CITATION: Economical Insurance Co. v. Trafalgar Insurance Co., 2023 ONSC 5060
COURT FILE NO.: CV-22-00676209-0000
DATE: 20230907

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ECONOMICAL INSURANCE COMPANY Respondent	*Danielle Gauvreau* and *Jacob Damstra* for the Respondent
- and -	
TRAFALGAR INSURANCE COMPANY Appellant	*Joseph Lin*, *Rohit Sethi* and *Aida Davari* for the Appellant
	HEARD: July 20, 2023

MERRITT J.

REASONS FOR JUDGMENT

OVERVIEW

[1] This appeal arises out of a priority dispute between insurance companies brought under section 268(2) of the *Insurance Act*, R.S.O. 1990, c. I.8 (the "Act") and Ontario Regulation 283/95 - Disputes Between Insurers (the "Regulation").

[2] The priority dispute arises from a motor vehicle accident in which Jatinderjit Rakhra (“Ms. Rakhra”) was injured (the “Accident”). She was the driver of a 2009 Chevrolet Aveo ("Aveo") which she had borrowed from a rental company. The vehicle was owned by Satkar Auto Services and Sales ("Satkar"), whose insurer was Economical Insurance ("Economical"). The vehicle rear-ended by Ms. Rakhra was insured by Trafalgar Insurance ("Trafalgar").

[3] The Appellant, Trafalgar, appeals from an arbitration decision (the "Decision") dated January 6, 2022 issued by arbitrator Kenneth J. Bialkowski (the "Arbitrator") in which he found that Ms. Rakhra was not insured by Economical and not entitled to Statutory Accident Benefits (“ABs”) coverage from Economical.

DECISION

[4] The appeal is dismissed. The Arbitrator did not make any palpable and overriding factual errors and correctly applied the law. The Aveo was not an insured vehicle, it was an excluded vehicle under the insurance policy and the *Act* does not require that ABs are provided.

THE INSURANCE POLICY

[5] There is no dispute that Ms. Rakhra was not an insured person under the Economical policy. She would only be entitled to ABs if Economical was the insurer of the Aveo.

[6] At the time of the accident on October 3 ,2012 Economical insured Satkar under a standard Ontario Garage Policy (the "OAP 4" or the "Garage Policy"). The OAP 4 provided insurance coverage for automobiles owned by Satkar and used in its business. It is not disputed that the vehicle was owned by Satkar. The issue was whether the Aveo was used in Satkar's business and therefore included in the vehicles insured under the OPA 4 and whether coverage was excluded under s. 7.15.

[7] The OAP 4 provides coverage for "owned automobiles". Under "Definitions", s. 7.2.3. defines "owned automobile":

> For the purposes of Section 1 (Third Party Liability), Section 2 (Accident Benefits), Section 3 (Uninsured Automobile Coverage), Section 4 (Direct Compensation - Property Damage), and Section 5 (Loss or Damage to Owned Automobiles):
>
> "owned automobile" means:
>
> (a) an automobile, including trailers and equipment, owned by the Insured and used for pleasure or in connection with the business stated in Item 3 of the Certificate of Insurance; and
>
> ...
>
> EXCEPT an automobile the ownership, operation or use of which is excluded in Section 7, (General Provisions, Definitions and Exclusions) or Section 8, (Statutory Conditions) of this Policy.

[8] Item 3 of the Certificate of Insurance describes Saktar's business as "repairs of light commercial and private passenger vehicles and used car sales".

[9] Section 71.5 of the OAP 4 provides:

> 7.15 THE INSURER SHALL NOT BE LIABLE under this Policy for loss, damage, injury or death arising from the ownership, use or operation of any automobile,
>
> ...

(c) provided by the Insured to any person for regular or frequent use, except an active partner or a full time employee of the business stated in Item 3 of the Certificate of Insurance PROVIDED that this exclusion does not apply while the person is using the automobile in the business stated in Item 3 of the Certificate of Insurance.

POSTIONS OF THE PARTIES AND DECISION OF THE ARBRITRATOR

[10] Economical' s position was that the Aveo was not covered by the OAP 4 because in August of 2011 (before the Accident) Satkar gave the Aveo to Flash Car and Truck Rentals ("Flash") to use as a rental vehicle under a written "lease to buy" agreement whereby Flash made monthly lease payments to Satkar and at the end of the term of the lease ownership would be transferred to Flash. Making this agreement was not within the scope Satkar's business. Economical also submitted that the Aveo was excluded under s 7.15 of the Garage Policy.

[11] Trafalgar's position was that the OAP 4 is an automobile policy, it covered all vehicles owned by Satkar and as such, under s 268(1) the Insurance Act RSO 1990, c I.8 (the "*Act*") it is deemed to include Accident Benefits and Economical could not rely on a term in the OAP 4 to deny Accident Benefits coverage for the Aveo.

[12] The Arbitrator found that providing the Aveo to Flash to be used in a fleet of rental vehicles to be outside the scope of the business description set out in Item 3 of the OAP 4 and went far beyond "sale of used cars". He also found that the subject vehicle was specifically an "excluded vehicle" by reason of s. 7.15 of the contract. The vehicle was being made available to an individual for regular or frequent use who was not an active partner or employee of Satkar. Therefore, he concluded that the Economical policy did not cover the Aveo and did not respond to Ms. Rakhra's claim for ABs so Trafalgar was the priority insurer.

THE ISSUES

[13] Trafalgar appeals on the basis that:

1. The Arbitrator erred in law in drawing an improper inference that the Aveo was not an insured automobile under the Economical policy.

2. The Arbitrator, in effect, wrongly concluded that the OAP 4 was not a motor vehicle policy because all motor vehicle policies are required to provide AB coverage.

3. The Arbitrator failed to find that accident benefits coverage could only be limited by statue.

ANALYSIS

[14] The standard of review is an appellate review standard meaning for errors of law the standard is correctness and for errors of fact the standard is palpable and overriding error. If there is a question of mixed fact and law with an extricable legal error the standard is correctness. If there is a question of mixed fact and law with no extricable legal error the standard of review is palpable and overriding error. (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019

SCC 65, 441 D.L.R. (4th), *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII). [2002] 2 SCR 23 and *Wawanesa Mutual Insurance Company v Unica Insurance Inc* ., 2021 ONSC 4266).

[15] There is no issue that s. 268(1) of the *Act* requires all motor vehicle liability policies to provide ABs. There is also no issue that the Garage Policy is an automobile policy.

[16] The Arbitrator correctly identified the issues before him as being whether the Aveo was an insured vehicle under the Garage policy, whether it was excluded from coverage by s 7.15 and whether s. 233 of the *Act* applied (para 47).

Was the Aveo an Insured Vehicle?

[17] The Arbitrator found that the Aveo was not an insured vehicle under the Economical policy because it was not an "owned vehicle" since it was not used in connection with Satkar's business. The Arbitrator considered whether the "lease to buy" arrangement was part of Satkar's scope of business "used car sales" as set out in Item 3 of the Certificate of Insurance. The Arbitrator found as a fact that "the "lease to buy" arrangement between Satkar and Flash cannot be considered part of the ordinary described business of Satkar, namely "repairs of light commercial and private passenger vehicles and used car sales"". He found that "providing the vehicle to a stranger to the insurance contract to be used in a fleet of rental vehicles to be outside the scope of the business description set out in Item 3 of the Garage Policy" even though Satkar did provide financing for cars it sold. He found that the "lease to own" arrangement was far different than "used car sales" particularly where the vehicle was being used as part of a rental fleet given the increased risk of exposure far beyond that contemplated in the underwriting process. He specifically found that Economical did not insure rental companies because of the increased risk of claims, particularly claims for ABs (para 29, 33 and 50).

[18] I do not find that the Arbitrator made any palpable and overriding errors in making these factual findings.

Was the Aveo Excluded from Coverage by s. 7.15 ?

[19] The Arbitrator considered whether the Aveo was an excluded vehicle and found that it was excluded under s 7.15. He found that the Avro was an owned vehicle that was made available to Flash for its regular and frequent use for more than a year. He made no palpable and overriding error in finding this fact.

[20] The Arbitrator said that the preamble in Section 2 of the OAP 4 makes it clear that the Exclusions in s. 7 apply to every section of the policy, except as otherwise stated. Furthermore, the preamble contained in s. 7 also indicates that the exclusions found in s.7 apply to every section of the policy, except as otherwise stated. Nowhere in either s. 2 or s.7, does it say that ABs coverage continues where a vehicle owned by the insured is provided to another entity for its regular or frequent use, as was the case here. (para 34)

[21] The Arbitrator correctly stated the law as follows:

> As found by Arbitrator Robinson in *ING* (*supra*), on appeal by the Director's Delegate in *Goos* (*supra*) and by Justice McNeely in *O'Donnell* (*supra*), a vehicle owned by the insured and made available to another entity for its regular or frequent use is an excluded vehicle for which there is no coverage under a Garage Policy.

[22] On the appeal, counsel for Trafalgar referred to *The Motor Vehicle Accident Claims Fund v. The Dominion of Canada General Insurance Company* (February 11, 2002), Ontario, 00-CV-202023 (Ont Sup Ct) where the court held that s. 7.16 is an "exclusion based on who is driving" and once a policy is issued that is intended to cover the automobile involved in the accident, liability to pay ABs is not avoided because of misrepresentation, fraud or because a driver is excluded. The underlying facts of the case are not clear from the endorsement and it was not put before the Arbitrator. From reading the underlying decisions it appears that there was fraud and the insured represented to the Ministry of Transportation that the vehicle was used in the business. In any event, the endorsement is brief and does not consider the *Ing* and *O'Donnell* cases relied upon by the Arbitrator.

[23] Under the OAP 4, automobiles that are excluded in s. 7 are specifically excluded from the definition of "owned automobiles". In my view, the Arbitrator correctly decided that s. 7.16 creates a category of vehicles for which there is no coverage. The exclusion applies depending on how the vehicle is being used and for what purpose. It makes the automobile excluded. It does not simply create an excluded driver exception under the meaning of s. 225 and s. 240 of the *Act*.

[24] Trafalgar argued that because the Aveo was leased to Flash, it could not have been "provided" for "regular use". I was not provided with any authority for this proposition and it was not addressed by the Arbitrator. In my view, as submitted by the Respondent, applying the ordinary meaning of the words, "provided" for "regular use" could include several different types of arrangements such as the "lease to buy" as was done here, a more traditional lease and a situation in which no money is paid. The terms "lease" and "provided" for "regular use" are not mutually exclusive.

[25] The Arbitrator was correct in finding that Satkar provide the Aveo for Flash's "regular use" when it entered into the "lease to buy" arrangement, that the Aveo was excluded by s. 7.16 and therefore not an "owned automobile" and not covered by the Economical policy.

Does s. 233(2) Require ABs to be Provided?

[26] The Arbitrator considered the applicability of s. 233(2) of the Act which provides that even where there is a misrepresentation or a breach of a term of the contract or fraud, the insurer is still required to provide accident benefits to a claimant. (paras. 31 and 32).

[27] The Arbitrator considered whether s. 233(2) of the Act requires that Economical provide accident benefits. The Arbitrator reviewed the cases relied on by Trafalgar (*ING Insurance Co. of Canada and Non-Marine Underwriters*, 2005 CarswellOnt 12044, *State Farm Mutual Automobile Insurance Co. and Axa Insurance Inc*., 2013 CarswellOnt 19273 and *Merino v. ING Insurance Company of Canada*, 2019 ONCA 326) which held that misrepresentations do not void the insurance policy and do not relieve the insurer of the obligation to pay ABs. (paras. 36 to 45).

[28] Contrary to the submissions of Trafalgar, the Arbitrator did not effectively conclude that s 233 of the *Act* does not apply to OAP 4 policies. The Arbitrator did not find that there was no AB coverage because of a misrepresentation or nondisclosure or other violation of the policy. He found that the Aveo was not an insured vehicle because it was not part of the business described in Item 3 and was an excluded vehicle under s. 7.16.

[29] The Arbitrator correctly found that the cases relied upon by Trafalgar are distinguishable because they are cases involving standard auto policies and not garage policies. Under a standard auto policy there is usually only one automobile insured and there was no issue in those cases that the vehicle in question was an insured vehicle (para 46). Under an OPA 4 there are definitions in the policy which specify what vehicles are insured and one must look to those definitions to see if a vehicle is an insured vehicle.

[30] The Arbitrator found that s. 233(2) did not apply. He found that Satkar did not contravene a term of the contract. The exclusion in s 7.15 does not say the insured shall, not provide the vehicle to another entity for regular or frequent use, it says the insurer is not liable where the insured does so for more than 30 days. He concluded that the Aveo was not a described vehicle under a valid policy that was engaged in a prohibited use as contemplated by s. 250 of the Act. He did not find there was a contravention of the policy, that the insured engaged in a prohibited trade or transportation, failed to disclose a material risk or that there was any breach of the Statutory Conditions. Rather, he found that the Aveo was not an insured vehicle at the time of the accident and therefore the Garage Policy did not provide coverage. (paras. 48-50). His finding that s. 233 did not apply was correct.

[31] The Arbitrator made no palpable and overriding factual errors and was correct in applying the law. The Aveo was not covered by the Economical policy because it was not an "owned vehicle" as defined and was specifically excluded. The appeal is dismissed.

COSTS

[32] The parties have agreed on costs payable to the successful party in the amount of $15,000.00. Accordingly, cost are payable by Trafalgar to Economical fixed in the amount of $15,000.00.

Merritt J.

Released: September 7, 2023

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