CITATION: Definity Insurance Company v. Allstate Insurance Company et al, 2024 ONSC
COURT FILE NO.: CV-22-00690425-0000
DATE: 20240222

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DEFINITY INSURANCE COMPANY (formerly known as ECONOMICAL MUTUAL INSURANCE COMPANY) Applicant

AND:

ALLSTATE INSURANCE COMPANY and GORE MUTUAL INSURANCE COMPANY Respondents

BEFORE: Justice Chalmers

COUNSEL: *A. Leon,* for the Applicant

O. Gorman-Asal, for the Respondent, Allstate Insurance Company

M. Donaldson, for the Respondent, Gore Mutual Insurance Company

HEARD: December 15, 2023, by videoconference

REASONS FOR DECISION

OVERVIEW

[1] On January 14, 2021, Thomas Persin (Persin) was injured in a motor vehicle accident. He was a passenger in a vehicle insured by Definity Insurance Company (formerly known as Economical Insurance Company) (Definity).

[2] Persin submitted a claim for accident benefits to Definity. Definity adjusted the claim and paid benefits to Persin. Definity determined that there may be coverage available to Persin either through Allstate Insurance Company (Allstate) or Gore Mutual Insurance Company (Gore). Definity served a Notice to Applicant of Dispute Between Insurers to both Allstate and Gore. The insurers agreed to appoint Arbitrator Bialkowski to arbitrate the issue.

[3] Gore took the position that its policy with Persin was properly cancelled before the accident, for non-payment of premiums. Allstate claims that the cancellation of the Gore policy did not comply with the statutory requirements and was invalid. As part of the priority dispute Allstate raised a preliminary issue to address the validity of the cancelation of the Gore policy. The parties agreed that the preliminary issue would be addressed by written submissions to the Arbitrator.

[4] On October 4, 2022, Arbitrator Bialkowski released his decision. He concluded that Gore's notice of termination was invalid and therefore the Gore policy continued to be in effect at the time of the accident. Gore appeals the award. For the reasons set out below, I dismiss the appeal.

FACTUAL BACKGROUND

The Gore Policy

[5] On June 21, 2019, Persin submitted an Application for Automobile Insurance to Gore. The policy was with respect to coverage for a 2007 Hyundai for the policy period from June 22, 2018 to June 22, 2019. The premium was to be paid in installments on a monthly basis.

[6] Persin failed to make the monthly payments. By letter dated October 4, 2019, Gore sent a registered letter to Persin advising that his policy was cancelled effective November 5, 2019, at 12:01 a.m. for non-payment of premiums. The letter provided as follows:

> To reinstate your policy and ensure you have continuous coverage we must receive full payment of $837.01 (which includes all applicable fees), in cash, or by money order, or certified cheque payable to the order of Gore Mutual Insurance Company. The payment must be delivered to the address below and be received not later than 12:00 noon on the business day before the specified cancellation date.
>
> Gore Mutual Insurance
> Billing Department
> P.O. Box 70
> Cambridge, ON N1R 5T3.
>
> If you do not reinstate your policy the balance owing to Gore Mutual Insurance Company is $1,404.12.

[7] The notice also provided that if Persin had any additional questions, he was directed to contact his broker. There is no evidence that Persin did not understand the notice or contacted his broker with any questions.

[8] At the time of the termination letter, the monthly premiums were approximately $400. Persin was 2 months in arrears. There was one NSF fee of $35. Persin did not make any payments to reinstate the policy. Gore pursued Persin for the balance owing on the policy.

The Arbitrator's Award

[9] Allstate submitted the following preliminary question for determination by Arbitrator Bialkowski:

> Did Gore's cancellation notice comply with section 237(1) of the *Insurance Act* and section 11(1.3) of the Statutory Conditions?

[10] By award dated October 4, 2022, Arbitrator Bialkowski found that Gore's notice of termination did not comply with s. 237(1) of the *Insurance Act* and s. 11(1.3) of the Statutory Conditions, because the notice did not set out both the amount due under the contract and any administration fee charged by the insurer. Arbitrator Bialkowski concluded that the Gore policy was not properly terminated and therefore remained in effect at the time of the accident. Gore appeals the award.

THE ISSUES

[11] The following issues will be addressed:

a. What is the standard of review? and

b. Did the Arbitrator make any errors in finding that the Gore policy was not properly terminated?

ANALYSIS

Issue #1 - What is the Standard of Review?

[12] There is a presumption that the appropriate standard of review when a court is reviewing a decision of an administrative tribunal will be reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, (*Vavilov*) at paras. 23, 53. The reasonableness standard of review has been described as follows:

> Reasonableness is the deferential standard and flows from the recognition that "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result", but "to a number of possible, reasonable conclusions": *Dunsmuir*, para. 47. Reasonableness is concerned mostly "with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, para. 47. As re-iterated by the [Supreme] Court in *Khosa*, when applying a reasonableness standard. [A]s long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome: *Dominion of Canada General Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 2018 ONCA 101, (*Dominion v. State Farm*), at para. 56.

[13] Here, the issue determined by the Arbitrator was whether the notice of cancellation met the statutory requirements. This is a question of mixed fact and law. As stated by Justice Davies in *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830:

> Other issues raised by Allstate involve questions of mixed fact and law. For example, the question of whether the notice generated by Allstate in this case met the statutory requirement for a notice of termination is a question of mixed fact and law. This question involves applying the legal test to the facts, as found by the arbitrator. Assuming the arbitrator did not err in his interpretation of the regulations,

the arbitrator's conclusion that the content of the notice was deficient should not be set aside absent a palpable and overriding error: at para. 23.

[14] The parties both submit that the reasonableness standard of review applies in this case. I agree. The Arbitrator's decision is not to be set aside absent palpable and overriding error.

Issue #2 - Did the Arbitrator err in finding that the Gore policy was not properly cancelled?

The Statutory Scheme

[15] Where an insurer seeks to terminate a policy of automobile insurance, it must comply with the requirements set out in the *Insurance Act* and Statutory Conditions.

[16] Section 237(1) of the *Insurance Act* provides as follows:

> 237(1) If so required by the regulations and unless the insurer has complied therewith, an insurer shall not decline to issue or terminate or refuse to renew a contract in respect of such coverages and endorsements as may be set out in the regulations or decline to issue, terminate or refuse to renew any contract or refuse to provide of continue any coverage or endorsement on any ground set out in the regulations.

[17] Section 11(1.3) of the Statutory Conditions, O. Reg. 777/93 states:

> 11(1.3) A notice of termination mentioned in subcondition (1.2) shall,
>
> (a) State the amount due under the contract as at the date of the notice; and,
>
> (b) State the contract will terminate at 12:01 a.m. of the day specified for termination unless the full amount mentioned in clause (a), together with an administrative fee not exceeding the amount approved under Part XV of the *Act*, payable in cash or by money order or certified cheque payable to the order of the insurer or as the notice otherwise directs, is delivered to the address in Ontario that the notice specified, not later than 12:00 noon on the business day before the day specified for termination.

[18] Here, Gore and Persin agreed that the premiums would be paid in monthly installments. In those circumstances, the notice must set out the amount due under the contract as of the date of the notice.

> 11(1.4) For the purposes of clause (a) of subcondition (1.3), if the insured and the insurer have previously agreed, in accordance with the regulations, that the insured is permitted to pay the premium under the contract in instalments, the amount due under the contract as at the date of the notice shall not exceed the amount of the instalments due but unpaid as at the date of the notice.

[19] If the insured fails to pay the amount set out in the notice in the time and manner specified, the contract of insurance is deemed terminated.

> 11(1.5) If the full amount payable under clause (b) of subcondition (1.3) is not paid by the time and in the manner that the notice specified, the contract shall be deemed to be terminated, without any further action being required on the part of the insurer, as of 12:01 a.m. of the day specified for termination.

[20] Perfection is not required for each policy cancelation. However, the cancelation must strictly comply with the requirements set out in the Statutory Conditions. As stated by Arbitrator Novick in *Dominion of Canada Insurance Co. and Belair Direct Insurance*, 2019 CarswellOnt 14911, at para. 46:

> Given these clear directions from our higher courts, I have no trouble agreeing with my colleagues in the decisions noted above that a rigorous standard must be imposed on insurers that attempt to cancel policies for non-payment of premiums.

[21] The cancellation letter must include the "essential elements" set out in section 11(1.3) of the Statutory Conditions. As stated by Arbitrator Bialkowski in *Gore Mutual Insurance Company v. Lombard General Insurance Company and Motor Vehicle Claims Fund*, (2010, Arbitrator Bialkowski):

> 15. On my review of the case law before me, I am satisfied that for a letter of termination to be effective, there must be strict compliance to the extent that the "essential elements" of the legislative requirements are contained in the notice letter. I accept the proposition set out in *Conway v. Judgment Recovery (N.S.) Ltd*. 1990 CarswellNS 262, 111 N.S.R. (2d) 414 (N.S. T.D.), that the requirement does not necessarily mean that "every punctuation mark and capitalization in the notice of termination must be correct", but I do believe that the "essential elements" of legislative requirements must be for the termination to be effective.
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> 16. In my view, the "essential elements" as required by Statutory Condition 11 are as follows:
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> 1. The amount due, together with any administration fee being sought;
>
> 2. The date on which the termination is to take place; and,
>
> 3. That the insured has a right to avoid termination by paying the amount outstanding and the specific administration fee by noon on the day before the date on which the termination is to take place.

[22] The onus is on the insurer to strictly comply with the Statutory Conditions if it seeks to unilaterally terminate an insurance policy in mid-contract: *Allstate Insurance Company v. Her Majesty the Queen*, *supra*, at para. 41. If the notice is non-compliant, the termination is invalid, and coverage will continue until such time as the policy is properly cancelled: *Merino v. ING Insurance Company of Canada,* 2019 ONCA 326, at para. 43.

Was the Gore Notice of Cancellation Invalid?

[23] Section 11(1.3) of the Statutory Conditions has two parts, part (a) requires the notice to set out the amount owing under the contract, and part (b) requires notice of the amount in part (a) including the amount of the administrative fee. If premiums are paid in installments, section 11(1.4) provides that the amount in part (a) shall not exceed the amount of the instalments due but unpaid as at the date of the notice. The notice for termination of a policy that is paid in installments must also comply with part (b) in that the notice is to set out the amount owing in part (a) including the administrative fee.

[24] I am of the view that based on the clear wording of s.11(1.3) and (1.4) of the Statutory Conditions, the notice must set out two amounts: the amount owing on the contract at the time of the notice, and the amount owing on the contract plus the administration fees. Part (b) goes on to state that the administration fees must not exceed the approved amounts.

[25] Arbitrator Bialkowski concluded that the notice of termination was invalid. The notice sent by Gore only includes a single amount of $837.01. At the time of the notice letter, the amount due under the contract was $802.01. Gore also charged an NSF fee in the amount of $35. Although the notice of termination included the amount in part (b), which is the contract amount, plus the administrative fee, it did not set out the amount in part (a) which was the amount of the installments due but unpaid as of the date of notice. There is no breakdown as between the amount owing on the contract and the amount owing plus the administration fee. The Arbitrator found that the failure to provide this breakdown was fatal to Gore's position.

[26] Gore argues that the Arbitrator's decision is contrary to his earlier decisions.

[27] In *Gore Mutual Insurance Company v. Lombard General Insurance Company of Canada and the Motor Vehicle Accident Claims Fund* (Arbitrator Bialkowski – June 21, 2010), the notice of termination did not set out the administrative fee in the amount demanded. The Arbitrator found that the notice of termination was valid. He stated as follows:

> Arguably, the Gore letter of January 29, 2007 sets out the amount due under the contract, namely $193.33. It does not set out any administration fee that is outstanding. I do not find this fatal. The absence of an administration fee would simply be construed as indicated that Gore is not seeking an administrative fee over and above the amount actually outstanding: at para. 6.

[28] It is my view that the *Gore v. Lombard* case is distinguished on its facts. In that case, the insurer was not seeking an administration fee over and above the amount owing on the policy. Therefore, it was not necessary to include specific reference to an administration fee in the notice. Here, an NSF fee was being claimed in addition to the amount owing on the policy. The Arbitrator held that if an additional administration fee is being charged, the notice of termination must set out the amount of the administration fee. This would allow the insured to determine whether the fee is reasonable.

[29] Gore also states that Arbitrator Bialkowski's decision is contrary to his decision in *Co-Operators General Insurance Company v. Dominion of Canada Insurance/Travelers Canada and Optimum General Insurance Company Inc.* (2022, Arbitrator Bialkowski). In that case, the notice

of termination did not provide a specific address where the funds could be forwarded. The letter also failed to set out a specific deadline for when payment was required. Although the letter did not include a specific address for where the funds could be sent, the letter enclosed a return self-addressed envelope. Arbitrator Bialkowski concluded that a reasonable person would not be confused and would know where the funds had to be sent.

[30] I am also of the view that the *Optimum* case is distinguishable on the facts. In *Optimum*, the insurer included a self-addressed envelope and therefore a reasonable person receiving the notice would know where to send the payment. Here, the issue is the breakdown of the amount to be paid and not where the payment was to be sent. Without a breakdown between the amount owing in installments as of the date of the notice and the administration fee, a "reasonable person" receiving the notice would not know the amount of the separate administration fee and whether the fee exceeded the approved amount.

[31] Gore also refers to Arbitrator Bialkowski's previous decision in *Economical Mutual Insurance Company v. Wawanesa Mutual Insurance Company*, 2011 CarswellOnt 19154. In that case, the notice provided that in order to have the policy reinstated, the insured was directed to contract the broker for payment options. Arbitrator Bialkowski found that the notice was valid.

[32] I am also of the view that the *Economical v. Wawanesa* decision is distinguishable on the facts. The entire notice letter is not reproduced in the decision. However, Arbitrator Bialkowski states that the notice "clearly set out the name and address of the broker, the amount of $240.60 due, and the reinstatement date and time of October 27, 2007, at 12:02 a.m." The issue turned on the third essential element, namely when and where the payment was to be made. The Arbitrator found that the direction to contact the broker satisfied the third element. The decision did not specifically address the issue in this case, which is the breakdown of the amount owing on the date of the notice and the administrative fee.

[33] Allstate relies on the decision of *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830. Justice Davies found that the content of the policy cancellation letter was not in dispute because it stated both the principal amount owed by the insured and the administrative fee: at para. 38.

[34] Allstate also relies on *The Economical Insurance Group and Wawanesa Insurance, Re*, 2014 CarswellOnt 19333. In that case, Economical had set out in the notice of termination, that the contract will terminate unless the total amount of $2,318.20 is received by the Customer Account Centre no later than 12:00 noon on the day before the specified termination date. The notice of termination included the following statement of the financial status of the policy:

The amount due to Perth Insurance Company is	$ 2,258.20
Service Charge	0.00
Reinstatement fee (if applicable)	60.00
Total amount due	$ 2,318.20

[35] Arbitrator Samis found that the table "clearly meets the obligation to communicate 'the amount due, together with any administration fee being sought'. This essential element has been provided by Economical". Arbitrator Samis found that the termination letter is "exactly in accordance with Statutory Condition 11(1.3) (b)": at para. 29.

[36] Arbitrator Bialkowski found that strict compliance with the Statutory Conditions required the breakdown between the amount due on the contract and the total amount, including the administration fee. He stated as follows:

> [46] I cannot help but find that the Statutory Conditions required the Notice of Cancellation to contain specifics as to both the amount due under the contract and any administration fee being charged by the insurer. It is clear from the evidence that the unpaid premium totaled $802.01. In addition, there was a charge for a $35 NSF charge making the total owing $837.01. Gore has claimed that no administration fee was charged. However, to suggest that such an NSF charge is not administrative in nature goes against the common-sense definition of "administration fee".
>
> [47] [….] As such, I find that the NSF fee added onto the amount due under the contract would qualify as an administration fee. As a result, the Notice of Cancelation did not set out separately both the amount due under the contract and the administrative fees charged as required and as an "essential element" of the Statutory Condition. There was no way for Persin or his counsel to determine whether the administration fee exceeded the amount approved under Part XV of the *Act*. Accordingly, I find that the "essential elements" of the Statutory Condition were not met in Gore's Notice of Cancelation.
>
> […]
>
> [52] Given the requirement of strict compliance with the *Regulation*, it behooves insurers to use a table similar to the one in *Economical* (supra) in any Notice of Cancellation sent to their insureds. The amount due under the contract and the amount of any administrative fee, if one has been charged, must be set out separately to meet the "essential elements" of that required by the *Regulation*. In the case before me, the amount due under the contract and the amount charged as an administrative fee were not set out separately. The "essential elements" of the requirements set out in s. 11(1.3) of the Statutory Conditions O. Reg. 777/93 were not fully met by Gore's Notice of Cancellation and the Gore policy remained in full force and effect at the time of Thomas Persin's subject motor vehicle accident.

[37] I am of the view that the breakdown as between the amount owing on the contract and the total amount including administration fees, is not a minor or non-essential requirement. If, in the notice of termination, the insurer does not provide the breakdown, the insured will not know whether the total amount includes excessive and unreasonable administration fees. To properly determine whether the amount that is to be paid to avoid termination is reasonable, the insured must know the administration fee component of the total amount owing.

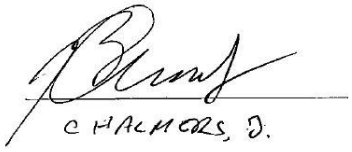
[38] It is my view that the Arbitrator applied the proper test. At paragraph 42 of his reasons, he states that clauses in insurance policies excluding coverage are to be interpreted strictly against the insurer. He also notes that a standard of perfection is not required. I am also of the view that the Arbitrator did not err in finding that the notice of termination was deficient because it did not provide a breakdown of the amount owing on the policy and the amount of the administrative fee. His conclusion is reasonable and falls within a range of possible acceptable outcomes. I am satisfied that the process and outcome, "fit comfortably with the principles of justification, transparency and intelligibility": *Dominion v. State Farm*, at para. 56.

DISPOSITION

[39] I find that the Arbitrator reasonably concluded that a notice of termination must include a breakdown of the amount owing on the policy and a separate amount which consists of the amount owing on the policy including an administration fee. This finding is consistent with the wording of s.11.1(1.3) and (1.4) of the Statutory Conditions. The breakdown will allow an insured to determine the amount of the administration fee being charged and whether the charge is reasonable and does not exceed the approved amount.

[40] I dismiss the appeal. I find that the Arbitrator did not err in finding that the Gore policy was not properly terminated. The Gore policy was therefore in effect at the time of the subject accident.

[41] Allstate is successful and is presumptively entitled to its costs. If the parties are unable to reach an agreement as to costs, the issue will be heard in writing. Allstate may deliver its written cost submissions of no more that 3 pages in length within 15 days of the date of this endorsement. Gore may deliver its written cost submissions in response within 15 days of receiving Allstate's cost submissions.



Date: February 22, 2024