

Appeal P08-00036

OFFICE OF THE DIRECTOR OF ARBITRATIONS

AVIVA CANADA INC.

Appellant

and

AFRIM UKA

Respondent

BEFORE: David Evans
REPRESENTATIVES: Robert H. Rogers for Aviva Canada Inc.
Joel Timmerman for Mr. Uka
HEARING DATE: February 2, 2009

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Paragraph 1 of the arbitrator's order dated October 31, 2008, is rescinded and replaced with:
 1. Aviva is not required to disclose to Mr. Uka its reserves in respect of Mr. Uka's claim for accident benefits.
2. If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

David Evans
Director's Delegate

July 16, 2009

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

This case deals with whether or not an insurer's reserves should be revealed in statutory accident benefits claims under the *SABS-1996*.¹

II. BACKGROUND AND ANALYSIS

I am releasing three decisions simultaneously dealing with the topic of reserves. The first arbitration decision being appealed is *Rama and Allstate Insurance Company of Canada*, (FSCO A06-002177, October 23, 2007). Subsequently, the decision in *Qazi and Security National Insurance Co./Monnex Insurance Mgmt. Inc.*, (FSCO A07-000109, January 8, 2008) was issued, which relied in part on *Rama*. Next, the decision in *Uka and Aviva Canada Inc.*, (FSCO A07-001692, October 31, 2008) was issued, which also followed *Rama*. The parties in *Qazi* and *Rama* made further submissions about reserves in light of *Uka*.

It is for this reason that I am releasing all three decisions at the same time. In the following section, I will set out the law regarding reserves, which is repeated in all the decisions, and then deal with any particulars of the case.

III. ANALYSIS

(a) Law Regarding Reserves

The position taken by the arbitrators in the cases under appeal is that reserve information is relevant regarding the insurer's investigation and assessment of a claim and therefore should be produced. Indeed, in *Uka*, the arbitrator applied a very broad test of relevance, namely whether there was a reasonable possibility of the relevance of the reserve information, which she found was met when the insured offered a plausible argument for their relevance.

¹ *The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The decisions then held that there is no “zone of privacy” in a first-party insurer’s file, so there was no reason to withhold relevant information. Furthermore, the arbitrators indicated that consumer protection suggested that the reserves should be provided. In *Rama*, the arbitrator went as far as stating that this principle meant the provisions of the *SABS* actually require disclosure of reserves.

However, arbitrators have also found otherwise.² For instance, arbitrators have held that reserves can confuse applicants while not expediting their receipt of benefits. In *Ouimet and Wawanesa Mutual Insurance Company*, (FSCO A05-001491, May 11, 2006), the arbitrator concluded that “Reserves are estimated amounts assigned by an insurer to account for the total possible future payout of a person’s claims arising from an accident” and that “evidence about total claims serves little to advance an insured person’s claim for the specific benefits, while offering potential to sidetrack the disability or treatment issues.”

The courts have generally taken the same position as set out in *Ouimet*. For instance, most of the decision in *Osborne v. Non-Marine Underwriters, Lloyd’s of London* (2003), 2003 CanLII 7000, 68 O.R. (3d) 770, (ON S.C.) is devoted to the essential immateriality of reserve information. The court agreed with observations that “the setting of reserves per se does not have a semblance of relevance.”³ In *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*, [2007] O.J. No. 1190, Master Dash commented that “absent rare and exceptional circumstances” information about setting a reserve is not relevant to an insurer’s conduct in assessing and responding to the claim. MacDonald J. stated in the subsequent appeal decision *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*, [2007] O.J. No. 4899, that “while the Master held that litigation privilege does not apply to documents described as addressing the appellant’s reserve position, the Master permitted the appellant to delete references to its reserve figures. The Master clearly was correct in this regard.”

² For instance, in *Ghaedsharagy and Kingsway General Insurance Company*, (FSCO A07-001061, February 12, 2008), the arbitrator ordered production of all adjuster’s log notes to the date of the last Application for Mediation, but nonetheless held that the insurer “need not disclose entries related to reserve information.” In other cases, the parties simply agreed that notes or letters regarding reserves need not be produced: *Allstate Insurance Company of Canada and Al-Obaidi*, (FSCO P99-00009, May 2, 2000); *Levin and Security National Insurance Co./Monnex Insurance Mgmt. Inc.*, (FSCO A06-000257, September 8, 2006); *Mizzi and York Fire & Casualty Insurance Company*, (FSCO A01-000176, November 9, 2001); and *Niklis and Wawanesa Mutual Insurance Company*, (FSCO A04-000822, April 24, 2006).

³ From *Rex v. General Accident Assurance Co. of Canada*, [2001] O.J. No. 348.

I see no reason why arbitral case law should differ from the courts in this area.

I find that providing irrelevant information to an insured does not serve the purpose of consumer protection, or that the provisions of the *SABS* require their production. Blair R.S.J. in *Osborne* stated that a plaintiff would have an unfair advantage in knowing how much an insurer estimates a claim is worth and might have a feeling of entitlement to a settlement in that amount, especially since the reserve is nothing more than an intelligent estimate of the risk as a whole. As I see it, the court was concerned whether an insured would be confused into thinking that the amount of the reserves equal the amount of the benefits payable.

The arbitrator in *Qazi* relied on *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, for the proposition that the insurer's duty of good faith outweighed the same concerns about unreasonable expectations and negotiation advantages. However, I agree with the comment in *Osborne* that none of the factors set out in *Whiten* for ordering production "mandates the production, or suggests the relevance, of information relating to the setting of reserves" [par. 17].

I am not persuaded that there is no "zone of privacy" with respect to the first-party insurer's file. As stated in *Allstate Insurance Company of Canada and Al-Obaidi*, (FSCO P99-00009, May 2, 2000), the relevance of the production request must be weighed against considerations like the sensitivity of the information, the practicalities of compliance and the timing of the request. As noted in *Griscti and Non-Marine Underwriters, Mbrs. of Lloyd's*, (FSCO A01-000471, October 5, 2001), "reserve information is confidential and should generally be protected from disclosure to promote settlement and business efficiency." And MacDonald J's comment in *Mamaca* that the Master "clearly was correct" to allow the deletion of the reserve figures necessarily implies a zone of privacy.

In conclusion, the courts have stated that, except in rare and exceptional circumstances, reserves should not be required to be disclosed. Such circumstances might arise where the setting of a reserve actually had an impact on the adjusting of a file, not, as in the cases under review, where the adjusting of the file allegedly had an impact on the setting of the reserves. I am not persuaded that production of the reserves under the guise of consumer protection serves any useful purpose.

I am also not persuaded that arbitral jurisprudence should be different from that of the courts regarding the production of reserve information. Accordingly, I find that the arbitrator erred in law and the order cannot stand.

(b) Issues specific to this case

A preliminary issue at the appeal hearing regarded the extent of the appeal. The arbitrator had made the following order: “Aviva shall disclose to Mr. Uka information regarding its setting of reserve amounts in respect of Mr. Uka’s claim for accident benefits.” She did not set any time limits. Counsel for Mr. Uka confirmed that he was only seeking production from the insurer’s file including reserves up to the date of the application for mediation.

I declined Aviva’s request for a stated case to the Divisional Court on the issue of reserves because I felt it was premature, in that I was planning on issuing these three decisions.

The appeal is allowed on the basis set out above.

III. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

David Evans
Director’s Delegate

July 16, 2009
Date