CITATION: The Economical Mutual Insurance Company v. Zurich Insurance Company, 2014 ONSC 4763
COURT FILE NO.: CV-13-479611
DATE: 20140902

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER of the Insurance Act, R.S.O. 1990, c. I. 8, and Regulation 283/95;
AND IN THE MATTER of the Arbitration Act, S.O. 1991, c. 17;
AND IN THE MATTER of an Arbitration

RE: THE ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant
(Respondent in Appeal)

AND:

ZURICH INSURANCE COMPANY

Respondent
(Appellant in Appeal)

BEFORE: Mr. Justice Lederer

COUNSEL: *Kevin Mitchell*, for the Applicant/Respondent

Martin Forget, for the Respondent/Appellant

HEARD: July 8, 2014

ENDORSEMENT

[1] This is an appeal from the order of an arbitrator. She found that the applicant, The Economical Mutual Insurance Company ("Economical"), was not barred as a result of the operation of any limitation period from pursuing a claim for a "loss transfer" from the respondent, Zurich Insurance Company ("Zurich"). Zurich has appealed. It says the claim is out of time.

BACKGROUND

[2] Joan Hall was insured by Economical. On July 18, 2005, she was involved in a motor vehicle accident. Economical responded to her accident benefit claim. It made payments to her. The car being driven by Joan Hall had been struck by a "dump truck"[1] insured by Zurich. Economical, as the "first-party insurer" purports to have made a loss transfer claim from Zurich, as the "second-party insurer".

[3] Notice of Loss Transfer was provided by Economical to Zurich on November 8, 2005.

[4] On January 30, 2006, Economical forwarded a "Request for Indemnification" to Zurich claiming $27,516.12 less the $2,000 statutory deductible. On February 21, 2008, Economical served a second updated Request for Indemnification listing all payments to that date, totalling $119,898.14. A third Request for Indemnification was sent by Economical on April 17, 2008 in the amount of $127,172.22.

[5] A Notice to Participate and Demand for Arbitration, dated November 25, 2009, was served by Economical, on Zurich, on November 29, 2009.

[6] Between the Notice of Loss Transfer (November 8, 2005) and the service of the Notice to Participate and Demand for Arbitration (November 27, 2009), there was considerable correspondence between the two insurance companies. For its part, Zurich sought to obtain the accident benefit file indicating that, on receipt, an audit would be conducted and a response provided. As it is, the parties agree that, at no time during the course of this communication, did Zurich indicate that it would be accepting the loss transfer claim or agree to indemnify Economical.

[7] On December 8, 2011, the underlying accident benefit claim was settled as between Joan Hall and Economical. The Settlement Disclosure Notice indicates the total settlement was in the amount of $127,220.00. A further Request for Indemnification, dated January 24, 2012, was sent from Economical to Zurich reflecting the amount of the settlement less costs, disbursements and HST. The amount requested for indemnification was $95,857.00.

[8] No payment has been made by Zurich to Economical. Zurich has accepted that its insured is liable for the accident and that this is an applicable case for loss transfer. In this case, Zurich

---

[1] The decision of the Arbitrator refers to the vehicle insured by Zurich as a "dump truck". The Factum of Zurich says it was a "concrete mixer". Either way, it was treated as a "heavy commercial vehicle", as defined in Ontario Regulation 664 for the purpose of loss transfer recovery.

relies on the expiration of the limitation period and, on that basis, denies it bears any continuing responsibility under the loss transfer regime.[2]

ANALYSIS

[9] The position taken by Zurich is founded on the understanding that the applicable limitation period (2 years)[3] commenced on January 30, 2006, the date of the first Request for Indemnification, and that the arbitration was not commenced (the claim was not made) until November 27, 2009, when the Notice to Participate and Demand for Arbitration was served. This was well after the end of the limitation period. As Zurich sees it, if no arbitration was begun within two years, the first-party insurer (Economical) has no right to make a claim, even though payments which could not have been contemplated within the two-year time period were paid after it had expired.

[10] The Arbitrator did not agree. She found that each Request of Indemnification invoked an independent or separate limitation period. This was referred to as a "rolling limitation period".

[11] Her decision relied on *Federation Insurance Company of Canada v. Kingsway General Insurance Company.*[4] In that case, it was determined that the limitation period with respect to a loss transfer claim begins to run at the time the Request for Indemnification is made.[5] This was confirmed by the Court of Appeal:

> Once a legally valid (i.e., apart from any issue as to limitations) claim is asserted by the first party insurer's request for indemnification, the second party insurer is under a legal obligation to satisfy it. All the facts are present to trigger the legal obligation of the part of the second party insurer to indemnify the first party insurer for the loss. The situation has crystallized into complete and valid legal claim that is immediately enforceable against the second party insurer. There is nothing more that must happen to create the legal obligation of the second party insurer to pay the claim.

---

[2] This rendering of the facts generally derives from the decision of the Arbitrator (*The Economical Mutual Insurance Company v. Zurich Insurance Company* decision of Arbitrator Philippa G. Samworth, March 27, 2013, at pp. 2-4.) The facts were not disputed.

[3] *Limitations Act, 2002*, S.O. 2002, Ch. 24, Sch. B s. 4 and s. 5, which applies to this arbitration as a result of the *Arbitrations Act, 1991*, S.O. 1991, Ch. 17, s. 52(1).

[4] Award of Arbitrator Scott W. Densem, dated December 16, 2010.

[5] *Ibid*, at pp. 20-21.

> In my view, it must follow that the first party insurer suffers a loss from the moment the second party insurer can be said to have failed to satisfy its legal obligation to satisfy the loss transfer claim. I agree with the arbitrator in Federation v. Kingsway that the first party insurer suffers a loss caused by the second party insurer's omission in failing to satisfy the claim the day after the request for indemnification is made.[6]

[12] What this leads to is that each time there is a Request for Indemnification, followed by the failure of the second-party insurer to satisfy its legal obligations, that is failing or omitting to pay the loss transfer, a new limitation period commences.[7] This is the "rolling limitation period".

[13] Zurich argued that the decision of the Court of Appeal did not deal with and cannot be relied on as determining that each new request for indemnification has its own separate limitation period. The Arbitrator was at some pains to point out that the decision of the Court of Appeal leads logically to that result:

> The court also in paragraph 15 commented on Arbitrator Densem noting that a loss is sustained each time a request for indemnification is submitted. While the Court of Appeal does not specifically go on further to analyze the rolling limitation period it is my view that having clearly reviewed those parts of the Arbitrator's decision dealing with the rolling limitation period and then upholding his decision that the court has supported the rolling limitation period in loss transfer and in conjunction with the *Limitations Act* of 2002 and that I am bound by that decision as well.
>
> The Court of Appeal states (see paragraph 26) that once a legally valid claim is asserted by the first party insurer's request for indemnification that the second party insurer is under a legal obligation to satisfy it. At that time all the facts are present to trigger the legal obligation of the second party to indemnify the first party for its loss. The court says that the situation is crystallized into a complete and legally valid claim that is immediately enforceable. I interpret this as meaning that this situation occurs each time a Request for Indemnification is

---

[6] *Markel Insurance Co. of Canada v, ING Insurance Co. of Canada; Federation Insurance Co. of Canada v. Kingsway General Insurance Co.*, [2012] O.J. No. 1505 (C.A.), at paras. 26-27.

[7] This is to be distinguished from the proposition that the limitation period begins to run from the date the second-party insurer definitively refuses to indemnify the first-party insurer. This was rejected by the Court of Appeal (*Markel Insurance Co. of Canada v. ING Insurance Co. of Canada; Federation Insurance Co. of Canada v. Kingsway General Insurance Co., supra*, (fn. 6)).

> made and not that the limitation period begins to run and for all time with the first request.[8] . . .

[14] It was also submitted on behalf of Zurich that, to commence the limitation period with the refusal or omission of the second-party insurer to pay, which is to say, immediately after the delivery of the Request for Indemnification if payment is not made, is to give control of the limitation period to the first-party insurer. This may be so but, as the Arbitrator pointed out, this is not as a result of her decision, but is an outgrowth of the decision of the Court of Appeal.[9] She goes on to point out that there is an expectation that insurers will want to have their indemnifications completed.[10] Presumably, they want the money. The Arbitrator also noted that there has been a demonstration of some measure of control remaining with the second-party insurer. In *Intact Insurance Company of Canada v. Lombard General Insurance Company of Canada*[11], the first-party insurer was denied its claim for loss transfer. It had waited too long to make the claim. The doctrine of *laches* was applied.

[15] There is a broader concern for the approach proposed by Zurich. To my mind, Zurich seeks to treat this matter as if the action was based on the underlying tort, the negligence that was the cause of the motor vehicle accident. In a tort case, the commencement of the running of the limitation period is associated with the accident.

[16] The applicable limitation period is set by the *Limitations Act, 2002*[12], s. 4:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was *discovered*.
>
> [Emphasis added]

[17] The limitation period begins when the claim is discovered. The factors that explain discovery are provided in *Limitations Act, 2002*, s. 5:

> 5. (1) A claim is discovered on the earlier of,

---

[8] *The Economical Mutual Insurance Company v. Zurich Insurance Company*, decision of Arbitrator Philippa G. Samworth, March 27, 2013, at p. 9.

[9] *Ibid*, at p. 9, referring to *Markel Insurance Co. of Canada v. ING Insurance Co. of Canada; Federation Insurance Co. of Canada v. Kingsway General Insurance Co., supra*, (fn. 6).

[10] *Ibid*, at p. 10.

[11] Award of Arbitrator Robinson, dated October 31, 2012.

[12] See fn. 3.

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature or the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[18] It is not difficult to see that where the harm arises from a car accident, it is that event which will generally give rise to the fulfillment of these requirements: the "discovery" of the claim and the commencement of the running of the limitation period. It follows that it will often be the case that there will not be a full understanding of the damages at the time the two-year limitation period expires. In such circumstances, there is no new cause of action associated with any increased understanding of the damages. It is understood that the action will have to be started within two years of the accident and that its process will have to respond to what is unknown, either by waiting for some time to pass or projecting what will happen in the future. In this case, Zurich is arguing for the same approach. However, the action in a loss transfer claim is not the same. It is not a claim in negligence. It is a claim that finds its basis in the legislation.

[19] The legislative foundation for a claim for loss transfer is in the *Insurance Act*[13], s. 275 (1):

> The insurer responsible under subsection 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.

[20] This section makes clear that the first-party insurer is to be indemnified for the payments that it is required to make on account of Statutory Accident Benefits. The indemnification is to

---

[13] R.S.O. 1990, c. I.8.

be fault based.[14] Where there is a dispute, the legislation calls for arbitration as the method to be employed in resolving the difference:

> If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.[15]

[21] The Court of Appeal has confirmed that, given that s. 275(1) of the *Insurance Act* creates a statutory cause of action, there is no reason to apply the principles of limitation that have been developed in the common law of torts to claims made under this provision.[16]

[22] The better analogy is to claims in contract, say for the payment of rent under a lease or for some product purchased over time. If a tenant or purchaser stops paying monthly rent or installments and no action is commenced for more than two years after the first payment is missed, it would not be the case that the landlord or the seller would lose out on its ability to sue for every and all future failures to pay. Rather, the entitlement to sue would remain for all payments not made within the preceding two years. This is consistent with the approach taken by Economical in this case and the policy behind the loss transfer system which "...was created to establish a streamlined mechanism to readjust the responsibility for the payment of various Statutory Accident Benefits between two insurance companies and to reduce litigation with respect to that loss transfer."[17] I join the Arbitrator in her expressed confidence that sophisticated insurance companies will work reasonably to have these indemnifications completed[18] and not make a habit of holding them up or attempting to avoid the responsibilities the legislation dictates by the reliance on the sort of technical objections referred to by Zurich.

---

[14] See: Ontario Regulation 668/90 made under the *Insurance Act* (fn. 14), which sets out the Fault Determination Rules (referred to in *State Farm Insurance Company v. Manitoba Public Insurance Company*, decision of Kenneth J., February 4, 2014, at p. 8).

[15] *Supra*, (fn. 14), s. 275(4).

[16] *State Farm Mutual Automobile Insurance Co. v. Dominion of Canada General Insurance Co.* 79 O.R. (3d) 78; 205 O.A.C. 270; [2005] O.J. No 5502, at para. 6, referred to in *The Economical Mutual Insurance Company v. Zurich Insurance Company* decision of Arbitrator Philippa G. Samworth, March 27, 2013, at pp. 6-7.

[17] *The Economical Mutual Insurance Company v. Zurich Insurance Company* decision of Arbitrator Philippa G. Samworth, March 27, 2013, at p. 8.

[18] *Ibid*, at pp. 9-10.

[23] It is in this vein that I should refer to *State Farm Insurance Company v. Manitoba Public Insurance Company.*[19] It could be said that the problem there is the reverse of the issue raised here. In that case, over a time-frame of years, a series of requests for indemnification were made. Before some but after others, a Notice to Participate and Demand for Arbitration was made. There was no dispute that the arbitration would reach back and cover the Requests for Indemnification made over the two years prior to the serving of the Demand for Arbitration. The question was whether it also covered the Requests for Indemnification that came after the Demand for Arbitration was served or whether, as fresh causes of action, they required their own Demands for Arbitration. Since none had been made and more than two years had passed, it was argued that it was too late and that no claim for these further requests for indemnification could be made. The Arbitrator was clear in his view that this position was not supportable:

> In my view to require a separate arbitration for each unsatisfied Request for Indemnification makes no sense. It would result in an unnecessary multiplicity of legal proceedings with potential conflicting legal findings. There is no guarantee that the same arbitrator would be chosen for each of the arbitrations. As a result there could be conflicting production orders and conflicting liability findings. In many loss transfer disputes liability for a collision must be determined by the arbitrator either by application of the Fault Determination Rules or in some cases by application of the ordinary rules of negligence. I find that once a loss transfer arbitration is commenced it governs the claims outlined in Requests of Indemnification served within two years of the commencement of the arbitration and any Requests made subsequent to the commencement of arbitration so long as the arbitration is still active and has not been finalized.[20] . . .

[24] Interestingly, the arbitrator justified his conclusion, in part, by analogizing this claim to an action in tort. He pointed out that, where a claim is made for a bodily injury requiring a claim for additional damages incurred after the action was commenced, it would not be necessary to start a separate lawsuit for those expenses. The claim would be dealt with in the context of the existing lawsuit perhaps, but not necessarily, requiring an amendment to the pleadings.[21] In this context, this may seem to be a useful comparison. I repeat that, to my mind, it is problematic and inconsistent with the finding made by the Court of Appeal. The limitation period should not be applied as it would be in common law torts. The proposition that no new action or claim would have to be commenced is equally true in the analogy to contract claims to which I referred earlier. If a claim is made for a failure to pay rent or to make periodic payments in the furtherance of the purchase of some product, it is unlikely that a new claim would be required for each failure that occurs after an action has begun. The necessary adjustments could be made through an amendment to the pleadings.

---

[19] *Supra*, at fn. 15.

[20] *Ibid*, at p. 6.

[21] *Ibid*, at p. 6.

[25] Ultimately, the processes we use to resolve our differences have to work and not be tied up in unnecessary and unhelpful overly-technical positions.

CONCLUSION

[26] For the reasons reviewed herein, the appeal is dismissed.

[27] I confirm, as did the Arbitrator, that the first Request for Loss Transfer, dated January 30, 2006 is excluded by operation of the *Limitations Act, 2002*, as the arbitration was not initiated until November 27, 2009. This request for loss transfer was in the amount of $27,516.12 before the $2000 deductible was applied. All subsequent requests for indemnification (February 21, 2008, April 17, 2008, March 8, 2011 and January 24, 2012) are not barred as a result of any limitation period.

COSTS

[28] As agreed to by the parties, costs are awarded to Economical to be paid by Zurich in the amount of $11,000.

LEDERER J.

Date: 20140902