IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of an Arbitration

BETWEEN:

JEVCO INSURANCE COMPANY

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

DECISION

Appearances:

Lori J. Sprott: Jevco Insurance Company/Applicant (hereinafter called "Jevco).

Ashleigh T. Leon: Economical Mutual Insurance Company (hereinafter called "Economical).

Introduction:

This matter comes before me pursuant to the *Arbitrations Act*, 1991 to arbitrate a dispute as between 2 insurers with respect to a claim for loss transfer pursuant to Section 275 of the *Insurance Act* R.S.O. 1990, c. I.8 and its Regulation 664/90. Specifically this claim is with respect to a motor vehicle accident that occurred on June 25, 2012. As a result of that accident Steven Maddocks sustained some injuries and submitted a claim for Statutory Accident Benefits to Jevco.

Jevco claims that Economical is responsible for indemnifying pursuant to the loss transfer provisions of the *Insurance Act*. The parties have selected me as their Arbitrator on consent. The arbitration in this matter is scheduled to proceed for 2 days in Ottawa August 9 and 10, 2018. Counsel have raised 2 preliminary issues which they have asked me to provide a decision on in advance of the arbitration date. Counsel advise that the decision with respect these 2

preliminary issues will assist in directing what evidence will be called at the arbitration hearing and possibly narrowing the issues.

It is to be noted that this loss transfer claim arises as Mr. Steven Maddocks was the driver of a motorcycle insured by Jevco on the date of loss when it was involved in an incident with a vehicle driven by Tyler Nesbitt, the driver of a Buick Century automobile insured by Economical. There is no dispute that this is properly a matter for a loss transfer claim.

Preliminary Issue:

Counsel have asked me to address 2 preliminary issues:

1. Whether Economical is permitted to re-litigate the November 20, 2012 trial decision of the Provicial Offences Court in this arbitration.

2. Did the incident of June 24, 2012 occur at an intersection such that Rule 15 (2) of the fault chart would apply.

Result

1. I have concluded that Economical is permitted to re-litigate the November 20, 2012 trial decision of the Provincial Offences Court in this arbitration.

2. I have concluded that rule 15 (2) is applicable as the incident did occur at an intersection.

Documents:

For the purposes of this preliminary issue hearing counsel provided the following:

1. The transcripts of the proceeding at trial before Her Worship Justice of the Peace L. Lauzon together with her reasons for judgment heard and delivered in Ottawa on November 30, 2012.

2. Transcripts of examination for discovery of Tyler Nesbitt in the civil court action *Maddocks v Nesbitt* evidence taken on October 4, 2014.

3. Transcripts of examination for discovery of Steven Maddocks in civil court action *Maddocks v. Nesbitt* evidence taken on October 8, 2014.

4. Agreed Statement of Facts together with 4 photographs: TheAgreed Statement of Facts are undated and unsigned.

In addition counsel for Economical provided an accident reconstruction report from Jenish Forensic Engineering dated April 7, 2014. In her submissions counsel for Jevco objected to the Jenish report at least for the purposes of this preliminary issue determination. Whether the report would be admissible at the full hearing is another issue. While I did review the Jenish report as counsel's objections came in after I had already received and reviewed those materials I did not find anything in the report to have any relevance to the decision I have been asked to render on the 2 preliminary issues.

Counsel made argument through written submissions only and there were no oral submissions made.

Facts:

The parties filed an Agreed Statement of Facts and those facts are reproduced below:

1. A motor vehicle accident occurred on June 25, 2012 on West Hunt Club Road in Ottawa at approximately 3:30 p.m.

2. Tyler Nesbitt was the driver of 2000 Buick Century insured by Economical.

3. Steven Maddocks was the driver of a 2005 Harley Davidson Electra Glide Classic motorcycle insured by Jevco.

4. The location of the accident is an entrance to several shopping plazas located on both the north and south sides of West Hunt Club Road. The named intersections nearest to the location of the accident are: Merivale Road and West Hunt Club Road to the east; and Cleopatra Drive and West Hunt Club Road to the west.

5. The plaza entrances on West Hunt Club Road where the accident occurred are controlled by traffic signals in all four directions on West Hunt Club Road.

6. West Hunt Club Road at the location of the accident has two straight through lanes in the eastbound direction, and three straight through westbound direction. There is a left hand turn lane in both eastbound and westbound directions.

7. The following documents show an accurate depiction of the location where the accident occurred:

    Location of the Incident View #1;
    Location of the Incident View #2;
    Location of the Incident View #3; and

Location of the Incident View #4.

8. Nesbitt was travelling in an eastbound direction. He entered the left hand turning lane and then immediately prior to the accident, was sitting in a stopped position beyond the white stop line, waiting to turn left.

9. Maddocks was travelling in a westbound direction. Immediately prior to the accident, he was travelling straight head in the farthest left through lane.

10. A collision occurred when the Nesbitt vehicle turn left as the Maddocks vehicle travelled straight ahead.

11. A trial took place before the Provincial Offences Court on November 30, 2012, in respect of whether Maddocks failed to stop for a red light contrary to section 144(18) of the *Highway Traffic Act*, identified as docket #0065615Z ("the Provincial Offences trial"). Jevco and Economical have a true copy of the transcript from the Provincial Offences trial.

12. Witnesses at the Provincial Offences trial included:

    Yannik Bernard. Constable, Ottawa Police Service (off-duty witness)
    Tyler Nesbitt, Economical's insured
    James William Coles, witness
    Maria Belyea, witness
    Bettina Schmidt, Constable with the Ottawa Police Service
    Steven William Maddocks, Jevco's insured

13. The charge against Maddocks pursuant to section 144(18) of the *Highway Traffic Act* was dismissed within the Provincial Offences trial.

14. Steven Maddocks and Stacey Johns commenced a civil action against Tyler Nesbitt in the Ottawa Superior Court of Justice (13-56822).

Attached to the Agreed Statement of Facts were 4 views of the area where the accident occurred.

I also reviewed very carefully the transcripts from the *Highway Traffic Act* proceeding from November 30, 2012 as well as the transcripts for the discovery of Mr. Maddocks and Mr. Nesbitt. To the extent that there are relevant facts that I rely upon from my review of those documents they will be referred to in my analysis and conclusions in relationship to each issue.

Issue 1: Re-Litigation

Position of the Parties

Jevco takes the position that the decision of the Justice of the Peace rendered on November 20, 2012 with respect to the charge against Mr. Maddocks under Section 144(18) of the *Highway Traffic Act* cannot be re-litigated in the context of the loss transfer arbitration claim. Jevco submits that this was a full trial where 6 witnesses were called to provide evidence with respect to the circumstances in which the incident occurred. Jevco points out that the witnesses included Economical's insured, Tyler Nesbitt, as well as Jevco's insured, Steven Maddocks, together with other independent witnesses and police officers.

Jevco submits that the Justice of the Peace after reviewing all the evidence concluded that Mr. Maddocks did not enter the "intersection" on a red light on the date of loss and did not convict him of the offence. Jevco submits that based on various statutes and case law that that finding is essentially sacrosanct and cannot be re-litigated in the context of the loss transfer arbitration as to do so would result in an abuse of process. Jevco submits that there are some key factors that I must consider when looking at the right to re-litigate. Jevco's position with respect to those criteria is set out below:

1. The abuse of process doctrine prevents the misuse of process by the re-litigation of previously decided facts. Re-litigation has a detrimental effect on the administration of justice and the facts in this case fall squarely within the criteria that would suggest re-litigation would meet the abuse of process test.

2. One key criteria to consider is the fairness of re-litigation. With respect to that issue Jevco submits I must look at who were the parties to the 2 proceedings and notes that while neither Jevco nor Economical were involved in the Provincial Offences trial that both their insureds gave evidence at that trial.

3. With respect to fairness I am to look at the nature of the initial proceeding and Jevco submits that I should take notice of the fact that there is an 83 page transcript of the trial where 6 witnesses were asked to give evidence and were examined both in chief and cross examination. Jevco also submits that the trial took place only 5 months after the incident so there is no reason to discount the reliability of the factual findings made.

4. Also with respect to fairness Jevco submits that I should look at the potential consequences of that proceeding. With respect to this issue is there any evidence to suggest that the stakes in the first proceeding were too minor as opposed to the stakes in the second proceeding which could be more significant? Jevco's position is that there was a significant incentive for Mr. Maddocks to defend the Provincial Offences trial as liability would be a significant factor for him as he had commenced a civil action against Economical's insured, Nesbitt, in the Ottawa Superior Court of Justice.

5. Jevco submits that I should look at the nature of the second proceeding when considering the issue of fairness. In that regard Jevco submits that an inconsistent decision may arise if the Economical were given the right to litigate the question of the colour of the light again and that such an inconsistent decision would threaten the overall integrity of the adjudicative process and the public confidence in the justice system.

Finally Jevco strongly puts forward the proposition that the trial judge in the *Highway Traffic Act* case made an express finding of fact that resulted in an acquittal for Mr. Maddocks and that that previously decided fact should not be re-litigated.

Economical's positon is that it should be allowed to lead evidence with respect to the circumstances giving rise to the accident on June 25, 2012 and that they not be limited in the presenting of that evidence to the findings of the trial judge in the *Highway Traffic Act* matter. In reviewing Economical's submissions it does not disagree with the law as set out by Jevco but disagrees as to how that law should be applied in the circumstances of this loss transfer case.

Economical submits that I should consider the following factors in determining whether it would be an abuse of process to re-litigate the red light issue:

1. While Economical agrees that Mr. Nesbitt and Mr. Maddocks gave evidence at the *Highway Traffic Act* proceeding Economical stresses that neither it nor Jevco were parties to the initial proceeding and that that is a significant factor in favour of allowing re-litigation.

2. Economical points out that a person who is acquitted in a criminal proceeding has not in fact proven their innocence. Rather what they have done is raised a reasonable doubt. In other words the prosecution has not established the fact beyond a reasonable doubt and therefore an acquittal must flow. Economical points out that in the loss transfer proceeding the burden of proof is not to prove the colour of the light beyond a reasonable doubt but rather on a balance of probabilities. Therefore there would be no inconsistency if a different result were reached in the loss transfer matter because the case would be decided on a different standard of review.

3. With respect to the potential consequences or stakes in the initial proceedings Economical points out that had Mr. Maddocks been found guilty of the *Highway Traffic Act* offence it would have resulted in a minor fine to Mr. Maddocks of somewhere between $200.00 and $1,000.00. Economical notes that the amount of the loss transfer being claimed by Jevco against Economical is $766,833.09. Economical submits that the difference is "stark and significant" favouring re-litigation.

Finally Economical submits that considering the above that the abuse of process doctrine will not apply because there was not a prior judicial determination on a balance of probabilities that Mr. Maddocks did not disobey a red traffic signal. Rather his acquittal was not based on such a factual finding but was as a result of the prosecution's inability to prove that factual finding beyond a reasonable doubt.

Both counsel provided extensive case law and an excellent review of the case law in their Factum all of which I have carefully considered.

Analysis and Conclusions on Re-Litigation

I have reached the conclusion that Economical does have the right to re-litigate the red light issue. I am somewhat uncomfortable using the term "right to re-litigate" as in my view Economical has not had an opportunity to litigate that issue at all. Nor am I convinced by the review of the materials that the findings of the Provincial Court judge in the *Highway Traffic Act* resulted in the conclusions that Jevco has put forward. I agree with Economical that the result of the *Highway Traffic Act* hearing was to conclude that the prosecution had not met the burden of proof and that the judge had a reasonable doubt as to the circumstances under which this accident occurred and specifically whether "Mr. Maddocks' motorcycle crossed the white line on a red light".

To understand my conclusions it is helpful to review some of the evidence and reasons from the Provincial Court trial.

The first place to start is with the section of the *Highway Traffic Act* that Mr. Maddocks was charged with. Section 144(18) of the *Highway Traffic Act* states as follows:

> "Every driver approaching a traffic control signal showing a circular red indication and facing the indication shall stop his or her vehicle and shall not proceed until a green indication is shown".

From a review of both the relevant section noted above and the reasons of the Justice of the Peace the real issue that she was asked to decide was whether the prosecution had proved beyond a reasonable doubt that Mr. Maddocks' motorcycle when it crossed the white line was crossing on a red light. She heard evidence from a number of witnesses and provided a detailed analysis as to what conclusions she drew from the evidence of those witnesses. It is important that some of the factors she considered when making her decision included the weather and the fact that it was raining, how the weather may have been a reason for Mr. Maddocks to speed towards the intersection, the location of the motorcycle and the car at the time of the impact and she also made reference to some issues with respect to visibility and the spray coming up from Mr. Maddocks' motorcycle. She says at one point that she is relying on 2 things with respect to her determination and one of those is "on the impact". (see page 79).

In addition the Justice of the Peace on a number of occasions within her reasons when commenting on the evidence of other witnesses and what evidence she does or does not accept comments on the burden of proof. For example in dealing with the evidence of Officer Bernard she notes that there was some discrepancies in his evidence and therefore states "That is basically fatal to his testimony. Clearly if there is doubt it has to go to the accused". (see page 80). In the course of her reasons the Justice of the Peace directs herself with respect to what she describes as the bottom line as to what she has to determine in order to provide a decision. She states and I quote:

> "The bottom line is in the totality of the evidence that I accept today, is there a reasonable doubt that the light was red or another colour".

In answering that question Justice Lauzon states "On the totality of the crown's witnesses I am left with a reasonable doubt as to colour of the light, whether amber or red, as the front of your motorcycle was crossing that stop line".

She goes on to say "You I am convinced (in reference to Mr. Maddocks) were gunning it, but I cannot say whether the light was amber or whether it was red at the time you decided to go for it, OK?".

In reviewing the totality of the judge's comments I do not conclude that she made a clear finding that the light was red when Mr. Maddocks motorcycle crossed the white line. Rather I conclude that she was left with a reasonable doubt as to whether that light was red or yellow.

That brings me to a consideration of the relevant case law and the test that counsel have so carefully laid out as to when it is improper to re-litigate issues because of an abuse of process. Both counsel agree that the lead case in this area is *Toronto (City) v Canadian Union of Public Employees Local 79* [2003] S.C.J. No. 63. In that case the Supreme Court of Canada considered whether a criminal conviction which is prima facie admissible in a civil proceeding under Section 22.1 of the *Ontario Evidence Act* ought to be permitted to rebutted by "evidence to the contrary" or whether it should be taken as conclusive by a subsequent judicial or quasi-judicial trier of fact. In that particular case a recreation instructor had been charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At a trial before judge alone he testified and was cross examined. The trial judge found that the complainant was credible and that the accused was not. A conviction was entered. There was an appeal launched and the conviction was confirmed on appeal. The City of Toronto later fired the individual after his conviction. He filed a grievance. At the arbitration hearing with respect to the grievance the arbitrator ruled that the criminal conviction was admissible evidence but not conclusive evidence. The arbitrator held that there was evidence introduced before him that rebutted the criminal conviction presumption and therefore concluded that the individual had been dismissed without cause. The Divisional Court quashed the arbitrator's ruling and the Supreme Court of Canada upheld that decision.

Justice Arbour who provided the decision of the court made a number of observations in upholding the Divisional Court decision and these observations have formed the criteria for consideration of when criminal convictions (or acquittals) can be re-litigated. These include the following:

1. When determining whether to re-litigate the doctrine of the abuse of process should be considered to ascertain whether re-litigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute.

2. When considering whether re-litigation should be permitted one should consider whether to re-litigate would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice.

3. It is improper to attempt to impeach a judicial finding by simply re-litigating a finding in a different forum.

4. Re-litigation should be avoided unless the circumstances dictate that re-litigation is necessary to enhance the credibility and the effectiveness of the judicial process of a whole.

5. There will be instances when re-litigation will enhance rather than impeach the integrity of the judicial system. One example is where fairness dictates that the original result should not be binding in the new context and/or where fresh new evidence previously unavailable conclusively impeaches the original results.

I have carefully reviewed the criteria set out by the Supreme Court of Canada in reaching my conclusion that fairness dictates that Economical has the right to "re-litigate". The factors that I have taken into consideration and case law relevant to private arbitrations versus criminal proceedings is outlined below.

The First place to start in my view is to compare the wording of the offence under the *Highway Traffic Act* that Justice Lauzon was asked to consider versus the test under the Fault Determination Rules (FDR) that I will be asked to consider in the loss transfer matter.

The key parts of Section 144(18) (already reproduced) is the specific reference to there being a red traffic light (circular red indication) and that the driver of the vehicle must stop when faced with that red light.

In the loss transfer case Rule 15(2) provides:

> "If the driver of automobile "B" fails to obey a traffic signal, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100% at fault for this incident".

Therefore with respect to Mr. Maddocks and his motorcycle I will be asked to determine whether he failed to obey a traffic signal. I am not being asked to determine whether he stopped prior to the white line when faced with a red traffic light. I agree with the submissions of Economical that under Rule 15 as cited above I can look at whether the light was red or yellow and whether Mr. Maddocks failed to obey either an amber or red traffic signal.

The second item that I considered was Rule 3 of the FDR which provides as follows:

> The degree of fault of an insured is determined without reference to;
>
> a) The circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; or
>
> b) The location on the insured's automobile of the point of contact with any other automobile involved in the incident.

Both Economical and Jevco agree that the case of *State Farm v Aviva* 2015 ONCA 920 requires an arbitrator in a loss transfer matter to determine fault pursuant to the FDR by considering the application of Rule 3. In other words when looking at the applicability and the liability that may arise under Rule 15(2) I cannot consider the circumstances in which the incident occurred including the weather conditions, road conditions, visibility or the location on the automobile of the point of contact. Tort law does not apply nor does the *Highway Traffic Act* law apply. Rather the scheme under Section 275 of the *Insurance Act* is (as noted by Justice Perell in *ING Insurance Company of Canada v Farmer's Mutual Insurance Company* [2007] O.J. No. 2150 (ONSC)) "to provide an expedient and summary method of reimbursing the first party insurer for payment of no-fault benefits from the second party insurer whose insured was fully or partially at fault for the accident". Generally this has been referred to by many private arbitrators and in appellate decisions as a form of "rough justice". I am quite sure Justice Lauzon would never consider applying rough justice to her consideration of whether or not Mr. Maddocks failed to obey a red traffic signal. Therefore I conclude that the type of evidence and what evidence I am able to consider in making a determination in this loss transfer case is quite different to the type of evidence that was lead and considered by the Justice of the Peace.

The third consideration for me was the burden of proof. There is no doubt that Justice Lauzon was swayed by the fact that she could only convict if there was evidence beyond a reasonable doubt that Mr. Maddocks did not stop for the red traffic light. Justice Lauzon was not satisfied that that test had been met. In the case that I will hear the burden of proof is on a balance of probabilities. That is quite a different test and is one item that in my view suggests that fairness dictates the right of both Jevco and Economical to fully canvas the evidence relating to the incident on June 25, 2012.

I also consider it to be a significant factor that neither Jevco or Economical were involved in the proceeding before Justice Lauzon. While each of their insureds may have given evidence that is not the same as the parties and their counsel having a full right to participate in the relevant evidence to be lead with respect to a loss transfer claim.

I do not find that allowing Economical to re-litigate would result in any inconsistencies as any result would be based on a different type of evidence, a different standard or proof and a different liability issue (*Highway Traffic Act* versus FDR).

Finally I agree with Economical that there is a stark and significant difference between the potential consequences in the initial proceeding versus the potential consequences in this proceeding. While I appreciate that the acquittal would be important to Mr. Maddocks particularly because of his civil trial the fact is that there would have only be a relatively minor fine had he been convicted. In this case there is close to $800,000.00 in dispute and in my view fairness dictates that Economical should have a full opportunity to canvas the evidence relating to the incident on June 25, 2012 in relationship to a loss transfer liability claim.

Lastly I do note that there seems to me to be a difference between a conviction in a criminal trial/*Highway Traffic Act* trial and an acquittal. I note the case of *Rizzo v Hanover Insurance* [1993] O.J. No. 1352 (Court of Appeal). In that case there was a question as to whether an acquittal with respect to arson could be admitted in a civil trial as to proof that the individual did not set the fire. The Court of Appeal held that the verdict of acquittal in a criminal trial is not admissible in a subsequent civil trial as to proof that the party did not commit the offence. The court held that the evidence regarding Mr. Rizzo's acquittal at his criminal trial on arson should not have been admitted at the subsequent trial of the civil action against his insurance company.

I also reviewed the case of *Polgrain as Executor on Behalf of Polgrain v Toronto East General Hospital* (2008) ONCA 42 a decision of the Court of Appeal. In that case a nurse had been acquitted on charges of sexually assaulting an elderly hospital patient. The estate of that patient subsequently brought a civil action against the nurse and the hospital for damages arising out of the alleged assault. The hospital moved to have the case dismissed on the grounds it was an abuse of process. Initially the motion was granted on the basis that it would be an abuse of process to allow a re-litigation of the criminal trial judge's determination that the assaults did not in fact occur. This was reversed on appeal. The court stated the following:

> "Ordinarily re-litigation in a civil forum of the facts underlying an acquittal does not engage these concerns because of the different burdens of proof. A finding in the civil case the defendant probably committed the criminal act of which he or she was acquitted does not undermine the credibility of a system that found there was reasonable doubt. Thus it is not a question of whether re-litigation has led to a more accurate result, the system contemplates that different results are possible because of different burdens of proof. Is the same result is reached in the subsequent civil proceeding, it may be argued

that there has been a waste of judicial resources, expenses to the parties that might have been avoided and hardship to the parties and witnesses. However, this is a tolerable consequence because of other competing principles, in particular access to the courts to pursue legitimate claims." (see page 24)

Finally the court said at paragraph 31:

"I start with other dimensions of fairness. A concern in this case is that there is no way for the appellant or any other party to the litigation to review the judicial findings upon which the hospital relies. An appeal is against the verdict not the reasons for the verdict."

The last case that I felt was relevant to my decision was the decision of the Court of Appeal in *Intact Insurance Company v Federated Insurance Company of Canada* (2017) ONCA 73.

The Federated case was a priority dispute between 2 insurers. Mr. Cadieux whose vehicle was insured by Intact had been convicted of driving without insurance at the time of the accident contrary to section 2(1) of the *Compulsory Automobile Insurance Act* R.S.O. 1990 c.25. In a priority dispute Intact took the position that it was not the priority insurer for various Statutory Accident Benefit claims arising from injuries in that accident because Mr. Cadieux's policy had been cancelled prior to the date of loss. Intact took the position that Federated could not re-litigate that issue because of Mr. Cadieux's conviction and claimed the applicability of the abuse of process doctrine. At first instance the arbitrator took the position that Federated could lead that evidence. That decision was overturned on an appeal to Justice Diamond but the arbitrator's decision was reinstated by the Court of Appeal.

The Court of Appeal held that Federated as the party seeking to re-litigate the insurance status of Mr. Cadieux had the onus of demonstrating that re-litigation would not in the circumstances amount to an abuse of process. Similarly I find that Economical had the burden of proof in this case and I am satisfied that they met that burden of proof.

The Court of Appeal went on to say fairness strongly dictated that Federated should have an opportunity to litigate the question as to whether Mr. Cadieux was insured at the time of the accident. The court felt that that would not result in any unfairness to Intact. They noted that the re-litigation was in the context of a private arbitration between insurers and that would have no negative effect on the integrity of the overall judicial process and in fact would enhance that integrity by generating a more reliable result. The same factors apply in my view to the loss transfer process. I therefore conclude that Economical has met its burden of proof that the abuse of process doctrine does not apply to the circumstances of this case that I have outlined and that fairness dictates that Economical has a right to lead evidence as to the whether Mr. Maddocks failed to obey a traffic signal contrary to 15(2) of the FDR.

Issue 2: Did the Incident of June 25, 2012 Occur at an Intersection?

Facts

According to the Agreed Statement of Facts the location of this accident occurred at West Hunt Club Road where it intersects with an unnamed road. The nearest named roads are to the east Merivale Road and to the west Cleopatra Drive. The area where this incident occurred is where West Hunt Club Road which travels east and west intersects with an unnamed road that runs north and south.

There are traffic signals that cover all 4 directions at the area where the accident occurred.

West Hunt Club Road in this location has 2 straight through lanes in the eastbound direction and 3 straight through in the westbound direction. There is also a left hand turn lane in both the eastbound and westbound directions. In looking at the photographs provided by counsel both east, west, north and southbound lanes are marked with white lines. In addition the West Hunt Club Road and the unnamed road have clearly marked stopped lines where the traffic signals are located. However the south side of this area where the road intersects while it does have a clearly marked white stop line there do not appear to be any lane markings delineating the roadway. The lane markings appear to be limited to the other side (northside).

The Google map that was attached to the Agreed Statement of Facts (there were 4) shows that on the north side of this area the road provides access to a couple of parking lots on the left which appear to service the LCBO and Upper Room Home Furnishings. However in order to access the parking lots one must exit the roadway and make a left turn into those parking lots. On the right hand side or west side of that same roadway is another series of parking lots. Again to get into those parking lots one must exit the roadway, enter the access road to the parking lots and then choose your parking spot. These parking spaces appear to service a Starbucks, a Burger King and a Boston Pizza.

The south side of the area appears to be less of a roadway and more a parkway or a driveway that when you reach the end of you have to either proceed forward into a parking space, turn right into a parking lot or left which will then take you to a further parking lot that services East Side Marios and a few other stores. There is a very different appearance between what appears to be a roadway on the north side and what appears to be more an entrance, driveway or parkway on the south side.

I did review the transcripts of Tyler Nesbitt from the civil action. He describes the northerly roadway that he was intending to turn on as a road with a set of lights. Mr. Maddocks in his examination for discovery does not provide any description at all with respect to what type of roads these are. However generally throughout both examinations for discovery this area is referred to as an intersection.

Position of the Parties

It is Jevco's position that the area where the unnamed road and West Hunt Club Road intersect and where the accident of June 25, 2012 occurred is not an intersection under the fault determination Rules and specifically Rule 15. Rule 15 applies where "an incident occurs at an intersection with traffic signals". Jevco accepts that an incident occurred and that there was traffic signals but takes the position that this was not an intersection.

Jevco submits that I should look to the definition under the *Highway Traffic Act* to assist me in determining what constitutes an intersection. Jevco points to Section 20 of the *Highway Traffic Act* "an intersection is where 2 or more **highways** join one another an angle". Jevco further submits that the unnamed road as well as West Hunt Club Road have to be highways for Section 15 to apply. Jevco accepts that West Hunt Club Road is a highway but submits the unnamed road is not. Jevco relies on the definition under the *Highway Traffic Act* and submits that the unnamed road is not a street, avenue, parkway or driveway which is intended for or used by the general public for the passage of vehicles.

Jevco particularly relies on the case of *Gill v Elwood* [1970] 2 O.R. 59 where they submit the Court of Appeal held that a shopping centre plaza that is mainly a parking lot for the use of people who have business in the stores within the plaza does not constitute a highway.

Jevco submits in accordance with that case that where access is for the limited purpose of parking that the roadway providing that access would not constitute a highway. While Jevco admits that this is not a privately owned parking lot they say by analogy I should conclude that the unnamed road that is for the purpose of accessing parking lots to service the stores as outlined above results in the unmarked road not constituting a highway.

Finally Jevco submits that even if one does not rely strictly on the definition under the *Highway Traffic Act* that in common parlance an intersection is a place where 2 or more roads intersect and Jevco submits that the unnamed road is not in fact a road.

Economical takes the position that the location where the accident occurred is in fact an intersection so that Rule 15 and more specifically 15(2) would be applicable. Economical submits that I should not restrict myself to the definition of the *Highway Traffic Act* and looking at what is or is not an intersection noting that such a limited interpretation would not be consistent with the rough and ready nature of the loss transfer scheme.

Economical submits that a member of the public looking at this particular location would describe it as an intersection and that common sense dictates that it must be an intersection. They point to the traffic signals in all 4 directions as well as pedestrian crosswalks in all 4 directions.

In the alternative Economical submits that even if one looks at the definition of intersection under the *Highway Traffic Act* that this particular location would still be considered an intersection. Economical submits that the unnamed road constitutes a highway. Economical submits that the roadway in question leads to shopping plazas and the road in itself is not used for parking. Economical notes that this roadway is one the public uses to access parking lots for the plazas and stores but that they can also access other connecting roadways. Further Economical submits that the markings on the roadway clearly indicate that it is meant for vehicular traffic. They note on the northbound side there is a yellow centre dividing line as well as a clearly marked left turn lane. Economical submits that there is no requirement that a roadway has to be named to be a highway.

Finally Economical relies on the decision of *State Farm Mutual Automobile Insurance Company v Economical Mutual Insurance Company* (private arbitration decision Shari Novick March 31, 2017) where she concluded that in the context of road and highways that the plain meaning of the word "intersection" simply requires 2 things to meet and cross at a certain point.

Analysis and Conclusion

I have concluded that the location where this accident occurred constitutes an intersection for the purposes of Rule 15(2) of the fault determination rules.

As I found in the decision *State Farm Mutual Automobile Insurance Company v Belair Insurance Company Inc.* (private arbitration decision October 16, 2016) under the FDR I find that the word intersection should be interpreted by looking at what that terms means in common parlance rather than by specific reference to the *Highway Traffic Act*. While I find the *Highway Traffic Act* definition helpful it is not definitive.

The *Highway Traffic Act* defines an intersection as follows:

> "Intersection" means the area embraced with the prolongation or connection of the lateral curve lines or, if none, then of the lateral boundary lines of 2 or more highways that join one another at an angle, whether or not one highway crosses the other.

To understand the definition under the *Highway Traffic Act* of intersection one must also understand what constitutes a highway under the *Highway Traffic Act*. It is defined as follows:

> "Highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof.

I also looked to the new shorter Oxford English Dictionary: Oxford University Press 1993 which defines an intersection as "a place where 2 or more roads intersect or form a junction".

There is no definition under the FDR as to what constitutes an intersection.

In concluding that where this accident occurred constitutes an intersection I note the following facts:

1. All 4 corners of where these roads intersect are governed by traffic lights.

2. Both parties agree that West Hunt Club Road is a highway.

3. The northerly side of the unnamed road is clearly an access road from which cars travelling it can branch off to the left or the right of the road in order to access a variety of parking lots and stores. This part of the road is clearly marked with a yellow line and for cars travelling in the southerly direction there is a clearly marked left turn lane and straight through lane. These clearly indicate that the north side road is for automobile travel.

4. Neither the northbound portion of the unnamed road or the southbound portion of the unnamed road are in and of themselves parking lots.

5. I note that Cleopatra which is to the west of this unnamed road on the north side is very similar in nature (from the Google map pictures) to the unnamed road. It seems to provide similar access to stores and parking lots as does the unnamed road but simply further to the west.

6. The southbound side of the unnamed road is more in the nature of a driveway entrance to various parking lots and stores. If one proceeds straight on the southbound portion of this unnamed road it appears to end at the most southerly point in one of the parking areas that is available within the plaza.

In reviewing the photographs and the facts as outlined above there appears to be no other conclusion that the area where this accident occurred in ordinary parlance would be considered an intersection by any member of the public who might be asked to describe this particular location.

I am also satisfied that if I were to only apply the *Highway Traffic Act* definition of intersection to this location that it would still be an intersection.

I am satisfied that this unnamed road is on the south side a driveway and on the north side is a street and that both sides are intended for and are used by the general public for the passage of vehicles. I do not agree with Jevco that the evidence suggests that either the north or the south side of this unnamed road is for the limited purpose of parking. Both sides clearly provide passage to numerous stores and a variety of parking lots. Both are transportation

routes that are designed to get members of the public in their motor car from one location to another.

Both counsel made reference to the case of arbitrator Samis: *TD Home and Auto Insurance Company v Wawanesa Mutual Insurance Company* (June 3, 2016). That case had similar issues and Arbitrator Samis had to determine whether or not there was an intersection under Rule 13. In that case an individual was operating a snowmobile on a trail when it was struck by a truck proceeding on an access road. Arbitrator Samis felt that in the circumstances of his case it was not unreasonable to look at the *Highway Traffic Act* definition of intersection "as a source for the use that term under the fault determination rules. He felt the *Highway Traffic Act* was of assistance in understanding what the ordinary parlance of that word meant. He also felt it would be insufficient to adopt a rule of interpretation under the *Insurance Act's* fault determination rules which would be at odds with the rule of interpretation under the *Highway Traffic Act* as both statutes address the consequences of what happens to the same vehicles in the same place.

Arbitrator Samis in his case concluded that for there to be an intersection there must be a highway. For there to be a highway he felt there must be an intention for use by the general public or use by the general public for the passage of vehicles. He concluded that the trail and the access road were not highways and therefore that the place where the accident occurred was not an intersection.

I agree with Arbitrator Samis' conclusion that in certain cases it is appropriate to look at the *Highway Traffic Act* definition to assist in the understanding of the definition of intersection for cases involving the FDR. However it is my view that that is not the only definition that one should rely upon. The FDR do not import into it the *Highway Traffic Act* definition of intersection. In fact the FDR are silent as to what constitutes an intersection.

Arbitrator Samis' case is quite distinguishable from the case at hand. His case involved a trail where a snowmobile was operating and an access road with a truck. In this particular case we have an acknowledged highway and an unnamed road one side of which is clearly intended for use by the general public and could be described as thoroughfare within the plaza and the other side of which might more properly described as a driveway but still a driveway used by the general public for the passage of vehicles and not solely a driveway into a parking lot.

For those reasons I conclude that the accident of June 25, 2012 occurred at an intersection and on that basis Rule 15(2) is applicable to the circumstances of this case.

Order:

1. I order that Economical is permitted to re-litigate the Provincial Offences court trial acquittal in the context of this loss transfer arbitration.

2. I find that the area where the accident occurred constitutes an intersection under Rule 15 of the fault determination rules.

Costs:

Each party requested costs of this preliminary issue hearing. While Economical has been entirely successful in this preliminary issue hearing I will reserve my finding with respect to costs until the full arbitration has been completed.

DATED THIS 29th day of June, 2018 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP