CITATION: Intact Insurance v. Economical Mutual, 2021 ONSC 7750
COURT FILE NO.: CV-21-6671624
DATE: 20211123

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Intact Insurance Company, Applicant

AND:

Economical Mutual Insurance Group Company, Respondent

BEFORE: W.D. Black J.

COUNSEL: *Joseph Lin,* for the Applicant

Kadey B.J. Schultz, for the Respondent

HEARD: November 10, 2021

ENDORSEMENT

OVERVIEW

[1] This is an appeal by Intact Insurance Company ("Intact") from a July 19, 2021 decision (the "Decision") of an Arbitrator (the "Arbitrator") relative to a loss transfer dispute.

[2] The Arbitrator held, in considering the interplay between s. 2.2.2 of the Ontario Automobile Policy ("O.A.P.1") and s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8, that there is no time limitation on s. 2.2.2 of the O.A.P.1 as it pertains to "renting" a "temporary substitute vehicle".

[3] Intact's position is that there is a 30-day limit that applies to s. 2.2.2, such that the "priority insurer" in the circumstances (described below), was Northbridge Insurance Company ("Northbridge"), rather than the respondent, Economical Mutual Insurance Group Company ("Economical"). Intact's appeal focuses on the Arbitrator's conclusion that no such 30-day limit applies.

RELEVANT UNDERLYING FACTS

[4] The events giving rise to this proceeding involve a claimant, Vito Nocerino ("Nocerino"). On March 28, 2019, Nocerino was involved in a motor vehicle accident while driving his 2011 Mazda GX. His automobile policy was issued by Economical and, following the March 28 accident, an adjustor for Economical arranged for a rental car from Vaughan Car Rental pending a repair or other disposition of Nocerino's car. The rental car provided for Nocerino was a 2017 Hyundai ESE (the "Hyundai").

[5] On May 4, 2019, while travelling eastbound on Steeles Avenue in the Hyundai, Nocerino was involved in a collision (the "Collision") with a tractor trailer insured by Intact.

[6] I do not know the precise details of Nocerino's injuries resulting from the Collision, but it is clear that they were severe and have required substantial ongoing expenditures.

[7] As of May 4, 2019, when the Collision occurred, Nocerino had been using the Hyundai for 37 days. At that time, Nocerino remained the named insured on a policy of motor vehicle insurance issued by Economical. It is noteworthy that Economical had twice extended the duration of its coverage of the Hyundai, by written communications of April 18 and April 26, and that the latter extension took the coverage beyond the date of the Collision, to May 7, 2019. The Hyundai was also insured under a fleet policy issued by Northbridge and the parties agree that since Nocerino had used the Hyundai for more than 30 days, he became a deemed named insured under the Northbridge policy.

[8] On May 7, 2019, Nocerino submitted an OCF-1 (Application for Accident Benefits) to Economical.

[9] On July 29, 2019, Economical presented Intact with a Notice of Loss Transfer. At no time did Economical pursue a priority dispute against Northbridge.

THE ARBITRATION

[10] The Arbitration from which this appeal is taken was the loss transfer Arbitration between Intact and Economical.

[11] In her decision, the Arbitrator found that there was no time limit for vehicles considered to be "temporary substitute vehicles" pursuant to s. 2.2.2 of the O.A.P.1. and that s. 3(7)(f)(ii) of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg. 34/10 (the "*SABS*") created a situation in which a temporary substitute vehicle rented for more than 30 days was insured by two policies of insurance at the same time. By submitting an OCF-1 to Economical, the Arbitrator also found that Nocerino was effectively "choosing" an insurer pursuant to s. 268(4) of the *Insurance Act*.

ISSUES ON APPEAL

[12] With some slight differences, the parties agree on the issues on appeal.

[13] Both parties agree that the first issue is the question of the applicable standard of review.

[14] The appellant characterizes the second issue as: "Does section 2.2.2 of the O.A.P.1 have a time-limitation of 30 days?". The respondent, getting at substantially the same issue, puts it as: "Did the Economical O.A.P.1 provide coverage for the temporary substitute vehicle at the time of the accident?".

[15] The appellant describes the third issue as: "Is submitting an OCF-1 to an insurer "choosing" an insurer as contemplated by section 268(4) of the *Insurance Act*?", whereas the respondent

comes at the issue from a slightly different perspective, asking: "Is Economical the insurer responsible for paying accident benefits pursuant to section 268 of the *Insurance Act*?".

STANDARD OF REVIEW

[16] In the appellant's submission, this is a statutory appeal raising questions of law, including questions of statutory interpretation, such that the standard of correctness applies.

[17] The respondent's position, while largely agreeing that the correctness standard applies, is slightly more nuanced. It agrees that for alleged errors of law concerning the interpretation of the *Insurance Act*, the *SABS*, and the O.A.P.1 standard form contract, the review standard is correctness.

[18] However, it says that while the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, confirms that the correctness standard must apply to this appeal pursuant to s. 45 of the *Arbitration Act, 1991*, S.O. 1991, c. 17, it also directs reviewing courts to take the administrative decision-maker's reasoning into account in applying the correctness standard. According to the respondent, a reviewing court may ultimately find such reasoning persuasive and worthy of adoption, even though it is technically empowered to reach its own conclusions.

[19] Finally, with respect to the issue about whether or not Nocerino's submission of an OCF-1 to Economical reflects his "choice" of insurer, the respondent points out that Intact's argument is that the Arbitrator's conclusion on this point was not supported by the evidence or in law. Economical argues that, as such, to the extent this ground of appeal is found to be an issue of mixed fact and law, the relevant review standard would be "palpable and overriding error". Along similar lines, Economical submits that there is necessarily and appropriately an element of discretion reserved to the Arbitrator, and that she had exclusive jurisdiction to make findings of fact, to which the standard of palpable and overriding error will or may apply.

[20] On this latter point, Intact points to the decision of Justice LeMay in *Intact v. Dominion and Wawanesa*, 2020 ONSC 7982, 154 O.R. (3d) 781, an appeal from the same Arbitrator involved in the case before me concerning a priority dispute. The issue in that case turned on the question of whether or not one of the claimants was a spouse of the other claimant (as defined in the *Insurance Act*). In overturning the Arbitrator's finding that the claimants were spouses for the purposes of the *Insurance Act*, His Honour considered the applicable standard of review. While acknowledging that there will invariably be factual underpinnings that must be considered in this type of question, Justice LeMay wrote, at para. 51:

> In this case, the question is whether *at law* the definition of spouse under the *Insurance Act* is broad enough to capture relationships, even committed and exclusive relationships, between unmarried people who have separate residences. This is a much larger question of more general application. [Emphasis in original].

To a similar effect, Intact argues that the questions to be determined in this appeal, while arising from a factual matrix, are larger questions of more general application, and as such are reviewable on a correctness standard.

[21] Fundamentally, I believe that the parties' respective positions on the standard of review are not substantially at odds. To the extent that factual findings require a detailed consideration and weighing of evidence, I suspect both sides would agree to a more deferential standard of review. On the other hand, to the extent that the facts are largely given and uncontested, from which "larger questions of more general application" arise, I expect each party would favour moving along the spectrum towards correctness as the relevant standard. Moreover, on the legal questions of interpretation of the *Insurance Act*, the *SABS*, and O.A.P.1, there is no dispute that correctness is the standard to apply.

INTERPLAY BETWEEN O.A.P.1 AND S. 268 OF THE *INSURANCE ACT*

[22] I turn now to what in my view is the essence of this appeal, namely the question of the interplay between the relevant section or sections of O.A.P.1 and s. 268 of the *Insurance Act*.

[23] Some background about the legislative and regulatory setting and certain policy considerations is important, and is largely agreed between the parties.

[24] Section 3(1) of the *SABS* defines an "insured person" for the purpose of claiming benefits. The definition includes "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 dependent of the named insured or his or her spouse". The definition also encompasses "a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario".

[25] This expansive definition of "insured person" under the *SABS* fosters the public policy goal of broad coverage and easy to access no-fault statutory accident benefits.

[26] It is agreed that Nocerino is an "insured person" for the purpose of claiming statutory accident benefits from three insurers (the parties and Northbridge).

[27] Given the broad definition of "insured person" under the *SABS*, a person, like Nocerino in this case, can be an "insured person" under multiple insurance policies in relation to a single accident. Ultimately, however, only one insurer will be responsible for the payment of accident benefits to a claimant. The determination of which insurer is the priority insurer in a given circumstance is made under s. 268 of the *Insurance Act* (together with s. 6 of the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M.41 and *Disputes Between Insurers*, O. Reg. 283/95 ("DBI Regulation")).

[28] In *Allstate Insurance Company of Canada v. Motor Vehicle Accident Claims Fund*, 2007 ONCA 61, 84 O.R. (3d) 401, at paras. 38-39, the Court of Appeal for Ontario described s. 268 of the *Insurance Act*, s. 6(2) of the *Motor Vehicle Accident Claims Act*, and the DBI Regulation as "an integrated legislative and regulatory scheme for the payment of accident benefits", the main purpose of which is "the prompt delivery of accident benefits to injured persons and the timely and cost-efficient resolution of disputes over who should pay those benefits."

[29] In that regard, it should be noted that while this appeal will determine which insurer is ultimately responsible for paying Nocerino's claim, his eligibility to claim and receive accident benefits will not be affected; the question is not whether he is entitled to be paid, but rather which insurer is responsible for the payments.

INTACT'S POSITION ON PRIORITY INSURER

[30] Intact takes particular issue with the Arbitrator's statement that there is "nothing in the *Insurance Act*, the provisions of the standard automobile policy (O.A.P.1) or the SABS to support that Economical coverage of the claimant while in the rental vehicle ended at 30 days".

[31] Intact argues that while there is no 30-day limit specified in s. 2.2.2 of O.A.P.1, s. 2.2.4, which deals specifically with rental vehicles, expressly limits coverage to 30 days.

[32] Relying on Justice Belobaba's decision in *Nguyet v. King and Hertz Canada*, 2010 ONSC 5506, Intact argues that the sections of O.A.P.1 must be read together as a whole and not compartmentalized into separate sections. At para. 21, Justice Belobaba explained things this way:

> It is trite law that insurance policies must be interpreted in their entirety, as a whole. There is no suggestion in the 2006 amendments or in the revisions to the OAP-1 that "temporary substitute automobile" and "rented and leased automobile" would be mutually exclusive categories.

[33] As such, Intact argues, "Section 2.2.4 should be read together with Section 2.2.2 making a rental vehicle that is also a temporary substitute vehicle insured as such for only 30 days."

[34] Intact says that this interpretation is also consistent with the initial communication between Economical and Nocerino, in which the adjustor advised (on behalf of Economical):

> We will pay for a comparable size vehicle to the one you have. Please be aware that we do not cover gas, any excessive mileage, any tickets as well as extra insurance because your own coverage will transfer to the rented vehicle. The rental vehicle will be due back once the 30-day policy limit is reached, when repairs are complete or when settlement is offered which ever comes first [*sic*].

[35] As noted above, the parties agree that on a vehicle rental of more than 30 days, the renter becomes a deemed named insured on the fleet policy of the rental company, as provided in s. 3(7)(f) of the *SABS*. That subsection says:

> An individual who is living and ordinarily resident in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of the accident if, at the time of the accident, the insured automobile is being rented by the individual for a period of more than 30 days.

[36] Accordingly, and again as set out above, the Arbitrator and both parties agree that Nocerino was a deemed named insured on the Northbridge policy (covering the rental company's fleet) at the time of the Collision.

[37] Intact argues that "despite section 3(7)(f) of the SABS", the Arbitrator found that Nocerino was both a deemed named insured of Northbridge and a named insured under Economical's policy covering the temporary substitute vehicle.

[38] Intact's position, at the heart of its appeal, is that this interpretation creates a redundancy in insurance coverage on rental vehicles rented for more than 30 days and that allowing such a redundancy is not consistent with commercial sense. It cites various authorities underlining the need to interpret agreements in keeping with business common sense and argues that allowing for redundant insurance coverage results in unnecessary expenditures and, as a result, does not align with this interpretative guidance.

ECONOMICAL'S POSITION

[39] Economical responds that there are "multiple flaws" in Intact's argument that ss. 2.2.2 and 2.2.4 of O.A.P.1 should be read together for the purpose Intact urges.

[40] First and foremost, Economical says that s. 2.2.4 of O.A.P.1 is not applicable to accident benefits and therefore does not alter the wording or effect of s. 2.2.2, which expressly deals with accident benefits.

[41] Economical's argument starts with the definition of "temporary substitute automobile" within O.A.P.1: "[A] temporary substitute automobile is an automobile that is temporarily used while a described automobile is out of service."

[42] Economical next notes that in the context of a claim for accident benefits under the *SABS*, "temporary" is described in both s. 11 (temporary return to employment) and s. 47 (deduction of temporary disability benefits) as less than 104 weeks. It says that in the context of s. 2.2.2, temporary simply means the period of time that the described automobile is out of service due to necessary repairs or replacement.

[43] Section 2.2.4., Economical maintains, deals with liability coverage for "other automobiles that are rented or leased" as opposed to accident benefits.

[44] Economical agrees with Intact that Justice Belobaba's decision in *Nguyet* stands for the principle that "temporary substitute vehicles" and "other rented automobiles" are not mutually exclusive categories. It observes, noting Intact's concession to this effect during oral submissions at the Arbitration (which Intact appears to accept again here), that it is possible for an "other rental vehicle" to also be a temporary substitute vehicle, but that it is also possible for a rental vehicle not to be a temporary substitute vehicle. For example, Economical says a rental vehicle would be a temporary substitute vehicle when rented during the period of time that the described vehicle is out of service (s. 2.2.2), but a rental vehicle rented by a traveling insured who spends time away from home while the described vehicle is parked at home would only be an "other rented automobile" under s. 2.2.4.

[45] In Economical's submission, *Nguyet* confirmed that the two categories are neither mutually exclusive nor identical categories. It argues that there is nothing in that decision, in the *Insurance Act*, or in O.A.P.1 that supports Intact's argument that the 30-day limit for liability coverage set out in s. 2.2.4 applies to accident benefits coverage under s. 2.2.2.

[46] Section 2.2.2, Economical notes, does not itself contain any objective or concrete limitation on the time for which coverages apply to temporary substitute vehicles. As a result, Economical says that the temporary substitute vehicle coverage applies for as long as the described vehicle is

out of service. Moreover, Economical notes that s. 2.2.2 provides much broader coverage than s. 2.2.4, in the form of liability, accident benefits, uninsured, and property damage insurance. By contrast, the coverage under s. 2.2.4 does not deal with statutory accident benefits and only provides liability coverage for other rented vehicles. Its function is limited, says Economical, to assisting with determining priority for providing liability coverage for a loss and, as such, is simply irrelevant to this accident benefits priority dispute.

[47] Given that these are separate types of coverage for separate types of vehicles in separate fact situations, Economical says that there is no basis to read the 30-day limitation from s. 2.2.4 into s. 2.2.2. It points out that s. 2.2.2 would not be read into s. 2.2.4 to provide for coverage beyond liability coverage for other rented vehicles.

[48] *Nguyet*, notes Economical, contains an important discussion about the legislative intent behind the 2006 amendments to the *Insurance Act* and O.A.P.1, which added the 30-day limit for liability coverage under s. 2.2.4. At para. 12, Justice Belobaba wrote that:

> The purpose of these amendments, as described by the Court of Appeal in *Enterprise Rent-a-Car v. Meloche Monnex*, was to make renters liable for damages sustained by reason of negligence in the operation of a rented vehicle and to relieve the insurer of the owner of the rented vehicle from being the first loss insurer where other insurance is available to the renter or driver.

[49] In *Nguyet*, it is clear that the rental vehicle with coverage under s. 2.2.4 also qualified as a temporary substitute vehicle under s. 2.2.2. However, as mentioned, this does not mean that all vehicles are covered under both subsections. Ultimately, then, Economical concludes its argument on this aspect of the case by saying that s. 2.2.4 "has no bearing on the determination of accident benefits coverage or a priority dispute between insurers regarding priority of payment for an accident benefits claim".

[50] In response to Intact's argument that redundancy of coverage would be nonsensical from a business perspective and would result in a waste of resources, Economical notes that there are many instances in which more than one insurance policy may respond to a given set of circumstances, and that from a policy perspective this reflects a choice that some redundancy in coverage is preferable to potentially leaving scenarios in which no coverage is available.

RELEVANT ASPECTS OF THE ARBITRATOR'S DECISION

[51] In dealing with this aspect of the case, the Arbitrator first noted the extent of the parties' agreement and specifically where they parted company. She said:

> [T]he parties agree that for the first 30 days that the claimant was renting the vehicle that it was a temporary substitute vehicle and therefore the claimant was covered under the Economical policy. Where they differ is what happens on day 31.

[52] The Arbitrator's analysis and conclusion on this point are contained in a few paragraphs, as follows:

Factually, I find it important to reflect on what Crawford (the adjustor)/Economical did after the 30-days had expired for which they had originally offered the vehicle rental to the claimant. The initial note from Crawford was that the claimant was told that the rental vehicle would be due back once the 30-day policy limit was reached, when repairs are complete or when settlement is offered whichever comes first. Clearly in this case the 30-days came first as the repairs were never completed and no settlement was offered within the 30-day period. This would seem to provide support to the argument for Intact that Economical only considered its policy coverage to be a 30-day limit. However, counsel for Intact could not refer to any portion of the O.A.P.1 to suggest that there was such a 30-day limit within the contract of automobile insurance. They were also unable to point to any specific provision in the Insurance Act or the SABS that stated that a temporary substitute vehicle is only a temporary substitute for a period of 30 days and that the extended coverage under the personal policy ends at the 30-day mark.

Further, in this case, it is relevant that even if one accepts Intact's argument that there may have been a 30-day limit, Crawford/Economical agreed to extend that 30-day limit on two occasions. The first occasion by an additional 10 days and then a further 10 days during which the accident occurred. During the extension Economical agreed to pay for the car rental. The car rental invoice shows that it was sent to Perth (Economical) and that Economical was asked to pay for the full 41-day rental. There is no evidence before me to suggest that the claimant was told that while payment for the rental vehicle was extended past the 30 days that the policy coverage would not be extended.

While Intact's argument with respect to the interaction between the temporary substitute vehicle and the deemed named insured 30-day rental provision is creative it does not, in my view, hold water. The one thing inherent in the Ontario Automobile Insurance system is that there can be multiple insurers against whom claims can be made for Statutory Accident Benefits. Intact's argument appears to assume that we must interpret these provisions to identify only one insurer that the claimant can access or who would be at the top of the priority hierarchy. The fact is that Section 268 of the Insurance Act clearly contemplates that there are circumstances when two or more insurers may rank equally. I find that that is what occurred in this case.

[53] The Arbitrator then distils this into the conclusion:

I find that on the date of loss Economical continued to provide coverage to its insured while driving the rental vehicle as that vehicle continued to be a temporary substitute vehicle. I find nothing in the Insurance Act, the provisions of the standard automobile policy (O.A.P.1) or the SABS to support that the Economical coverage of the claimant while in the rental vehicle ended at 30 days.

I also find that on day 31 that the Northbridge policy would then also provide coverage by virtue of the deemed named insured provisions. From day 31 to 41, Northbridge insured the rental vehicle and the claimant would have been a deemed

> named insured under their policy while at the same time continuing to be a named insured under the Economical policy.

[54] Subject to the argument about redundancy, discussed below, I agree with the Arbitrator's findings. While echoing her remarks about Intact's counsel's creativity, I do not find it necessary or appropriate to import the 30-day limit under s. 2.2.4 into s. 2.2.2 of O.A.P.1. I accept the general observation of Justice Belobaba in *Nguyen*, at para. 21 that "insurance policies must be interpreted in their entirety, as a whole". However, this does not mean that time limits provided in a certain section or sections of a policy necessarily apply to other sections of the policy. Generally, where a time limit is intended to govern a particular section, the document should make that clear and not leave it to the creativity of counsel to borrow and insert time limits from other sections of the contract. That is particularly so when, as here, the sections in question deal primarily with separate issues, albeit there is some overlap.

[55] While I would reach this conclusion on the facts before me regardless of the two extensions provided by Economical, in my view those extensions make the result all the more clear. It would be oddly inconsistent, as the Arbitrator implies in her decision, if Economical was on one hand agreeing to pay for an extension of the rental, but on the other hand discontinuing coverage during that extension. Indeed, in my view, if that were the case, it would be incumbent on the insurer to advise of that purported position. Economical did not do so, I expect because its abiding intention was to continue coverage and because it did not have any expectation that Northbridge would take over as the priority insurer on day 31.

ISSUE OF REDUNDANCY AND "FRESH EVIDENCE"

[56] This still leaves the issue of redundancy and the effect of Nocerino's submission of the OCF-1 to Economical (rather than to Northbridge).

[57] I should pause to note that an issue was raised about Economical's ability to rely on the actual OCF-1 form, filled out by or on behalf of Nocerino. I am told, and the record appears to reflect, that the actual completed form was not in the record before the Arbitrator.

[58] Intact argues that the document is therefore subject to the test for "fresh evidence" and that, because the document was known to all and readily available to include in the record before the Arbitrator, it cannot meet the test and ought to be excluded from the record before me.

[59] This frankly strikes me as a tempest in a teapot. While the actual document was not put before the Arbitrator, there was an agreed statement of facts before her in which the parties agreed that Nocerino submitted the OCF-1 form to Economical.

[60] The document is a standard form and so unless it was suggested that Nocerino had written something extra on the form explicitly confirming his informed choice of insurer, there is no magic or significance to the actual form beyond the fact that it was submitted to Economical (and identified Economical as the insurer to which the form was being submitted). There is no suggestion that any such additional contents were added by Nocerino. As such, I have not reviewed the form but am nevertheless proceeding on the basis of the facts to which the parties agreed, namely, that Nocerino submitted the form to Economical.

[61] I have set out Intact's argument about commercial redundancy and business common sense above. With respect to the OCF-1 form, Intact argues, relying on *Primmum Insurance Company v. L'Unique Assurances Générales Inc.*, 2017 ONSC 5235 (Div. Ct.), that submitting an OCF-1 form has been found by the courts not to be evidence of an election to choose one insurer over another.

[62] I do not find *Primmum* to be helpful to the question before me. In *Primmum*, Justice Corthorn's decision turned in large part on the conflation on the part of Primmum and then the Arbitrator (from whom the appeal came before Justice Corthorn) of the priority dispute and loss transfer regimens, respectively, under the *Insurance Act* and the Arbitrator's mishandling, as a consequence of that conflation, of the proper evidentiary burden. As His Honour said, at para. 40:

> I find that as opposed to distinguishing between the priority dispute scheme and indemnity dispute scheme, the Arbitrator conflated them. The conflation of the two schemes was unreasonable. The conflation resulted in the Arbitrator overlooking or failing to appreciate the evidentiary burden on the first party insurer seeking indemnification pursuant to section 275 of the Act.

[63] One of the missteps Justice Corthorn identified was that the Arbitrator decided an issue that was not before him based on evidence that was also not before him. At para. 43, His Honour wrote:

> I agree with L'Unique that the issue of whether the OCF-1 included in Primmum's brief as evidence of Kyle's choice of insurer to whom to apply for SABs was not before the Arbitrator. The Arbitrator's decision in that regard goes beyond the issues he was requested to determine and was therefore unreasonable.

[64] At para. 45, Justice Corthorn, in nonetheless considering the evidentiary effect of the OCF-1, observed:

> The OCF-1 was not before the Arbitrator as part of the record on the motion. The OCF-1 was included as an attachment to the factum delivered on behalf of Primmum. Prior to the return of the motion, the parties agreed that (a) the Arbitrator was permitted to consider the contents of the OCF-1, and (b) the policy number that appeared on page 1 of the OCF-1 was typed/completed by Primmum before it sent the form to Doug for completion on Kyle's behalf.

[65] I agree that in circumstances in which one of the insurers, with a view to establishing a particular position in anticipation of a potential dispute, fills out the "choice" of policy before sending the form to the claimant, this does not necessarily constitute evidence of the claimant's choice.

[66] There is no suggestion that this was the mechanism employed in the case before me.

[67] Intact also argues that the omission of the OCF-1 from the record before the Arbitrator and its attempted inclusion in the record before me puts this case squarely in the category of *Primmum*. For the reasons discussed above, I do not agree. While I have declined to consider the specific form, it is the fact of Nocerino's submission of the form to Economical that may reflect his choice.

Again, there is no suggestion before me that Economical (or its adjustor) filled out the form on Nocerino's behalf, or pre-populated the policy number section (as was done in *Primmum*).

[68] Intact also relies on the decision of this court in *Yaromich and Botbyl v. Heartland*, 2021 ONSC 3759. At para. 50 of that decision, Justice Turnbull, after noting that the case before him was not a priority dispute between two insurers, but rather a dispute between two insured and their insurer, said:

> During submissions counsel were unable to point me to any legislative provision which says anything more than an insured shall use the application provided by the insurer and shall send the completed application to only one insurer. The purpose is clear. An insured cannot be claiming accident benefits from two insurers. The legislation does not state that only one application for benefits can be filed. If a party chooses to withdraw the completed application for a valid reason such as having filed it by mistake with the wrong insurer, I have not been provided with any legislative provision in the SABS or in the Insurance Act which says the insured is unable to the send the completed application to the second insurer (Heartland in this case) as the insured has at that point only sent the completed application to only one insurer.

[69] Intact submits that *Heartland* in general and this excerpt specifically represent a "finding (rejecting) that submitting an OCF-1 was an 'election'". I do not read them that way. To the contrary, *Heartland* arguably supports the notion that submitting an OCF-1 is an election because it says that a claimant is not precluded from "re-electing" if he or she determines that they initially filed the form with the wrong insurer: *Heartland*, at paras. 49-50.

QUESTION OF WHETHER OR NOT SUBMISSION OF OCF-1 CONSTITUTES "A CHOICE"

[70] While I am not persuaded that the authorities on which Intact relies in this area actually support its argument, I think there is nonetheless a fair question as to whether or not submitting an OCF-1 with a particular insurer represents a "choice" or "election" by a claimant giving that insurer the priority insurer position.

[71] However, in my view, this particular question is also one for which the Arbitrator has considerable discretion and required some findings of fact.

[72] Specifically, the evidence before the Arbitrator confirmed, and it was in fact agreed by the parties, that Nocerino presented his claim for accident benefits to Economical.

[73] There was no evidence before her and none before me, to suggest that Nocerino's choice was uninformed or disadvantageous (for example, no evidence that there would have been advantages to him in submitting his claim to Northbridge rather than Economical), nor any evidence to suggest that Nocerino's choice of insurers to which to submit his claim was influenced or manipulated by an insurer (as was the case in *Primmum*).

[74] Rather, the evidence simply shows that Nocerino decided to submit the claim to Economical, presumably because Economical was his insurer and the one known to him.

[75] While that may not reach the level of compelling evidence of a carefully considered choice, it certainly is some evidence of a choice and I cannot find any basis to say that the Arbitrator's decision in that regard was unreasonable, or reflected palpable and overriding error. Nor can I find any basis to say that her decision was incorrect.

CONCLUSION

[76] For all of these reasons, and despite the able argument of Mr. Lin, I conclude that I must dismiss this appeal.

COSTS

[77] Economical is entitled to its costs.

[78] I expect, given the cooperative and professional manner in which this proceeding has been handled for which counsel are to be commended, that the parties will be able to agree on an appropriate amount of costs (which should be on a partial indemnity basis). If that is not the case, I can be spoken to in order to establish a schedule for the exchange of written submissions in that regard.

W.D. Black J.

Date: November 23, 2021