Case Summary: Aviva Insurance Company v Wawanesa Mutual Insurance Company

Defence + Indemnity

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For the purposes of determining the priority of insurers in the overlapping coverage situation with rental vehicles, the Court must first determine who the "lessee" is. This may not always be determined by the rental agreement alone, especially where an agency is involved.

***Aviva Insurance Company v Wawanesa Mutual Insurance Company*, 2019 ONCA 704, per Fairburn, J.A.**

Facts + Issues

On 29 October 2010, the Plaintiff Liu was rear-ended by a vehicle driven by the Defendant Mahamood, which was rented from New Horizons Car Truck Rentals. Mahamood was in the process of doing furniture deliveries for Fine Furnishings. Liu sued Mahamood, Fine Furnishings and New Horizons Car Truck Rentals in vehicular negligence.

Mahamood did not have any insurance of his own. Fine Furnishings was insured by Wawanesa. New Horizons Car Truck Rentals was insured by Aviva. The issue was as to which insurer (as between Aviva and Wawanesa) was the first loss insurer under the Ontario *Insurance Act*, R.S.O. 1990 c. I.H, section 277(1.1).

Mahamood was a college student who delivered furniture for Fine Furnishings, which was owned and operated by Mehta. Mahamood signed a "subcontractor agreement". Mahamood believed that he was both an employee and an independent contractor of Fine Furnishings. Mahamood did not work for any other employer, he did not pay any truck rental fees and he did not own a credit card. He could refuse a furniture delivery but when he did agree to do one, he ended up renting a truck from New Horizons because Fine Furnishings had an account there.

The Court accepted the evidence of Mahamood regarding the following facts (paragraph 31):

a. Fine Furnishings instructed him to rent vehicles from New Horizons for the purposes of completing Fine Furnishings' deliveries;
b. Fine Furnishings did not permit him to use the rental vehicles for any purpose other than making deliveries to its customers;
c. Fine Furnishings paid for the cost of fueling the rental vehicles;
d. Mr. Mahamood never paid New Horizons directly for the rental vehicles, as they were always billed to the credit card on file for Fine Furnishings; and
e. When he called to reserve the rental vehicle for October 29, 2010, Mr. Mahamood told New Horizons that he would be picking it up on behalf of Fine Furnishings.

On the date of the accident, Mahamood rented the truck from New Horizons. He did not provide the rental company with a credit card. New Horizons had an account for Fine Furnishings on its computer system, with Mehta's VISA card being associated with the account. Mahamood's booking of the truck in question was to be charged to that card. New Horizons believed it was contracting with Fine Furnishings.

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The rental agreement was signed by Mahamood. It did not list Fine Furnishings on the agreement. Only Mahamood's name and signature appeared. He was identified as the vehicle's renter. His home address was listed. The telephone number listed was the Fine Furnishings' business number.

Aviva argued that Fine Furnishings, not Mahamood, was the lessee of the truck. It noted that the rental was paid for by a credit card associated with Fine Furnishings. Wawanesa argued that Mahamood was the lessee because he was the only entity referred to in the rental agreement.

The motions judge found it unnecessary to go beyond the four corners of the rental agreement to determine that Mahamood was the lessee, referring to the principles set out in ***Intact Insurance Company of Canada v. American Home Assurance Company of Canada***, 2013 ONSC 2372 and ***The Insurance Corporation of British Colombia v. Lloyds Underwriter***, 2017 ONSC 670. (The decision in the Court below was briefed in the December 2018 edition of ***Defence + Indemnity***.)

Aviva appealed.

HELD: For Aviva; appeal allowed and Fine Furnishings held to the be lessee.

The Court rejected that argument that ***Intact Insurance Company of Canada v. American Home Assurance Company of Canada*** and ***The Insurance Corporation of British Colombia v. Lloyds Underwriter*** were in conflict because "at their core, both decisions correctly focus upon identifying the lessee by determining the identities of the actual contracting parties". (paragraph 27)

The motions judge was held to have erred in relying solely on the provisions of the rental contract in this case. Fairburn, J.A. held that while that may typically be the case, it may not provide the complete answer as to the identity of the lessee when agency principles are involved:

27 . . . Importantly, the parties to a contract are not always those who sign it. Determining the identity of the "lessee" for the purposes of s. 277(1.1) may require courts to apply agency principles where the face of the agreement and the surrounding circumstances show that one of the signatories was signing on behalf of another person. As G.H.L. Fridman explains in his text, ***The Law of Contract in Canada***, 6th ed (Toronto: Thomson Reuters, 2011) at p. 192:

Under the law of agency, a principal may contract with another party through an agent. In such circumstances, even though the contract is negotiated between the agent and the third party (and may even be signed by the agent, not the principal), the contract which comes about is held to be between the principal and the third party, not the agent and the third party . . . . [Ordinarily,] the principal, on whose behalf the agent contracts, is the one entitled to take the benefit of the contract so negotiated, as well as being the one liable in the event of default. [Emphasis added by Fairburn, J.A..]

29 Although the contracting parties will typically be identified by ascertaining the identities of the signatories to a rental agreement, in those situations where a relationship of agency is raised, like in *Lloyds*, it may be necessary to go beyond the four corners of a rental agreement to understand the identities of the actual contracting parties.

...

30 In my view, it was an error of law to simply rely upon the face of the two-page rental agreement to determine the lessee status in this case. By doing so, the application judge failed to grapple with the fact that Mr. Mahamood was acting as Fine Furnishings' agent when he rented the truck. Mr. Mehta impliedly authorized him to do so by telling him that he could rent a vehicle from New Horizons and have that vehicle billed to the credit card on file for Fine Furnishings. New Horizons was aware of this grant of authority and dealt with Mr. Mahamood on that basis.

The Court found it unnecessary to consider whether Mahamood was an employee or independent contractor of Fine Furnishings, because the fact that he acted as its agent in renting the vehicle settled the question of the lessee's identity.