IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, section 275 and *REGULATION 283/95*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

- and -

STATE FARM INSURANCE COMPANY

Respondent

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

Charlia von Buchwald for the Applicant

D'Arcy McGoey for the Respondent

PRELIMINARY ISSUES:

1. Did State Farm accept priority of Joshua Willson's claim, and if so, is it permitted to withdraw its acceptance and proceed to arbitration against Aviva?

RESULT:

1. State Farm accepted priority to pay Mr. Willson's claim, and may not withdraw this acceptance. They are therefore precluded from defending the arbitration brought by Aviva.

ARBITRATION AGREEMENT:

The parties indicated at the outset of the hearing that they had not executed a written arbitration agreement prior to the hearing. They requested that I confirm in writing their agreement on the following terms:

(a) each party retains the right to appeal this preliminary issue decision on an issue of law or mixed fact and law, without leave, within thirty days of the issuance of the decision;

(b) the unsuccessful party will pay the legal costs incurred by the successful party on this preliminary issue, as well as all arbitration fees and disbursements.

BACKGROUND FACTS:

The relevant facts are not in dispute. Counsel filed a joint Document Brief and transcripts of examinations under oath conducted of James Eshuis, the claims representative at State Farm at the relevant time, and Marisa Chiu, the Aviva adjuster, all of which were referred to in the course of their submissions.

The above documentation establishes the following facts: Joshua Willson was involved in an accident on March 25, 2010, while driving a vehicle owned by his employer and

insured by Aviva Canada. He suffered a brain injury in the accident, and has been determined to have sustained a catastrophic impairment as defined in the *Statutory Accident Benefits Schedule*. Mr. Willson's representatives submitted an Application for payment of accident benefits to Aviva on April 21, 2010, and they began paying benefits in accordance with the *Schedule*.

In the course of its investigation into the matter, Aviva determined that Mr. Willson was a named insured on an auto policy issued by State Farm that was in effect on the date of the accident. Aviva contended that section 66 of the *Schedule* was not applicable in the circumstances, as the Claimant's employer had not made the vehicle that he was driving at the time of the accident available for his "regular use". Accordingly, it took the position that State Farm was in higher priority to pay the claim.

Ms. Chiu from Aviva forwarded a Notice of Dispute Between Insurers to State Farm on May 4, 2010. This notice was received on May 13, 2010. Despite repeated phone calls and follow-up letters to State Farm requesting its position on the matter, no response was received. Finally, on August 31, 2010 James Eshuis, the claims representative from State Farm who had been assigned to the file, returned one of Ms. Chiu's calls and left a message stating that he would be responding in writing with his position. He then wrote to Ms. Chiu on that same date, advising that he had reviewed the Notice of Dispute, and as Mr. Willson was a named insured under the State Farm policy, State Farm would accept priority for the claim.

After receiving this confirmation, Ms. Chiu contacted counsel for the Claimant and advised that State Farm had accepted priority. She also contacted various treatment providers and directed them to forward any further invoices or treatment plans to State Farm. She submitted a request for reserve reduction to the committee at Aviva so that the reserves that had been set on the file would be reduced, based on State Farm's acceptance of priority. She also forwarded Mr. Willson's accident benefits file to Mr. Eshuis at State Farm, advised him of the amounts paid out by Aviva to that point, and requested reimbursement.

When a month had passed without any response, Ms. Chiu telephoned Mr. Eshuis to follow up on her request for reimbursement. After placing her 'on hold', he conferred with a colleague and then with his supervisor about whether his earlier decision to accept priority was incorrect. After determining that it was, he advised Ms. Chiu that he may have accepted priority in error and that he would need to conduct further investigations into the matter.

On October 13, 2010, a few days later, Mr. Eshuis sent a letter to Ms. Chiu in which he advised that State Farm had "inadvertently accepted priority for the Accident benefits claim of Joshua Willson in our letter of August 31, 2010, and this acceptance is withdrawn pending further investigation." The letter went on to say that the question of whether Mr. Willson qualifies as a deemed named insured pursuant to section 66 of the *Schedule* would be investigated.

Despite the above statement, it was conceded that no one at State Farm took any further steps to investigate the priority issue, until the file was referred to counsel a few months later, after the arbitration was commenced.

After being advised of State Farm's position, Aviva continued to adjust the file.

At his examination under oath, Mr. Eshuis confirmed that he had full authority to bind State Farm. He also stated that he had expected Aviva to have understood from his initial letter that State Farm had accepted priority for Mr. Willson's claim, and that it would take over adjusting Mr. Willson's claim. He also stated that he could have consulted with counsel before making the decision to accept priority, but that he chose not to do so.

PARTIES' ARGUMENTS:

Applicant's argument

Counsel for Aviva submitted that State Farm is bound by its initial decision to accept priority for Mr. Willson's claim, and contended that it should not be permitted to resile from that agreement once it was clearly communicated to Aviva, and was acted upon by its adjuster.

Counsel noted that State Farm conceded that when Mr. Eshuis finally reviewed the Notice of Dispute Between Insurers that was sent by Aviva, he did nothing to investigate the priority issue raised. He did not to ask for clarification or request any further details, and did not consult with counsel before making his decision. She stated that while an adjuster can choose to act in this lackadaisical manner, he should not be permitted to withdraw his decision if he later decides to inform himself of further facts, or conducts further investigation. She stated that if insurers are permitted to withdraw agreements to accept priority whenever they want to or whenever they receive new information, the purpose of the Regulation would be defeated and the system for determining priority among insurers would devolve into chaos.

Counsel emphasized that Mr. Eshuis' decision to withdraw his acceptance of priority did not result from any new information coming to light, or because Aviva had withheld any facts. She noted that when asked at the examination under oath to explain why he had decided to change his mind, he simply stated that "something didn't sit right" with him when Ms. Chiu finally reached him by telephone to follow up on her earlier letter.

Ms. von Buchwald relied on two arbitration decisions by Arbitrator Jones in support of her position. In *Motors Insurance Company v. Co-operators Insurance Company* (unreported decision, August 23, 2004) the issue to be decided was whether the Claimant was financially dependent upon his father, a Co-operators' insured. Co-operators had received the application and began paying benefits but contended that the Claimant was not dependent upon its insured and that Motors, as the insurer of the vehicle in which the

Claimant was an occupant, was in higher priority to pay the claim. After conducting an investigation, Motors advised that it would accept priority of the claim, based on its understanding that the Claimant was not financially dependent upon his father. Approximately six weeks later, after receiving a letter from Claimant's counsel advising of some further investigation that reached the opposite conclusion, Motors attempted to withdraw its acceptance of priority. The Motors adjuster stated that the information she had received previously was "not complete and correct", and that if she had been provided with all of the information at the outset, she would not have accepted priority.

Arbitrator Jones ruled that Motors was not permitted to withdraw its agreement to accept priority. He noted the Ontario Court of Appeal's comments in *Kingsway General v. West Wawanosh* [2002] 58 O.R. (3d) 251 (C.A.) that given the regulatory background against which priority disputes unfold, there is "little room for carving out judicial exceptions designed to deal with the equities of particular cases" and that clarity and certainty are of primary concern. Relying on those statements, he reasoned that certainty, simplicity and efficiency should be paramount, and that allowing a party to revoke a previous agreement because they become aware of new facts is not desirable. He allowed that arbitrators can exercise equitable powers to allow a party to withdraw from an agreement made to accept priority in proper circumstances, but that "this should only occur in the most extreme cases".

In *Enterprise Rent -A-Car v. ING Insurance* (unreported decision, November 1, 2006) a Claimant who suffered injuries while driving a rental car submitted an application for benefits to Enterprise. Enterprise determined that the Claimant was a listed driver on a policy issued to his brother by ING Insurance, and contended that ING was in higher priority to pay the claim. ING advised in writing that they had reviewed the matter and would accept priority. Approximately four weeks later, the ING adjuster wrote a further letter stating that after reviewing the coverage provided by the policy, he had determined that there was no liability coverage on the vehicle at the relevant time and that ING would accordingly not accept the Claimant's accident benefits claim.

Arbitrator Jones referred to his findings in the *Motors* case and determined that ING should not be allowed to withdraw its decision to accept priority. He emphasized that "the Legislature set out a system that was to be quick, efficient and effective" and stated that "once a company has agreed to take over priority, it is only in unusual and extreme circumstances that the company should be allowed to withdraw that acceptance".

Ms. von Buchwald contended that the reasons for State Farm having changed its mind in this case cannot be characterised as "unusual" or "extreme". She submitted that the circumstances do not support the exercise of my equitable powers to permit State Farm to resile from its agreement to accept priority. She suggested that the court's comments in *Kingsway v. West Wawanosh, supra,* with regard to insurers making appropriate decisions with respect to conducting investigations and having access to the best advisors are particularly applicable to this type of case, and should be heeded.

Counsel for Aviva argued alternatively that State Farm should be considered to have waived its right to dispute priority. She contended that it had full knowledge of its rights to dispute priority, but that Mr. Eshuis' letter accepting priority is clear evidence of his intention to abandon this right, and satisfies all of the required criteria for a waiver.

She argued in the further alternative that if the principle of waiver does not apply in these circumstances, Aviva could rely on the principle of estoppel. Counsel contended that all of the required elements of estoppel are made out, and that State Farm should be estopped from withdrawing its acceptance as Aviva had detrimentally relied upon its earlier agreement by taking various steps to proceed on the basis of State Farm's earlier agreement to accept priority.

Respondent's argument

Mr. McGoey submitted that State Farm's initial decision to accept priority in this case was an honest mistake that was subsequently rectified, and that it would be inequitable to allow Aviva's position to prevail.

Counsel noted that the priority regulation is silent on the issue of an insurer accepting and subsequently withdrawing priority. He submitted that the comments made by the Court of Appeal in *Kingsway v. West Wawanosh, supra,* relied on by Arbitrator Jones in the cases set out above were made in reference to the ninety-day notice provision in the regulation. He argued that it is incorrect to extrapolate comments made in reference to a narrow and clearly-worded provision to the much wider and more general issue of acceptance and subsequent withdrawal of priority, and that Arbitrator Jones' reliance on the principles expressed by the Court in the *Motors* and *Enterprise* cases was misguided.

Further, counsel contended that Arbitrator Jones' statement that the exercise of an arbitrator's equitable powers to permit an insurer to withdraw its acceptance of priority should be restricted to extreme or unusual circumstances was not supported by judicial authority. He submitted that there was simply no authority for the limitation he placed on the exercise of equitable powers, and urged me not to accept that approach.

Mr. McGoey referred to the decision in *Gan General Insurance v. State Farm Mutual Insurance* (1999) 19 C.C.L.I (3d) 266 (Ont. S.C.J) in which the court ruled that Gan was permitted to resile from its agreement to indemnify State Farm in a case brought under the Loss Transfer provisions. In that case, Gan had agreed to pay State Farm's indemnification request, and had in fact paid the amount sought by State Farm. Gan subsequently decided that it had incorrectly applied the Fault Determination Rules, and contended that it was entitled to have the funds returned. The matter went before an arbitrator, who determined that Gan's insured was liable under the Rules, and that accordingly, Gan could not recover the funds it had paid to State Farm.

Gan appealed the arbitrator's findings. Justice Pitt determined that the arbitrator had erred in his interpretation of the relevant Rule. He also found that GAN's initial decision to indemnify State Farm did not constitute the satisfaction of a settlement, but was rather a payment made pursuant to a statutory scheme that was made in error. Applying the rules of unjust enrichment, he found that GAN was entitled to recover the funds paid out.

Counsel also relied on the case of *ING Halifax v. Royal and SunAlliance* (2004) 12 C.C.L.I. (4th) 272 (Ont. S.C.J.). In that case ING had made payments to Royal pursuant to the Loss Transfer provisions of the *Act* before discovering that the claimant's right of action was barred by the *Workers' Safety and Insurance Act*. ING then commenced an action in restitution seeking return of the funds paid out. Justice MacDonald found that Royal should have been aware of the fact that the claimant was operating his vehicle in the course of his employment, and stated that the statutory regimes at play do not preclude "equitable relief based on principles of restitution, monies paid under mistake of fact or unjust enrichment". She ordered the return of the monies paid by ING.

Mr. McGoey submitted that the circumstances of this case are more analogous to the above cases in which payments were made pursuant to the Loss Transfer provisions, than to a situation in which parties to a lawsuit reach a settlement of the claim. He argued that these cases are instructive on this point, and that I should follow their reasoning. He contended that when the principles of unjust enrichment are applied, it would be inequitable to impose the obligation to pay Mr. Willson's claim on State Farm, and that there is no juristic reason for Aviva to be unjustly enriched.

ANALYSIS & FINDINGS:

Regulation 283/95 mandates that all priority disputes in Ontario be resolved in accordance with its provisions. Its eleven sections (in force at that time) are fairly straightforward and contain basic rules, timelines and process details that parties must follow as they proceed through a priority dispute. The regulation has been interpreted by arbitrators and judges in many cases, and its underlying message of efficiency and certainty has been emphasized.

The appeal decisions in *Kingsway* v. *West Wawanosh*, *supra,* solidified this view. In the first appeal, Justice Nordheimer noted that the parties in a priority dispute are sophisticated and experienced litigants and have access to the "advisors of the highest quality that they could need" in order to determine their rights. While his focus in that case was whether the ninety-day notice provision in section 3 had been met, his statement

that "strict compliance promotes certainty for the parties in terms of their handling of claims" has been accepted as having general application. On further appeal to the Court of Appeal, J. A. Sharpe picked up on this theme, repeated the sentiment and in his oft-cited quote stated –

> Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions to deal with the equities of particular cases.

It is trite to say that the system for resolving priority disputes, outlined in the regulation, must be fair. However, it is also clear from the above judicial comments that a balance must be struck between fairness and equity on the one hand, and clarity, certainty and efficiency on the other. Hundreds, perhaps thousands of these disputes are likely to be proceeding at any point in time, and in order for the overall system to operate effectively, insurers must respond to notices, conduct investigations and make timely decisions.

The decision to accept priority and take over the adjusting of a claim should not be taken lightly. Aside from agreeing to reimburse the first insurer for benefits that have been paid out, it often involves establishing contact with the Claimant and their representative, and assuming relationships with various treatment providers. Reserves must be set, and files opened. Decisions regarding the adjusting of the file must be made, and attendances at FSCO proceedings may be required.

While I realise that claims adjusters handle several claims at the same time and have many demands on their time, I am struck by the lack of diligence on the part of the State Farm adjuster when he was presented with the notice from Aviva indicating that it was disputing its obligation to pay benefits to Mr. Willson. He did not respond to the notice sent after the matter was assigned to him, nor to the various letters and phone messages left for him by Ms. Chiu. When he finally did review the matter and responded more than three and one-half months after the initial notice was received, he advised that State Farm would accept priority for the claim, without doing any investigation whatsoever.

In his examination under oath, Mr. Eshuis allowed that when he saw reference to Mr. Willson not being a "regular user" of the Aviva vehicle that he was in at the time of the accident in the Notice of Dispute, he thought it might raise a question that should be investigated. He acknowledged however, that he did not do so. He also acknowledged that he could have contacted his counsel to seek advice prior to making a decision, but he chose not to do that either. I presume that he also could have consulted a colleague, or his supervisor about the issue before making a decision to accept priority, just as he did once Ms. Chiu called him to follow up on their earlier correspondence, and he decided to put her on hold because something just "did not sit right" with him.

Whether this lack of action was due to overwork, or was simply an "honest mistake" as characterized by counsel for State Farm, the system cannot function efficiently if adjusters fail to investigate at the appropriate time, and then, after advising the first insurer that they accept priority to take over the claim, ask a colleague and change their mind. As Ms. von Buchwald warned, if this were allowed to happen on a regular basis, the system would devolve into chaos.

In the *Motors* case cited above, the adjuster who had accepted priority purported to change her mind when new information was provided from the claimant's representative that was inconsistent with the conclusion she had reached on the question of financial dependency. Arbitrator Jones ruled that Motors could not resile from its agreement to accept priority for the claim, despite new information having been received. In the *Enterprise* case, the information that triggered the ING adjuster to change his mind was not new, but related to his discovery of the limited coverage that ING provided on the vehicle. In both cases, Arbitrator Jones stated that an insurer should only be permitted to withdraw from an agreement to accept priority in "extreme or unusual circumstances."

I agree that the range of cases in which insurers should be permitted to withdraw an agreement to accept priority that has been clearly communicated to the other side is narrow. In my view, an insurer should be permitted to withdraw its decision if the first insurer either provides false information in an effort to mislead the other insurer, or intentionally withholds information that is relevant to the priority issue. There may be

circumstances in which incorrect information is communicated by a reliable third party that an insurer relies on to accept priority, that is subsequently determined to be untrue. Each case must be determined on its own facts, but it seems that in those cases, the prejudice suffered by each party, if any, should be balanced against the need for efficiency and expediency in deciding whether a withdrawal of priority should be accepted.

Mr. McGoey cited the *Gan v. State Farm, supra,* and *ING v. Royal, supra,* cases in which courts ordered the repayment of funds paid by insurers pursuant to the Loss Transfer provisions, when it turned out that the justification for the payments being made was subsequently found to be incorrect. I note that in this case, the State Farm adjuster did not take any steps to investigate the "section 66 issue" after he attempted to withdraw his decision to accept priority, despite stating in his letter that he would do so. There is accordingly no basis upon which to conclude that the agreement to assume priority and pay past benefits to Aviva was made in error, or based on incorrect information as in the cases cited.

I also find that there is a distinction between a loss transfer payment made on the basis of what turns out to be an erroneous assumption, and a decision to take over the adjusting of a file based on acceptance of priority that was made without conducting any investigation or gathering any facts. I find that these decisions are distinguishable on that basis, and therefore not of assistance in this matter.

CONCLUSION:

In accordance with my findings above, State Farm is not permitted to withdraw its decision to accept priority for Mr. Willson's claim. It shall repay Aviva for all reasonable payments made to date, and take over adjusting the claim.

COSTS:

In accordance with the agreement referred to above, State Farm is liable to pay the legal costs incurred by Aviva as well as all fees and disbursements related to the arbitration. If counsel cannot agree on the quantum of costs payable to Aviva, I invite them to contact my office and arrangements will be made for further discussion and submissions.

DATED at TORONTO, ONTARIO this _____ DAY OF MARCH, 2012.

_____

Shari L. Novick
Arbitrator