IN THE MATTER of a dispute between State Farm Automobile Insurance Company and Lloyd's of London Insurance Company, The Toronto Transit Insurance Company Ltd., and Economical Mutual Insurance Company pursuant to Regulation 283/95 under the *Insurance* Act, R.S.O. 1990, 1.8 as amended.

AND IN THE MATTER of an Arbitration pursuant to the *Arbitration Act*, S.O. 1991

BETWEEN:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Applicant

-and-

**LLOYD'S OF LONDON INSURANCE COMPANY,
THE TORONTO TRANSIT COMMISSION INSURANCE COMPANY LTD.,
AND ECONOMICAL MUTUAL INSURANCE COMPANY**

Respondent

SUPPLEMENTARY REASONS

COUNSEL:

Jennifer Griffiths for the applicant, State Farm Mutual Automobile Insurance Company

Kevin S. Adams for the respondent, Lloyd's of London Insurance Company

Michael Atlas for the respondent, Toronto Transit Commission Insurance Company Ltd.

Lee Samis for the respondent, Economical Insurance Company

This matter involves a priority dispute between State Farm Mutual Automobile Insurance Company, Lloyd's of London, the Toronto Transit Commission Insurance Company Limited and Economical Mutual Insurance Company. On June 11, 1999, Ms. Maria DeMedeiros was involved in a motor vehicle accident. She applied for and received accident benefits from State Farm. State Farm subsequently took the position that the Toronto Transit Commission Insurance Company Limited, the insurer of the vehicle which Ms. DeMedeiros had just disembarked from, Lloyd's of London, the insurer of the motor vehicle that hit her, or the Economical, the insurer of the repair shop under whose care and control the vehicle was that hit her at the time of the accident, were properly responsible for the payment of accident benefits.

State Farm subsequently initiated an arbitration pursuant to Regulation 283/95 against the above named insurers.

Section 3 (1) of Regulation 283/95 requires that the insurer must give written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay. The respondents took the position that State Farm had not complied with section 3 (1) and therefore ought not to be permitted to continue with the arbitration. State Farm took the position that if it had failed to put the insurers on notice within the required 90 days, then they were entitled to rely upon the "saving provisions" of section 3 (2) which allows that an insurer may give notice after the 90 day period if:

(a) the 90 days was not a sufficient period of time to make a determination that another insurer was liable, and

(b) the insurer made reasonable investigations necessary to determine if another insurer was liable within the 90 days.

In written reasons released in January 2002 I found that State Farm had not complied with the 90 day notice requirement, and on the facts of this particular case, they were not able to rely upon the "saving provisions" of section 3 (2) of Regulation 283/95.

In addition to arguing that section 3 (2) should apply, State Farm also argued that this was an appropriate situation for the equitable relief of "relief from forfeiture" to apply. At the time of the hearing the Ontario Court of Appeal was scheduled to hear a case involving the right to such relief in Regulation 283/95 priority disputes, in the near future and the parties agreed that I should defer my decision until after the Court of Appeal had rendered its' decision. The Court of Appeal has now delivered its' decision in *Kingsway General Insurance Company vs. West Wawanosh Insurance Company* (unreported decision release February 15, 2002). The parties to this action, by letter from State Farm's counsel dated June 20, 2002 have advised me that they are content to have me rule on the relief from forfeiture issue based on submissions previously made.

As the facts of this case have already been set out in my earlier decision, I will not repeat them here. The first issue to be decided is whether in fact an arbitrator has the jurisdiction to grant equitable relief. Pursuant to section 31 of the Arbitration Act, I do not think that there is any doubt but that I do possess that general power. That section states:

> "an arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order other specific performance, injunctions, and other equitable remedies"

While I am prepared to accept that I have such jurisdiction, the question remains whether I can exercise that jurisdiction to set aside the requirements of a regulation. It is the respondent's position that, in essence, that I can not invoke equitable relief powers to override the Regulation. The Judicial Committee of the Privy Counsel in Rex vs. C.N.R. Co. [1923] 3D.L.R. 719 set out the general proposition that equitable relief provisions can not be used by the courts to override a statute. In that decision, Lord Parmoor stated:

> "… if the power given to the Court to relieve against penalties applied to statutory penalties, this would, in effect be giving an authority to enable the Court to appeal statutes . .."

This limitation on the right to relieve against forfeiture was commented upon and adopted by the Ontario Court of Appeal in McBride vs. Comfort Living Housing Co-operative Inc., 7O.R. (3rd) 394.

This line of thought has been generally followed in Ontario since that time with the exception of cases involving section 128 of the Insurance Act, which involves notice periods involving the insured, rather than the insurer. Section 129 does not apply in this matter.

The Ontario Court of Appeal most recently dealt with the relief from forfeiture issue as it relates to section 3 (1) of Regulation 283/95 in Kingsway General Insurance Company vs. West Wawanosh Insurance Company (unreported decision released February 15, 2002). In that case the Superior Court Judge hearing the appeal refused to grant relief from forfeiture. He found that

any jurisdiction to relieve from forfeiture had been ousted by the provisions of section 3 (2) of the Regulation. He held that the Legislature had, in essence, "occupied the field" by creating the relief provisions in section 3 (2) of the Regulation.

The Court of Appeal stated:

> I agree with the conclusion of the Superior Court judge that the Regulation provides a scheme that contemplates extension of the 90 day notice in certain circumstances, and that, by implication, any general discretion a court might have to grant extensions in other circumstances is excluded.

I am in agreement with the Court of Appeal's decision and find that it is applicable to the facts of this case. Accordingly, I can not invoke relief from forfeiture in this case. Accordingly, State Farm Mutual Automobile Insurance Company can not proceed with the arbitration.

Dated at Toronto this 10th day of July, 2002.

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M. Guy Jones
Arbitrator