IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, and REGULATION 664, s. 9

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM MUTUAL INSURANCE COMPANY

Applicant

- and -

DOMINION OF CANADA GENERAL INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

William J. Scott - counsel for the Applicant

Brian C. Atherton - counsel for the respondent

ISSUES:

1. Is the applicant entitled to proceed with the arbitration or is it barred for failure to commence the arbitration within the limitation period?

2. If the applicant is entitled to proceed, what fault determination rules apply and what is the respective liability of each party for payment of accident benefits to or on behalf of Mr. Quach?

RESULT:

1. The applicant is barred from proceeding with the arbitration for failure to commence the arbitration within the limitation period.

HEARING:

This matter was heard before me, M. Guy Jones, arbitrator, on June 26, 2003 in the city of Toronto, in the province of Ontario. Written submissions were received from the parties on August 27, October 29, November 6, 2003, and February 2, 10 and 12, 2004.

FACTS:

This arbitration arises out of an accident involving a Mr. Van Dong Quach, who was injured in a motor vehicle accident which occurred on March 10, 1992. Mr. Quach was the owner and driver of a motor vehicle insured by State Farm Automobile Insurance Company ("State Farm"). It came into collision with a heavy commercial motor vehicle insured by Dominion of Canada General Insurance Company ("Dominion"). State Farm paid accident benefits to Mr. Quach. The first payment of benefits was made on May 4, 1992. State Farm now takes the position that it is entitled to be reimbursed for the accident benefits payments made pursuant to the loss transfer provisions of the Insurance Act. R.S.O. 1990, c. I. 8 and Regulation 664.

Section 275 of the Insurance Act provides:

> The insurer responsible under sub section 268 (2) for the payment of no fault benefits to such classes or persons as may be named in the Regulations is entitled, subject to such terms, conditions, …to indemnification in relation to such benefits paid by it from the insurer's of such class or classes of automobiles as may be named in the Regulations involved in the incident from which the responsibility to pay the no fault benefits arose.

The Regulations referred to in section 275 of the Insurance Act are part of Regulation 664. Section 9 (3) of that Regulation states:

> A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving the statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.

The intent of the loss transfer provisions is to equalize, to some degree, the cost of providing accident benefit insurance to different kinds of insureds. The loss transfer provisions recognize that certain motor vehicles, when involved in an accident, will often result in more significant personal injury and payment of larger accident benefits than with other vehicles. Motorcycles

and heavy commercial vehicles are examples of such motor vehicles covered by the loss transfer provisions. In this particular case there is agreement between the parties that a heavy commercial motor vehicle was involved in the collision, and therefore, all things being equal, the loss transfer provisions would apply and it would then be necessary to apply the fault determination rules in order to determine the respective liability of the two insurers.

Before examining the facts of the accident and which fault determination rules apply, it is necessary to deal with a number of preliminary matters which have been raised by the parties. These may be summarised as follows:

1. When did the cause of action arise?

2. What is the applicable limitation period?

3. What constitutes compliance with the limitation period and did the applicant comply with it in this matter?

4. Is there a "rolling limitation period" in loss transfer matters, and if so, what are the implications in this particular case?

I will deal with each issue separately.

1. <u>When did the cause of action arise?</u>

In my view, the cause of action commences when the payment of the accident benefit is made. Counsel referred me to the decision of Mr. Justice Sommers in <u>York Fire & Casualty Insurance</u>

Company vs. Co-operators [1999] O.J. No. 4172, an appeal from the arbitration award of the Honourable R. E. Holland, dated July 20, 1999.

That matter involved a loss transfer issue and a question of from what date a limitation period would run. Arbitrator Holland decided that the appropriate date from which the limitation would run was the date of payment made by the insurer to the insured. He specifically rejected the approach taken by another arbitrator, that the limitation period would only commence when the insurers were "unable to agree" upon which insurer was ultimately responsible for payment of the benefits.

On appeal, Mr. Justice Sommers held that:

> The right of the insurer to an arbitration to determine the amount of loss transfer payments does not arise until there has been disagreement between it and the third party insurers. The right to reimbursement, however, arises immediately upon payment by it to its' insured.

I am in agreement with the reasoning of Mr. Justice Sommers. The first payment was made on May 4, 1992 and accordingly the limitation period began to run on that date.

2. What is the applicable limitation period?

The parties have agreed that section 45(1)(g) of the Limitations Act, 1990, R.S.O. c. L 15 applies and that the applicable limitation period is six years after the cause of action.

Section 45(1)(g) states that:

> The following actions shall be commenced within and not after the times respectively hearinafter mentioned . . .
>
> (g) And action for trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander within six years after the cause of action arose.

Mr. Justice Sommers in York Fire held that this section applied to loss transfer matters and I am in agreement with him in this regard.

3. What constitutes compliance with the limitation period and did the applicant comply with it in this matter?

A key element of the dispute between the parties is the question of when, if at all, State Farm complied with the provisions of the Limitations Act. Since the first payment was made on May 4, 1992, State Farm would have had to comply within six years of that date.

The parties spent a considerable amount of time during the hearing and later in written submissions dealing with the issue of what constitutes compliance with the Limitations Act. In

order to deal with these issues, it is necessary to look at both the Insurance Act and the Arbitration Act.

Section 275(4) of the Insurance Act provides that:

> If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the Arbitration Act.

Section 2(3) of the Arbitration Act provides that:

> This Act applies, with necessary modifications to an arbitration conducted in accordance with another Act, unless that Act provides otherwise; however in the event of conflict between this Act and the other Act, or Regulations made under the other Act, the other Act or the Regulations prevail.

In order to determine how an arbitration may be commenced, we must turn to section 23 (1) of the Arbitration Act which states:

> An Arbitration may be commenced in any way recognized by law, including the following:

1. A party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement…

3. A party serves on the other parties a notice demanding arbitration under the agreement.

Counsel for the applicant argues that an arbitration can be commenced by serving a notice demanding arbitration. He notes that there is no prescribed form for this notice and so the transferor will have complied with the limitation period if it serves notice demanding loss transfer within six years of the date of payment.

Counsel for the applicant points to a letter from Mr. Bruce Johnston of State Farm to Dominion of Canada, dated March 27, 1995 (Exhibit 2, Tab 5) which states:

> "Enclosed please find a notification of loss transfer form completed by the writer. State Farm Insurance will be looking toward your company for a loss transfer payment above the $2,000 deductible."

Enclosed with the letter was a form entitled "Notification of Loss Transfer", containing information regarding the insured party, benefits paid, reference to the applicable fault determination rule, etcetera. The form is signed by Mr. Johnston on behalf of State Farm and dated March 27, 1995.

The letter was followed by subsequent letters from State Farm to Dominion dated September 19, 1995 and February 15, 1996. There is no suggestion that Dominion did not receive the letters, although they may have ignored them. The February 15, 1996 letter included a statement that:

> "if we do not hear from you within sixty days then we will pass the file on to our defense counsel and look toward your company for the costs"

In addition, on March 26, 1998, or approximately five weeks before the running of the limitation, Mr. Martin Moore, a claims specialist with State Farm, wrote to the solicitor representing the respondents stating:

> "so that I may forward my loss transfer claim, I would ask that you kindly provide me with the name, address, phone number and claim policy number of the adjuster you report to at Dominion of Canada"

What then followed was a series of letters back and forth discussing the merits of the loss transfer claim.

Counsel for the respondent argues that the arbitration was not commenced until the "Notice of Application" was served upon the respondent on or about December 20, 2000. That document is a formal Application before the Ontario Superior Court of Justice, issued by the Court on that date.

The respondent's arguments may be summarised as follows:

1. Section 23 (3) of the Arbitration Act requires that there first be an "agreement" in order for the arbitration to be commenced under that sub section and there was no such agreement.

2. If there was such an agreement, there was no "Notice Demanding Arbitration" as required by Section 23 (3).

Dealing first with the issue of whether there was an "agreement" as contemplated by Section 23(3) of the Arbitration Act, the Court in Gore Mutual vs. Markel Insurance Company [1999] O.J. No. 2688, dealt with a similar situation. In that case, the applicant attempted to initiate a priority dispute pursuant to Regulation 283/95 and the Arbitration Act by serving a "Notice Demanding Arbitration". The respondent argued that the only way that the arbitration could be initiated would be to bring the matter before the Court. Mr. Justice Archibald rejected that position, and referring to the "agreement" in section 23(3) of the Arbitration Act, stated, " it cannot be said that the agreement in the Act is other than the relevant provisions of the Insurance Act and the Regulation in question."

In an Arbitration decision written by myself, CGU vs. Canada Life Casualty Insurance Company and Liberty Mutual Group (unreported decision dated February 27, 2004), I agreed with Justice Archibald that notice given pursuant to the Regulation and Act constitutes initiation of the arbitration in priority disputes. The priority dispute resolution process was enacted by way of Regulation after consultation with the insurance industry. It was developed as simple, expeditious and relatively inexpensive way of determining who the appropriate insurer was for the purposes of paying accident benefits. There is no alternative way of resolving these disputes.

They must proceed to arbitration pursuant to the Regulation and the Arbitration Act. Thus, in priority disputes, Regulation 283/95 is, in effect, the agreement to arbitrate.

The situation is similar in loss transfer matters. The dispute resolution system was worked out in consultation with the insurance industry. There is only one way to resolve the disputes – through arbitration pursuant to the Insurance Act and the Arbitration Act.

Section 275 of the Insurance Act states:

> (1) the insurer responsible under sub section 268 (2) for the payment of no-fault benefits to such classes of persons as may be named in the Regulation is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or such classes of automobiles as may be named in the Regulations involved in the incident from which the responsibility to pay no-fault benefits arose.
>
> (2) indemnification under sub section (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules . . .
>
> (4) if the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the Arbitration Act . . .

Thus, the agreement is, in effect section 275 of the Insurance Act.

The question then becomes whether or not the correspondence sent by State Farm in 1995 and early 1996 was sufficient to constitute commencement of the arbitration. In Gore Mutual vs.

Markel Mr. Justice Archibald found that two letters written by the Applicant's counsel initiated the arbitration. The first letter stated:

> "Pursuant to Ontario Regulation 283/95 please find enclosed the Gore's Notice of Application to Dispute Between Insurers dates August 25, 1997.
>
> We would appreciate it if Markel would appoint counsel so that we might proceed with a private arbitration in this matter concerning which insurer should be responsible for payment of accident benefits."

The second letter stated:

> "In this case, the claimant was the owner of the tractor unit which was insured with Markel. We have reviewed the motor vehicle liability card, and it appears that the claimant himself was a named insured with Markel. Since the claimant was a named insured with Markel, and was also the occupant of the Markel insured vehicle, the priority rules indicate that Markel is primary…Under the circumstances, we would appreciate your confirming that Markel will assume carriage of the accident benefit claim, and reimburse Gore in relation to its' payout."

Mr. Justice Archibald held that the two letters constituted clear notice that an arbitration should be held. If we then turn to our case, on March 25, 1995, the applicant sent a Notification of Loss Transfer Form along with a letter requesting loss transfer payment. It sets out that there is a claim for loss transfer and that State Farm is demanding that Dominion of Canada pay it. In this regard it is similar to the Notice of Dispute Between Insurers Form used in priority disputes.

State Farm followed this up with further letters to Gore on September 19, 1995 and February 15, 1996. In the latter letter State Farm stated:

> "please advise the writer of your intentions with respect to our Notification. If we do not hear from you within sixty (60) days then we will pass this file onto our defence counsel and look towards your company for the cost"

Subsequent to this letter it would appear that little was done with regard to the loss transfer issue until a representative of State Farm wrote a lawyer acting for Dominion in related matters on March 26, 1998 stating:

> "so that I may proceed with my loss transfer claim, I would ask that you kindly provide me with the name, address, phone number, and claim/policy number of the adjuster you report to at Dominion of Canada."

On March 31, 1998, the adjuster in charge of the matter for Dominion, Ms. Less, wrote to State Farm indicating that she was handling the file and requesting a copy of State Farm's file as Dominion had almost no documentation on the loss.

On April 20, 1998, or roughly two weeks before the running of the limitation period, State Farm wrote Dominion enclosing the accident benefit file and requesting that Dominion pay an amount representing payment for the loss transfer claim. Nothing further occurred prior to the running of the limitation period.

While I am sympathetic to the applicant's position, in my view what transpired falls short of commencing an arbitration. The mere providing of the Notification of Loss Transfer form does

not constitute commencement of the arbitration. It simply advises the recipient that the insurer who is paying the claim believes that the recipient is responsible because of the loss transfer regulations. The letter of February 15, 1996 certainly indicates that State Farm wants to know what Dominion's position is and that if they don't hear from them within sixty days they will forward their file to their counsel and look to Dominion for the cost. Very little would appear to have occurred with regard to the loss transfer issue until just before the six year mark when a request for payment was made once again. While State Farm did express a desire to have Dominion pay, pursuant to the loss transfer provisions, it did not, in my view, set out its demand to arbitrate with sufficient certainty to constitute commencement of the arbitration.

4. Is there a "rolling limitation period"?

Counsel for the applicant submitted that a "rolling limitation period" applies in these matters and that, in essence, a new limitation period begins each time there is a payment of the accident benefits. In support of this position, he refers to the case of Christian vs. Zurich [2002] O.J. No.1014 and York Fire vs. Co-operators, cited above.

In Christian, Mr. Justice Spiegel, in a pre O.M.P.P. income replacement benefit case, held that there was a new cause of action which arose each time a payment was due and the limitation period ran from the date each payment was due.

It is important to note that the Christian decision involved what was, in essence, a contractual dispute between the insurer and the insured. In our case there is a dispute between insurers that is not based on contract, but on a statute. In my view, the reasoning in Kirkham vs. State Farm

Mutual Automobile Insurance Company [1998] O.J.No. 6459, a divisional court decision of Mr. Justice O'Leary is applicable. In that case, dealing with an O.M.P.P. matter, which was subsequent to the legislation Mr. Justice Spiegel was dealing with, the court found that there was no "rolling limitation period". I note that leave to appeal to the Court of Appeal on this issue was denied. In my view, it would make little sense to have a situation where there was no rolling limitation period for the insured when claiming accident benefits, but then to allow a rolling limitation period in the loss transfer situation where there is a six-year limitation period.

Counsel for the applicant also referred to the decision of Mr. Justice Sommers in York Fire in support of the argument that there is a rolling limitation period. The Court does refer to the decision of Arbitrator Holland who stated:

> The appropriate date from which the limitation period would start to run was the ` dates on which payments were made by York Fire to its' insured.

I do not read the Court's decision in York Fire to mean that there is a rolling limitation period in loss transfer cases. The court was dealing with what the applicable limitation period was and when it commenced, rather than whether or not there was a rolling limitation period.

Counsel for both parties spoke of various hypothetical situations that could result in unfairness or injustice if there were or were not a rolling limitation period. I accept that there are certain dangers that could develop if there were or were not a rolling limitation period. Counsel for the applicant has referred me to the case of Kansa General Insurance Company vs. Mordan and

Helwig Limited [2001] 57 O.R. (3rd) 58, a decision of Mr. Justice Sutherland where the court held that an admission of liability is not necessarily sufficient to stop an insured from relying on a limitation period. Counsel for the applicant suggests that this case may be used as the basis for the argument that a loss transfer insurer would not be estoppped from relying on a limitation period merely because it had paid for the first six years of a claim. While I agree that such an argument could be made, I suggest that it would be a very risky course for an insurer to take.

A rolling limitation period is, in my view, inconsistent with one of the purposes of loss transfer provisions. They were created, in part, to allow for the relatively quick, efficient and inexpensive resolution of disputes between insurers as to which insurer is to pay certain benefits. To allow for situations where a hearing as to how an accident occurred, and therefore the applicability the various fault determination rules, more than six years after the accident, and indeed ten or twenty years thereafter, is not desirable.

Application of the Fault Determination Rules:

While I have found that State Farm is barred from recovering in light of their failure to comply with the limitation period, in the event that I am in error in this regard, I will deal with the application of the fault determination rules.

Counsel for the applicant argues that while its' insured was making a left turn at an intersection, and therefore it would be 100 percent at fault pursuant to Rule 12(5), the heavy commercial vehicle insured by Dominion went through a red light which would make Dominion 100 percent

responsible, in accordance with Rule 15(2) of the fault determination rules. It therefore takes the position that in accordance with Rule 4(2) each side should be held fifty percent at fault.

The respondent takes the position that the injured party, Mr. Quach was making a left turn at the intersection and therefore rule 12(5) of the fault determination rules apply and Mr. Quach should be held 100 percent at fault and therefore Dominion should pay the accident benefits in their entirety.

It also argues, in the alternative, that if the heavy commercial vehicle disobeyed a stoplight, then Mr. Quach may have also violated the traffic signal and therefore section 12(5) of the fault determination rules apply.

While the police report and the accident investigator's field notes were filed at the arbitration, the only witness to the accident to actually testify at the hearing was Mr. Joseph Duguay.

Mr. Duguay was driving northbound on Kipling Avenue approaching Queensway. He testified that as he approached the intersection the light for northbound traffic went yellow. Mr. Duguay began to pump his brakes in order to stop and also to warn the truck behind him that he was stopping. Mr Duguay testified that he pumped the brakes in part because he was concerned that the truck might strike him in the rear if he simply braked.

Mr. Duguay further testified that at the moment that he came to a stop the light for the northbound traffic was red. At that time the truck was still behind him, however, it subsequently swerved around Mr. Duguay, missed the back of Mr. Duguay's vehicle by inches and drove into

the intersection. The truck then hit Mr. Quach's vehicle which had been Southbound on Kipling and completing it's left turn onto Queensway.

On cross-examine by counsel for Dominion, Mr. Duguay indicated that when he stopped the front of his vehicle was into the pedestrian crosswalk on the south side of the intersection. He was very clear, however, that when he stopped, the rear of his vehicle was not in the intersection and since the truck was still behind him when he stopped, and the light was red at that time, the truck must have entered the intersection on a red light.

Despite vigorous cross-examination of Mr. Duguay on this point, Mr. Duguay remained very firm that the truck entered the intersection on a red light. While the accident occurred approximately ten years before he testified, I found Mr. Duguay to be a forthright and honest witness. He testified in a straightforward and consistent manner. He had no reason to colour his testimony. Accordingly, I find that the heavy commercial vehicle insured by Dominion entered the intersection on a red light and that rule 15(2) applies.

Counsel for Dominion has suggested that if the truck entered on a red light, then Mr. Quach also violated rule 15(2) in that he violated the red light. There was no evidence lead at the hearing to support this proposition. While he was turning left and was hit by the truck, this does not necessarily mean that he disobeyed the light.

In light of the above, I find that the Dominion of Canada motor vehicle disobeyed the red light and rule 15(2) applies. Mr. Quach was making a left turn at the intersection and therefore rule

12(5) applies. In accordance with rule 4(2) each insured would therefore be deemed to be fifty percent at fault for the accident. In light of my findings with regard to the limitation period, State Farm is, however barred from recovering the monies.

COSTS

If the parties are unable to agree upon the issue of costs, I may be spoken to.

Dated this _____ day of March, 2004 in the city of Toronto.

_____

M. Guy Jones
Arbitrator