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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ECONOMICAL MUTUAL INSURANCE COMPANY (Appellant)
v. PAFCO INSURANCE COMPANY LIMITED, THE MOTOR
VEHICLE ACCIDENT CLAIMS FUND and JACOB UNGER
(Respondents)

BEFORE: GANS J.

COUNSEL: *Peter N. Downs and Julie Lee*
For the Appellant

Colin S. Jackson
For the Respondent, The Motor Vehicle Accident Claims Fund

Lee Samis
For the Respondent, Pafco Insurance Company Limited

HEARD: August 15, 2001

ENDORSEMENT

Introduction

[1] The appellant, Economical Mutual Insurance Company ("Economical"), appeals from the private arbitral award of Jesse T. Glass dated October 18, 2000, after a hearing of some few days in June 2000. Mr. Glass was appointed arbitrator to resolve certain disputes between several insurers, the parties to this appeal, pursuant to the

The parties expressly agree that they reserve the rights of appeal without leave.

Ambit of Review

[4] At the outset of the appeal, I asked counsel for the appellant what she understood was the ambit of review having regard to s. 45 of the *Arbitration Act*, 1991, S.O. 1991, c.17, and the terms of the Agreement set out above. Was the appeal limited to a question of law or did it encompass a question of fact or a question of mixed fact and law?

[5] It was appellant counsel's position that she would be entitled to argue both questions of law and mixed questions of fact and law. She was of the view that the Agreement permitted such a review because para. 21 thereof was "blunt and unqualified", an expression utilized by MacPherson J., as he then was, in *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1995), 23 B.L.R. (2d) 259 at 265 (Ont. Gen. Div.).

[6] It is my view, expressed to counsel during the course of argument, that the relevant provision of the Agreement only permits the parties to argue, without leave, questions of law. This view is underscored by s. 45 of the *Arbitration Act*, 1991, in its entirety, in distinction to the appeal provisions found at s.16 of the *Arbitration Act*, R.S.O. 1990, c. A.24. Under the present regime, one is permitted to appeal arbitral

is there a statutory right of appeal, but, the right encompasses questions of law or mixed questions of law in fact and the tribunal has no greater expertise in the matters in issue than that of the Court of Appeal. In my view, arbitrators such as Mr. Glass, appointed under the *Insurance Act*, possess greater expertise than this court on the subject matter with which they are charged, as such arbitrators, are, routinely, drawn from the ranks of experienced insurance litigation counsel. I am going to assume, without deciding, that the ambit of review is therefore one of “correctness” and not “reasonableness”.

Principally Dependent for Financial Support or Care

[9] The first matter in issue for the learned arbitrator was to determine whether or not Jacob Unger was a “dependent”, and therefore an “insured” person under his father’s policy of insurance with Pafco. In this respect, the learned arbitrator was obliged to apply ss. 1 and 4 of the *Statutory Accident Benefits Schedule, Accidents* O. Reg. 77693, to the facts as he found them.

[10] It was the position of the appellant that Arbitrator Glass applied too restrictive an interpretation to the term “principally dependent” and failed to consider the scope of “dependency” expressed by O’Brien J. in *Miller v. SafeCo Insurance Co. of America* (1984), 48 O.R. (2d) 451 at 454; affirmed (1984), 50 O.R. (2d) 797 (Ont. C.A.). It was the position of appellant’s counsel that the learned arbitrator blindly applied a

[13] Appellant's counsel also argued that the learned arbitrator erred in determining that Jacob Unger was not primarily dependent on either of his parents for care. This issue, quite properly, required a consideration of the social and emotional factors at play in the relationship of Jacob Unger and his parents. In that respect, I was directed to a series of arbitral decisions which provided certain gloss on the term "care", which is not otherwise defined by the Act or the *Statutory Accident Benefits Schedule - Accidents*. Put otherwise, appellant's counsel has, for all intents and purposes, invited me to put myself in the shoes of the arbitrator and come to my own conclusion on the facts in evidence.

[14] Respectfully, in my view, the learned arbitrator exhaustively reviewed the facts pertinent to this issue at pp. 7 - 9 of the Award. He concluded, in clear and unequivocal terms that Jacob Unger was not "principally dependent" upon either his father or his mother for care. Again, it is not for me to second-guess the arbitrator on his assessment of all the evidence, having properly instructed himself on the law. Such an inquiry would clearly take me down the road of questions of fact, if not questions of mixed fact and law. I would therefore dismiss the appeal on that ground, as well.

day time period therein provided. Furthermore, such application of s. 236 rendered "... moot the insurer's ability to assess the risks and negotiate accordingly when faced with an application for insurance . . . ". Finally, appellant's counsel argued that the interpretation arrived at by the learned arbitrator resulted in an absurdity which, taken to its logical conclusion, conflicted with the wording and intent of the legislation. (See appellant's factum paras. 49 -55.)

[18] I have more than a little sympathy for the argument advanced by appellant's counsel, particularly when one has regard to the excerpted portion of the arbitrator's Award expressed in the first complete para. on p. 31 of the Award and as reproduced in para. 49 of the appellant's factum.

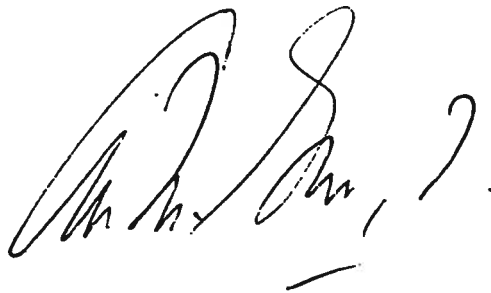
[19] If the learned arbitrator is taken to mean that an insurer cannot terminate a 30-day binder of insurance without providing the insured with a 30-day notice of its intention to do so, then, in my respectful opinion, the learned arbitrator erred at law. Such a conclusion would conflict with *Statutory Conditions - Automobile Insurance O. Reg. 77793 s. 11(1) and (5) and s. 12 of the compulsory Automobile Insurance Act, R.S.O. 1990 c. C.25, as amended*. In my opinion, an insurer is at liberty to terminate a 30-day binder or, indeed, a contract of insurance of a duration less than 60 days so long as the insurer provides the insured with the requisite written notice in a timely fashion, namely, in the manner anticipated by the statutory conditions described aforesaid. In

least from the date of the subject letter. Having come to that conclusion, the learned arbitrator was correct in interpreting s. 236 of the *Insurance Act* to say that it applied to the "30-day contract", creating a situation of an automatic renewal on, at least, the date of the accident.

[22] This interpretation predicated upon the evidence led before the learned arbitrator does not lead to an absurdity or otherwise invalidate the rationale for "temporary binders".

[23] I would therefore dismiss this aspect of the appeal, as well.

[24] Costs have not been argued before me. If the parties are unable to agree on a suitable disposition as to costs, I may be contacted through Judges Administration.

A handwritten signature in black ink, appearing to be "M. H. ...", written in a cursive style.

Released: August 28, 2001