutory and unlike the statutory provision considered in Perry, it does not have a “distinctively equitable flavour.”

The Court of Appeal stated at the end of paragraph 3:

“Loss transfer is not an equitable claim nor a claim for equitable relief.”

The scheme is one of indemnity that allows an insurer who is paying statutory accident benefits to seek reimbursement from an insurer of certain classes of vehicles such as heavy commercial vehicles. Loss transfer is created when there is an accident between a “first party insurer” and a second party insurer, the latter of which includes a heavy commercial vehicle.

The second party insurer is obliged under s. 275 to indemnify the first party insurer unless the

first party insurer is paying accident benefits pursuant to a policy that also insures a heavy commercial vehicle.

Indemnification is made pursuant to the respective degree of fault of each insurer's insured and that is determined pursuant to the Fault Chart Rules.

Section 275(4) provides that if the insurers are unable to agree with respect to indemnification, then they are to proceed to arbitration under the *Arbitration Act* 1991. Unlike priority, there is no regulation with respect to notice requirements, limitation periods or any rules and regulations with respect to the arbitration itself.

In this particular case, the parties agree, as do I, that s. 275 of the *Insurance Act*, on the face of it, is not applicable as the at fault vehicle did not have a gross weight greater than 4,500 kg. That is how a heavy commercial vehicle is defined under Regulation 664, s. 9(1).

The Aviva adjuster in this case sent out an email to Economical claiming entitlement to loss transfer even though the very documents that she enclosed to Economical on the face of it did not support a claim for loss transfer. The VIN/plate search that identified Economical's insured set out that the registered gross weight of the vehicle was 4,082 kg.

However, I appreciate that while that was the registered gross weight, that does not necessarily indicate what the weight of the vehicle was on the date of loss. Giving Aviva the benefit of the doubt, as there was no evidence with respect to this, the adjuster at Aviva could have assumed that the Ford truck could have been loaded and its weight was in excess of 4,500 kg. If that was the case then Aviva would leave it up to Economical to investigate the issue as they insured the Purolator truck.

There is also no doubt in this case that Economical, as of its receipt of Aviva's Notice of Loss Transfer dated September 25, 2020 had the information from the VIN/plate search that its insured's vehicle, at least on paper, had a gross weight of 4,082 kg.

There was no evidence before me either in the log notes of Economical nor evidence from the adjuster at Economical as to whether or not the adjuster reviewed and understood the information provided by Aviva. Her log notes show that she reviewed the Motor Vehicle Accident Report, the OCF-1 and the Notice of Loss Transfer. There is no reference to her having looked at nor did she comment on the plate search that was clearly attached to the Notice sent by Aviva to Economical.

The Economical adjuster did not immediately accept loss transfer. She sent out a request to Aviva on October 15, 2020 requesting some additional information and advising that they were investigating the issue of loss transfer. That information was provided promptly by Aviva on October 22, 2020.

Economical then continued to investigate for another month and ultimately made an entry in

their log notes on November 20, 2020 confirming that "Investigation now completed." In that log note there is reference to the truck and the nature of the liability as well as confirming that Aviva was actually the priority insurer. Again, there is no reference in the log notes to any investigation or thought about the gross weight of the Economical-insured vehicle.

The adjuster then sends a letter to Aviva on November 20, 2020 which clearly and unequivocally accepts loss transfer. The letter confirms Economical has completed its investigation and that they are accepting loss transfer.

On receipt of this, Aviva had the right to assume that Economical had not only investigated liability but had also investigated the applicability of loss transfer and in particular the issue of the gross weight. Aviva relied on Economical's letter and made no further investigations of its own and sent out its loss transfer request in February of 2021 which was fully paid by Economical with no further questions.

We then have the file review with the team leader April of 2021 in which Economical makes its first comment with respect to the gross weight of the truck being 4,082 kg. Now Economical decides to make further investigations. Efforts are made to contact Purolator and that information is confirmed. There is no effort at this time to ask Purolator as to whether they are aware of the actual gross weight of the vehicle on the date of the accident.

This falls to Aviva to ask when Economical attempts to retract its loss transfer acceptance. Economical does make those enquiries and confirms that there is no information to support the weight of the truck on the day of the accident as Purolator does not weigh their trucks.

Economical tries to characterize its efforts to retract its acceptance of loss transfer on the basis that it received "new" information with respect to the gross weight of the truck when the BI adjuster let them know on April 12, 2021 and secured a copy of the vehicle ownership. I find this was not new information. Economical already had that information when they accepted the loss transfer on November 20, 2020. Again there is no explanation as to how that happened.

I have carefully reviewed the legislative provisions and the case law provided by counsel and I conclude that Economical was in full knowledge of all the relevant facts in order to make a decision with respect to loss transfer on September 25, 2020 when it received the fax from Aviva. I find that this included the fact that the registered gross weight of the vehicle was 4,082 kg.

I find that when Economical sent out its letter of acceptance of loss transfer on November 20, 2020, that it did so in full knowledge of its rights and that it made an unequivocal and conscious intention to abandon any potential right to dispute loss transfer at a later date other than with respect to its rights to review issues related to the quantum of indemnification sought.

This conscious intention to abandon any potential right to dispute loss transfer under s. 275 was reinforced when they accepted the first request for indemnification and paid it in February of 2021.

I have carefully reviewed the *Motors v. Old Republic* decision of Justice Herman and I disagree with Economical that there are any significant, distinguishing features to the facts of that case such that it cannot be relied on. In this case, as in *Motors*, Economical made a conscious decision to pay after appropriate investigation. While it did not do so in order to avoid arbitration expenses, I do not find that to be a sufficient feature to distinguish these two cases.

I did not find the decision of *GAN v. State Farm* of Justice Pitt (*supra*) to be particularly helpful. The facts were quite different in that there did not seem to be any argument about waiver and that GAN had the right to request a repayment on the basis that it incorrectly applied the Fault Chart Rules. Justice Pitt spent most of the decision looking at the liability and making a determination as to the applicability of the Fault Chart and the appropriate rule. Having determined which rule was applicable, he concluded that there was no liability flowing from GAN to State Farm as liability for the accident rested with State Farm. He noted that as monies had been paid on the basis of a mistake of law or fact, that the principles of restitution would afford recovery as an individual was unjustly enriched. The arguments made before Justice Pitt were quite different than those before me and it did not involve an issue with respect to whether or not GAN could retract from its original waiver.

I also carefully reviewed Arbitrator Samis's decision in *Waterloo v. ACE INA* (*supra*).

In that case, Arbitrator Samis concluded that ACE INA knew all the relevant circumstances that pointed out that the claimant was a pedestrian. He found, however, that it may not have occurred to anyone that there may be a legal argument that would arise from those facts. Therefore they went ahead and communication was made to abandon the right to resist the claim for loss transfer.

Two months later a legal opinion was secured that determined loss transfer may not apply to a pedestrian and ACE INA sought to withdraw from its waiver. Arbitrator Samis applied the *Saskatchewan River Bungalow* decision. He concludes that the Supreme Court in that case expressly endorsed the idea that a waiver can be retracted "if reasonable notice is given to the party in whose favour it operates." However, the facts in the *Saskatchewan River Bungalow* case are quite different than the facts before me.

Arbitrator Samis in that case sets out four criteria which he feels must be considered in a loss transfer case where a party is seeking to be excused from an alleged waiver.

1. Did the person have full knowledge of their rights?
2. Does the evidence demonstrate an unequivocal and conscious intent to abandon their rights?
3. Has the waiver been retracted on reasonable notice?

4. Would it be unfair to allow the retraction of the waiver?

I disagree with Arbitrator Samis. I do not find that criteria numbers 3 and 4 are appropriate considerations in a loss transfer case. Loss transfer cases are not contract cases. They are a creature of statute. I disagree with Arbitrator Samis with respect to his suggestion that allowing a retraction of waiver will not create uncertainty and will run counter to expeditious proceedings. I conclude to the contrary. Whether the government has or has not bothered to regulate the process of loss transfer does not take away from the fact that there is a significant line of cases that have concluded that loss transfer is a regulatory scheme to provide an expedient and summary method of reimbursement of the first party insurer for the payment of no fault benefits from an at fault second party insurer. (See *Jevco Insurance Company v. Canadian General Insurance Company* (1993) 14 O.R. (3d) 545 Ontario Court of Appeal.) Loss transfer cases are approached on the basis that it is a “quick and dirty” method to quickly and efficiently assess entitlement to loss transfer both based on the statutory regulation and the fault determination rules. To read into the legislation, the right of an insurer to retract an acceptance of loss transfer and a waiver of its right to dispute loss transfer based on errors by an adjuster will result in some significant uncertainty and potential delay in loss transfer matters. It would also, in my view, allow adjusters who are dealing with loss transfer matters to sit comfortably in the knowledge that they need not ensure they have all necessary information available to them and have thoroughly investigated the matter before accepting the loss transfer as if they make a mistake, it can simply be set aside by way of retracting the waiver.

The loss transfer process allows the second party insurer time to fully investigate the claim, look into the question of liability, gross weight and make appropriate decisions. No loss transfer claim should be accepted until all the appropriate investigation has been completed and the necessary boxes checked off. Insurers, in the loss transfer scheme, are sophisticated and have been working in the loss transfer system since 1990. The definition of heavy commercial vehicle and the requirement with respect to the gross weight has been in place since loss transfer was first created.

I conclude that Economical had all the information it required as of September 25, 2020 and had full knowledge of its rights. It conducted further investigation and then with its letter of November 20, 2020 it demonstrated an unequivocal and conscious intent to abandon those rights.

I find that Economical cannot retract its waiver. I also find that the waiver was not retracted on retractable notice if that is a relevant criteria.

Again, Economical was in possession of the key information on September 25, 2020. It was not until May 5, 2021 that Economical sought to retract the waiver despite being advised a second time of the gross weight on September 12 and 13, 2021.

COSTS

According to the Arbitration Agreement, both the arbitrator's account and legal costs are in the discretion of the arbitrator. I have not been advised of any formal offer to settle. However, if there is one, counsel can let me know.

Otherwise I conclude that as Aviva was fully successful in this matter, that the arbitrator's account and any disbursements will be payable by Economical. In addition, Economical will be responsible for Aviva's legal costs. If the parties cannot agree on costs, I would ask them to contact me within 30 days and we can schedule a cost hearing.

DATED THIS 5th day of April, 2024 at Toronto.



Arbitrator Philippa G. Samworth
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