CITATION: Belairdirect Insurance v. Dominion of Canada General Insurance Company, 2017 ONSC 367
COURT FILE NO.: CV-16-552264
DATE: 2017-01-16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Belairdirect Insurance,	)	Tracy L. Brooks and Antonietta Alfano, for the Applicant
Applicant	)	
– and –	)	
Dominion of Canada General Insurance Company (Travelers)	)	Neil Colville-Reeves, for the Respondent
Respondent	)	
	)	**HEARD:** December 21, 2016.

AKBARALI, J.:

Overview

[1] The respondent, Dominion of Canada General Insurance Company (Travelers), issued a policy of insurance in which the named insureds were Maria B and Tarcisio B. Maria and Tarcisio's son, Matthew B, was identified as a "listed driver" under the policy, and also an excluded driver, he and his parents having signed an excluded driver endorsement agreeing that Matthew B would not drive the 2009 Toyota Corolla insured under the Dominion policy.

[2] Matthew B was driving an uninsured motorcycle when he was involved in an accident with a vehicle insured by the applicant, Belairdirect Insurance. Belair has been adjusting Matthew B's claim for statutory accident benefits. Belair and Dominion disagree about which of them has the higher priority to respond to Matthew B's claim for accident benefits. They submitted the dispute to private arbitration.

[3] Arbitrator Cooper, in his decision dated April 19, 2016, reasoned that Dominion should be the insurer with first priority to respond to Matthew B's accident benefits claim, because Matthew B is an "insured person" under the Dominion policy. However, the arbitrator held that he was bound by a decision of this court that reached the opposite conclusion – that an excluded driver was not an "insured person" for purposes of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg 34/10 ("SABS"). Arbitrator Cooper thus held that Belair is the insurer with first priority to respond to Matthew B's accident benefits claim.

[4] Belair appeals Arbitrator Cooper's decision by way of application to this court.

[5] I conclude that the standard of review requires me to consider whether Arbitrator Cooper's analysis of the Dominion policy and the relevant legislative framework was reasonable, and if so, to implement his conclusion that Matthew B is an "insured person" under the Dominion policy in my reasons. I find that Arbitrator Cooper's analysis was reasonable. Matthew B is an "insured person" under the Dominion policy such that Dominion is the insurer with first priority to respond to Matthew B's accident benefits claim.

Facts

[6] The facts of this case are not in dispute. Matthew B was driving an uninsured motorcycle when he was involved in a collision with a vehicle owned by Michael G that was insured by Belair. Matthew B applied to Belair for accident benefits. Matthew B was not insured by the Belair policy. Belair began handling his claim.

[7] Dominion issued a policy of insurance to Matthew B's parents, who are the named insureds under that policy. The Dominion policy was valid at the time of the accident. The summary of insurance under the Dominion policy indicates that there is one automobile insured, a 2009 Toyota Corolla.

[8] The summary of insurance next identifies the "listed drivers" under the Dominion policy as Matthew B's parents and Matthew B. Two pages further in, the Dominion policy provides that Matthew B's mother is the principal driver of the Corolla, his father is an occasional driver of the Corolla, and Matthew B is an excluded driver of the Corolla.

[9] Matthew B and his parents signed an OPCF 28A – Excluded Driver endorsement. It provides that if Matthew B drives the Corolla, the policy will not provide the insurance required by law, the policy will not provide coverage for damage or injuries caused by the excluded driver, and the automobile owner and the excluded driver may be personally responsible for damage or injuries caused by the excluded driver.

[10] The Excluded Driver endorsement further provides that "[e]xcept for certain Accident Benefits", the endorsement "excludes all coverage" when Matthew B drives the Corolla. By signing the endorsement, Matthew B acknowledged that there would be "no coverage under the policy for property damage and bodily injury, damage to the automobile and most Accident Benefits". The excluded driver endorsement forms part of the Dominion policy.

[11] The question before the arbitrator was which insurer – Belair or Dominion – has first priority to respond to Matthew B's accident benefits claim. As I have noted, the arbitrator concluded that Matthew B was an insured person under the Dominion policy such that Dominion has the higher priority. However, he held that he was bound by the decision of this court in *Dominion of Canada v. State Farm Mutual Automobile Insurance* (26 October 2015), Toronto, CV-15-533119 (Ontario Superior Court of Justice) ("*Dominion v State Farm*"), where the court held that an excluded driver did not fall within the definition of an insured driver, because the excluded driver was not a driver of an insured automobile and therefore not entitled to coverage.

Leave to appeal this decision has been granted by the Court of Appeal for Ontario. The appeal is scheduled to be heard in March, 2017.

Issues

[12] There are two issues before me.

[13] First, what is the appropriate standard of review, and what aspect of the arbitrator's decision am I reviewing – his reasoning on the merits of the issue or his conclusion based on the application of the decision of this court in *Dominion v. State Farm*?

[14] Second, I must determine whether the arbitrator's decision was either correct, or reasonable, depending on my conclusion on the first issue.

The Standard of Review

[15] Although the parties urge me to find that the standard of review of the arbitrator's decision is correctness, they acknowledge that the decision of the Court of Appeal for Ontario in *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 may require that I apply a reasonableness standard of review. In *Intact Insurance Company*, the Court of Appeal for Ontario considered a dispute about the priority of insurers to respond to a claim for statutory accident benefits. There, the issue turned on whether the claimants were principally dependent for financial support on an insured who was in a relationship with one of the claimants, such that his insurer had priority over the insurer of the vehicle that the claimants were riding in at the time of the accident.

[16] The question of the appropriate standard of review is answered definitively in *Intact Insurance Company* at para. 53. Even an extricable question of law is reviewed on a reasonableness standard. This standard of review recognizes the expertise of insurance arbitrators: see paras. 49-50. Where a decision maker is interpreting its home statute, or statutes closely connected to its function, there is a presumption that a reasonableness standard will apply: see para. 47.

[17] The exceptions to the reasonableness standard do not apply here. The question of which insurer has priority is not a question over which the arbitrator and the court share jurisdiction at first instance. It is not an "exceptional" question, those being questions of jurisdiction, constitutional questions, or general questions of law that are both of central importance to the legal system as a whole and outside the arbitrator's specialized area of expertise: see *Intact Insurance Company* at para. 51. To the contrary, the question of the priority of the insurers involves the interpretation of the policy, the *Insurance Act*, and the SABS - all squarely within the expertise of the insurance arbitrator.

[18] Dominion argues that a correctness standard is warranted, based on the reasoning of the Supreme Court of Canada in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at paras. 24 and 46, that an appeal involving the interpretation of a standard form

contract that is of precedential value requires a correctness standard of review. In so concluding, the Supreme Court of Canada clarified that its holding in *Sattva Capital Corporation v. Creston Moly Corporation*, 2014 SCC 53; [2014] 2 S.C.R. 633, to the effect that contractual interpretation is subject to a deferential standard of review, does not extend to appeals involving the interpretation of a standard form contract, where the interpretation at issue is of precedential value and there is no meaningful factual matrix specific to the particular parties to assist in the interpretation process: see *Ledcor* at para. 46.

[19] *Ledcor* was released about a month after the Court of Appeal's decision in *Intact Insurance Company.* It is noteworthy that prior to the release of the Supreme Court of Canada's decision in *Ledcor*, a number of provincial appellate courts had already departed from the holding in *Sattva* to find that the interpretation of standard form contracts is subject to a correctness standard of review. The Court of Appeal for Ontario was among them: see *McDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842 (CanLII) at para. 41.

[20] Notwithstanding its conclusion in *Chicago Title*, the Court of Appeal, after lengthy analysis in *Intact Insurance Company*, found that an arbitrator's decision in the type of priority dispute that is before me is reviewable on a reasonableness standard. I cannot depart from this clear guidance.

[21] In any event, as is apparent below, this appeal involves more than the interpretation of a standard form contract; it involves the interpretation of provisions of the SABS and the *Insurance Act.* This appeal asks how the policy of insurance interacts with the legislative framework. *Intact Insurance Company* clearly finds that even extricable questions of law relating to the legislative framework are reviewed for reasonableness.

[22] The standard of review is therefore reasonableness. But there is another question. What part of Arbitrator's Cooper's decision must I review for reasonableness – his analysis that led him to conclude that Matthew B was an insured person under the Dominion policy, or his conclusion that he was bound by the decision of Wright J. and so had to reach the opposite result?

[23] Arbitrator Cooper's conclusion that Matthew B was an insured person under the Dominion policy was the product of the analysis that engaged his particular expertise. However, he found he was bound to come to the opposite result in view of Wright J.'s decision in *Dominion v. State Farm*. That decision, released before the Court of Appeal's decision in *Intact Insurance Company*, reversed the conclusion of the arbitrator – which was consistent with Arbitrator Cooper's analysis in this case – on a correctness standard. It is not possible to know what Wright J. would have done had she reviewed the arbitrator's decision in the case before her on a reasonableness standard.

[24] Moreover, while Arbitrator Cooper considered himself bound by Wright J.'s decision, I am not so bound. The question of whether Wright J.'s decision bound Arbitrator Cooper is not a question within his particular expertise. Applying the doctrine of *stare decisis* is a general question of law.

[25] In the circumstances, I conclude that I must review Arbitrator Cooper's decision on the interpretation of the policy, the priority provisions of the *Insurance Act* and the interpretation of "insured person" in the SABS on a reasonableness standard. I reach this conclusion for the following reasons:

a. It is Arbitrator Cooper's determination of these matters that are within his particular expertise, and it is that expertise that lies at the heart of the policy rationale that supports a reasonableness standard;

b. Were I to ask whether Arbitrator Cooper's determination that he was bound by the decision of Wright J. were reasonable, I would, in effect, be binding myself to Wright J.'s decision, when I am not bound by it;

c. In any event, Wright J.'s decision must be read in its context, which includes that she reviewed the arbitrator's decision in that case on a correctness standard, a standard which the Court of Appeal has since held is not the appropriate standard of review. It does not make sense that I should bind myself to Wright J.'s review of an arbitrator's decision on a correctness standard (and in which she reversed the arbitrator) when we now know the review should be on a reasonableness standard, and there is no way to know what she would have concluded had she reviewed the decision for reasonableness.

[26] Accordingly, the issue on the merits of this appeal by way of application is whether the arbitrator's conclusion that Dominion is the insurer with the higher priority was reasonable. If it was, that conclusion should be implemented in my reasons.

Was the Arbitrator's decision that Dominion has the higher priority reasonable?

The Statutory Scheme

[27] Section 268(2)1 of the *Insurance Act* sets out the priority rules which determine which insurer is liable to pay accident benefits. An occupant of an automobile has recourse first "against the insurer of an automobile in respect of which the occupant is an insured". "The insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose" ranks lower in priority.

[28] Belair is unquestionably the insurer of "any other automobile involved in the incident from which the entitlement to statutory accident benefits arose". The issue is whether Dominion is "the insurer of an automobile in respect of which the occupant is an insured". "An automobile" is not necessarily an automobile that was involved in the incident.

[29] The parties agree that the relevant definition to determine whether Matthew B is "an insured" of Dominion is contained in s. 3(1)(a) of the SABS: see *Warwick v. Gore Mutual Insurance Co.*, 1997 CanLII 1732 (ONCA); (1997) 32 O.R. (3d) 76 (C.A.).

[30] Section 3(1)(a) of the SABS defines an "insured person" as "the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is

an individual, the spouse of the named insured and a dependent of the named insured or of his or her spouse…".

[31] Matthew B is not a named insured, nor is he the spouse or dependent of a named insured or of his or her spouse. Thus, the issue before me distills to this question: is Matthew B "specified in the [Dominion] policy as a driver of the insured automobile [the Corolla]"?

[32] In addition, I note s. 31(1) of the SABS, which sets out circumstances in which certain accident benefits are not payable. Under s. 31(1)(a)(iii), an insurer is not required to pay income replacement benefits, a non-earner benefit or benefits under ss. 21, 22 or 23 of the SABS if the person who was the driver of an automobile at the time of the accident is an excluded driver under the contract of automobile insurance. Notably, s. 31(1) does not limit the accident benefits available to an excluded driver if she is injured when she is not driving the automobile she is excluded from driving under the policy.

The Parties' Positions

[33] I describe below the parties' positions on the merits of the question of which insurer is higher in priority to respond to Matthew B's claim for accident benefits, although it is within the framework of the standard of review as I have identified it above that I make my findings.

[34] Dominion argues that Matthew B is not specified in the policy as a driver of the insured automobile. It submits that to find him to be so specified would be an absurdity, because although Matthew B is a listed driver, he is specifically excluded from driving the Corolla. It claims that such an interpretation would render the phrase "driver of the insured automobile" meaningless.

[35] Dominion relies on *Dominion v. State Farm.* As I have already noted, in this case, the court found that a driver listed in the certificate of insurance and who was an excluded driver was not "an insured driver" because he was not a driver of the insured automobile and not entitled to coverage. In that case, the arbitrator had reached the opposite conclusion but was reversed by Wright J. who concluded the arbitrator's decision was not correct.

[36] Dominion also relies on the decision in *The Dominion of Canada General Insurance Company v. Unifund Assurance Company*, a private arbitration decision of arbitrator Lee Samis, dated September 23, 2016. In that case, Arbitrator Samis found that an "excluded driver" is conceptually the opposite of "a person specified in the policy as a driver of the insured automobile".

[37] For its part, Belair argues that clauses in an insurance policy providing coverage are interpreted liberally or broadly in favour of the insured, while clauses excluding coverage are interpreted strictly against the insurer.

[38] Belair argues that the excluded driver endorsement does not exclude SABS coverage. It argues that s. 31 of the SABS allows a listed driver access to unrestricted SABS benefits except where the listed driver is operating the enumerated excluded vehicle, and even then, some significant SABS benefits (like attendant care benefits) remain available to the excluded driver.

[39] Belair relies on *State Farm Insurance and Wawanesa Mutual Insurance*, a private arbitration decision of Arbitrator Densem, dated March 10, 2016, and on two decisions from Abitrator Bialkowski: *Pafco Insurance and Cumis* dated March 31, 2014, and *Dominion of Canada v. State Farm*, dated June 26, 2015, this latter decision being the one overturned by Wright J. In each of these decisions, the arbitrator concluded that the excluded driver endorsement only limits access to certain accident benefits if the excluded driver is driving the insured automobile. The full scope of the benefit is available to all listed drivers in every other circumstance.

[40] Belair criticizes the decision of Wright J. in *Dominion v. State Farm,* arguing that she focused on whether the driver was "an insured driver" when the question was whether the driver was "an insured person", and arguing that her decision is not clearly reasoned.

The Arbitrator's Decision

[41] The arbitrator accepted the analysis offered by Arbitrators Bialkowski and Densem, referenced above. He found that Matthew B is one of three listed drivers as per the policy documentation issued by Dominion and as such, is specified in the policy as a driver in reference to the Corolla. The arbitrator found that the excluded driver endorsement would have some bearing on Matthew B's accident benefit coverage if he were driving the Corolla, but the endorsement did not negate all accident benefits coverage. He found that Matthew B is an "insured person" as set out in s. 3(1) of the SABS.

[42] However, as noted, Arbitrator Cooper considered himself bound by the decision of Wright J. in *Dominion v. State Farm* and so concluded that that Matthew B was not an "insured person" under the Dominion policy such that Belair has the higher priority to respond to Matthew B's claim for statutory accident benefits.

Analysis

[43] I have concluded that the arbitrator's conclusion that Matthew B is an "insured person" under the Dominion policy, such that Dominion is the insurer with the higher priority to respond to his claim for accident benefits, is reasonable and therefore should be implemented.

[44] In so concluding, I have had regard to the decisions of Arbitrator Demsen and Arbitrator Bialkowski, which Arbitrator Cooper specifically accepted in his reasons. Arbitrator Cooper offered his agreement with those reasons as the basis for his own analysis not needing to be particularly detailed.

[45] Arbitrator Densem's decision contains a very lengthy analysis of the same question that was before Arbitrator Cooper. Arbitrator Densem relied on the fact that all legislation is to be considered remedial, especially the SABS; the fact that the SABS' definition of "insured person" has been expanded to increase the number of persons who could qualify for the payment of SABS under a particular policy; and the principle that clauses in insurance policies providing coverage are to be interpreted liberally or broadly in favour of the insured, or, in this case, the claimant. He also concluded he had to apply ordinary principles of contractual interpretation, and to resolve any ambiguity against the insurer: see *Schneider v. Maahs Estate,* 2001 CanLII

3018 (ONCA); (2001) 56 O.R. (3d) 321 (C.A.) at paras. 13, 15 and 22, on which Arbitrator Densem relied.

[46] Arbitrator Densem found that had the legislature intended to preclude excluded drivers from receiving any statutory accident benefits, it would have made that intention clear. He relied on ss. 225 and 240 of the *Insurance Act* where the legislature clearly excluded liability for insurers when an excluded driver is driving the automobile she is excluded from driving, except as provided in the SABS.

[47] Arbitrator Densem found that "listed" is a synonym of "specified" and held that a person listed in the certificate of insurance under "driver name" is a specified driver of the insured automobile and therefore an insured person for purposes of the SABS. He concluded that an excluded driver is a sub-category of specified drivers and when viewed in this light, it is not absurd that an excluded driver is also a specified driver of an automobile under the policy.

[48] These conclusions are consistent with the conclusions of Arbitrator Bialkowski, which Arbitrator Cooper also accepted. I note in particular Arbitrator Bialkowski's conclusion in *Dominion v. State Farm* at p. 7, that accident benefits legislation is remedial in nature and should be accorded a broad and liberal interpretation. Arbitrator Bialkowski found that there was sufficient ambiguity to an individual reading the excluded driver endorsement to think there would be full accident benefits if not driving the excluded vehicle, and even limited accident benefits if driving the excluded vehicle. He found the ambiguity must be interpreted in favour of the insured.

[49] I find that the reasoning advanced by Arbitrator Cooper, and Arbitrators Bialkowski and Densem as adopted by Arbitrator Cooper, and the conclusion that an excluded driver is an "insured person" when the driver is also a "listed driver", are reasonable. I rely in particular on the following:

a. Although Matthew B is an excluded driver under the Dominion policy, he is not excluded from all coverage under the policy. The excluded driver endorsement makes clear that, when driving the Corolla, Matthew B is excluded from coverage under the policy for property damage and bodily injury, damage to the automobile and most – but not all – accident benefits. The policy, by its terms, makes available, under the policy, some limited coverage to Matthew B even if he is driving the vehicle that he is specifically excluded from driving. Neither the policy, nor the relevant statutory provisions, limit the accident benefits available to Matthew B if he is involved in an accident when he is not driving the Corolla.

b. The excluded driver endorsement is, at most, ambiguous with respect to the accident benefits coverage available to an excluded driver when she is not driving the excluded automobile. The ambiguity must be construed against the insurer. Moreover, the ambiguity relates to a coverage exclusion. Exclusions to coverage must be construed strictly against the insurer: see *Schneider v. Maahs Estate* at paras. 15 and 22.

c. By virtue of being a "listed driver", Matthew B was "specified" as a driver in the Dominion policy in relation to the insured automobile. That is apparent from the summary of insurance coverage which first identifies the insured automobile (the Corolla) and immediately below, identifies the "listed drivers", who include Matthew B. Put another way, Matthew B is specified in the policy as a driver by virtue of being listed as a driver. The list is the mechanism of specifying the drivers. In this context, "specified" is not meaningfully different than "listed".

[50] Dominion argues that Matthew B is entitled to some, but not most, accident benefits under the policy even if he were injured when driving the Corolla because of the operation of s. 3(1)(b) of the SABS. Section 3(1)(b) defines an "insured person" under the SABS as "a person who is involved in an accident involving the insured automobile…". As such, Dominion submits, if Matthew B were involved in an accident when he was driving the Corolla, he would have coverage for accident benefits because he would have been involved in an accident involving the insured automobile, but his coverage would be limited by the excluded driver endorsement.

[51] Although Arbitrator Cooper did not specifically address this argument, there is a reasonable answer to it consistent with the analysis he accepted. The definition of "insured person" in s. 3(1)(b) of the SABS explains why Matthew B is an insured person under the SABS for purposes of the Belair policy. Section 3(1)(b) in effect insures people who are strangers to a policy of insurance by virtue of their being involved in an accident involving the insured automobile. However, Matthew B is not a stranger to the Dominion policy. He is specifically contemplated by the policy which both lists and excludes him as a driver of the Corolla. The limited accident benefits coverage available to him when driving the Corolla is derived from the manner in which he is treated in the policy – first as a listed, then as an excluded driver.

[52] With respect to the decision of the court in *Dominion v. State Farm*, I do not think much turns on the fact that Wright J. used the term "insured driver" rather than "insured person". The thrust of her decision in that case was clear: she found that an excluded driver under the policy could not be a driver specified in the policy as a driver of the insured automobile. This is an argument Dominion clearly advanced on this application. I reject Belair's argument that Arbitrator Cooper was not bound by Wright J.'s decision because it was not clearly reasoned. Arbitrator Cooper did not err in determining he was bound. However, I am not bound by the decision, and for the reasons I articulate above, I must review Arbitrator Cooper's decision on the interpretation of the policy, the *Insurance Act* and the SABS on a reasonableness standard. On this standard, and with respect to Wright J. who reviewed Arbitrator Bialkowski's decision on a correctness standard, I conclude Arbitrator Cooper's decision was reasonable.

[53] As a result, I conclude that Matthew B meets the definition of an insured person under s. 3(1) of the SABS. He is a "person specified in the [Dominion] policy as a driver of the insured automobile". It follows that Dominion is the insurer with the higher priority to respond to Matthew B's accident benefits claim.

[54] Belair's application is therefore allowed. The decision of Arbitrator Cooper dated April 19, 2016 is overturned. Dominion has first priority to respond to Matthew B's claim for statutory accident benefits.

Costs

[55] The parties agreed on costs of this application in the amount of $7,500 all inclusive. Given my decision, Dominion owes this amount to Belair.

[56] Belair also sought costs of the arbitration before Arbitrator Cooper. If this issue cannot be agreed upon between the parties, Belair may deliver written submissions of no more than three pages to me by February 1, 2017, not including any relevant attachments. Dominion may deliver responding submissions of no more than three pages, not including any relevant attachments, by February 8, 2017.

[57] Finally, I thank counsel for their able submissions, which were very helpful to me.

Madam Justice Jasmine T. Akbarali

Date: January 16, 2017.

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COURT FILE NO.: CV-16-552264
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Belairdirect Insurance,

v.

Dominion of Canada General Insurance Company (Travelers)

REASONS FOR JUDGMENT

Akbarali

Released: January 16, 2017