COURT FILE NO.: 04-CV-266015CM2
DATE: 20041207

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: State Farm Mutual Automobile Insurance Company v. Dominion of Canada General Insurance Company

BEFORE: Justice Backhouse

COUNSEL: *Philippa Samworth*, for the Applicant
Brian Atherton, for the Respondent

DATE HEARD: December 3, 2004

ENDORSEMENT

[1] This is an appeal from an award of Arbitrator Jones wherein he concluded that the applicant had failed to commence an arbitration within the applicable limitation period.

[2] Because this is an appeal and not a judicial review, it seems to me that correctness is the standard in any question of law; deference, absent manifest error or misapprehension, is the standard on questions of fact. As for mixed questions of fact and law, because the facts are not in dispute, I have applied to the questions of mixed fact and law a standard correctness.

[3] In my opinion, the arbitrator was correct in each conclusion which he reached and his reasons were substantially correct.

[4] On the issue of apportionment between insurers, there is not a rolling limitation period. There is no reason why apportionment, which depends on respective fault, should not be decided once. Subsequent payments to a claimant may give rise to questions of appropriateness but have no effect on apportionment between insurers.

[5] As for whether the arbitration was commenced in a timely way, in my opinion, the two letters relied upon, do not satisfy s.23(1) of the *Arbitration Act*, even on a generous reading. There is a difference between advising a party that a claim will be made and commencing an arbitration to enforce the claim.

[6] The appeal is dismissed. The parties may make brief written submissions on costs.

Backhouse, J.

DATE: December 7, 2004

DATE: 20051222
DOCKET: C43653

COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., GOUDGE AND CRONK JJ.A.

B E T W E E N :	)	
	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	)	**Philippa G. Samworth for the appellant**
	)	
Appellant	)	
	)	
- and -	)	
	)	
DOMINION OF CANADA GENERAL INSURANCE COMPANY	)	**Brian C. Atherton for the respondent**
	)	
Respondent	)	
	)	
	)	**Heard: December 15, 2005**

On appeal from the judgment of Justice Nancy L. Backhouse of the Superior Court of Justice dated December 7, 2004.

BY THE COURT:

[1] The issue in this appeal is whether the limitation period for arbitrating a dispute between insurers over indemnification under s. 275 of the *Insurance Act*, R.S.O. 1990, c. I-8, (the Act) commences with the first benefit paid for which indemnification can be claimed, or whether a new limitation period arises with each subsequent payment.

[2] Backhouse J. found in favour of the former and upheld the award of Arbitrator Jones to the same effect. In our view, this is in error and the latter conclusion is the proper answer. We would therefore allow the appeal from the arbitrator and reverse his finding that the indemnification claim before him was time barred.

[3] The motor vehicle collision in this case occurred on March 10, 1992. The first accident benefit payment was made to the occupant of the car by the appellant on May 4, 1992. Section 275 of the Act entitled the appellant to indemnification from the respondent, the insurer of the other motor vehicle. However, the appellant did not commence the arbitration process necessary to settle the dispute with the respondent over

indemnification within six years after May 4, 1992, although the appellant made a number of benefits payments after that date.

[4] In this case, it is common ground that the arbitration must be commenced within six years after the cause of action arose as required by the *Limitations Act*, R.S.O. 1990, c. L-15.

[5] The cause of action here is the entitlement to indemnification given by s. 275(1) of the Act. It reads:

> 275. (1) *The insurer* responsible under subsection 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations *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 classes of automobiles* as may be named in the regulations *involved in the incident* from which the responsibility to pay the statutory accident benefits arose. (Emphasis added.)

[6] This section creates a statutory cause of action. There is therefore no reason to apply the principles of limitation that have been developed in the common law of torts.

[7] The section also leaves the clear implication that a cause of action arises with every payment for which indemnification can be claimed. It is an entitlement that arises in relation to each benefit paid, not just the first one. Hence, the conclusion we have reached is supported by the clear language of the statute.

[8] Moreover, there is a persuasive policy reason favouring that conclusion. If the limitation period runs only from the first payment, then any dispute between insurers about the quantum of any payment for which indemnification is provided that is made more than six years later, could not be resolved by arbitration. This is contrary to the intent of s. 275(4), which contemplates that any indemnification dispute under s. 275 between the involved insurers shall be resolved through arbitration.

[9] Nor is there any policy reason pointing the other way. There is no concern that if there is a sequence of limitation periods there could be a sequence of arbitrations, theoretically yielding conflicting decisions on fault. The first such adjudication would surely be binding on both insurers for all subsequent indemnification disputes where fault was in issue. And any concern that it would be open to an insurer to dispute fault for the first time many years after the first payment, after that insurer had lived with an apportionment of fault for all that time, is surely answered by the doctrine of estoppel.

[10] Finally, the conclusion we have reached conforms to that of the Honourable R.E. Holland in *York Fire and Casualty Insurance Company and the Co-operators*, an arbitration under the *Act* decided on July 20, 1999. The arbitrator, someone with vast experience in automobile insurance law, said this at p. 5:

> The right to indemnification arises when the benefits are paid. In my opinion, this starts the operation of the limitation period for any such benefit paid.

[11] This decision was upheld by Somers J. in *York Fire & Casualty Insurance Co. v. Co-operators* (1999), 17 C.C.L.I. (3d) 16 (Sup. Ct. J.).

[12] We therefore conclude that the claim for indemnification is not out of time but, rather, is alive for all payments made within six years of the commencement of arbitration.

[13] The appeal is allowed. Costs of the appeal to the appellant in the amount of $2500.00, inclusive of disbursements and G.S.T.

RELEASED: December 22, 2005 "MRR"

"R.R. McMurtry C.J.O."

"S.T. Goudge J.A."

"E.A. Cronk J.A."