IN THE MATTER OF SECTION 268 OF THE *INSURANCE ACT, R.S.O. C.1.8 and ONTARIO REGULATION 283/95;*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

DECISION - PRELIMINARY ISSUE

COUNSEL:

D'Arcy McGoey for the Applicant

Daniel Strigberger for the Respondent

ISSUE:

Did a sufficient "nexus" exist between the Claimant and State Farm such that State Farm was the first insurer to receive a completed application for benefits, and was therefore required to respond pursuant to section 2 of *Ontario Regulation 283/95* ?

RESULT:

Yes, a sufficient nexus existed, triggering an obligation on State Farm to respond to the Claimant's application.

BACKGROUND:

1. Jason Ramnarine was injured when the vehicle he was driving was involved in a collision with another vehicle on June 22, 2010. That vehicle was insured by Economical Mutual Insurance Company ("Economical").

2. Mr. Ramnarine submitted an application for accident benefits to State Farm Mutual Automobile Insurance Company ("State Farm"). He advised that he had purchased insurance for his 2003 Nissan Altima from an entity named Easyway Assurance, and was told by their representative that the coverage would be provided by State Farm.

3. State Farm denies that it ever issued a policy to Mr. Ramnarine, or that it is affiliated with Easyway Assurance in any way. It did not accept his application for benefits, claiming that no "nexus" existed between the Claimant and State Farm. State Farm has provided notice to Economical, claiming that as the insurer of the other vehicle involved in the accident, it is in higher priority to pay the claim pursuant to section 268(2)1 of the *Insurance Act.*

4. Economical asserts that a sufficient nexus exists between Mr. Ramnarine and State Farm, and that as the first insurer to have received the application, it is required to "pay now and dispute later".

5. Mr. Ramnarine applied for arbitration at the Financial Services Commission of Ontario ("FSCO") against State Farm. A pre-hearing was held at which the arbitrator initially ruled that he would determine the "nexus question" at a preliminary issue hearing. The parties ultimately agreed to hold the FSCO process in abeyance, pending my ruling on the issue in the context of this priority dispute.

6. Mr. Ramnarine filed an objection to the proposed transfer of his claim, in accordance with section 5 of *Ontario Regulation 283/95*. His representative participated in a pre-hearing call and confirmed that his office had submitted a further application for payment of accident benefits on Mr. Ramnarine's behalf to Economical in October 2012. He also advised that in the circumstances, he was prepared to withdraw the objection filed.

7. The parties agreed that I should determine this issue as a preliminary matter. A hearing was convened at which evidence was presented and submissions made by counsel.

EVIDENCE:

8. Mr. Ramnarine was examined under oath prior to the arbitration, and the transcript of his evidence was referred to and relied on by counsel at the hearing. Mr. Ramnarine was also called to testify at the hearing. State Farm called two witnesses – Frank Mercado, one of its underwriters, and Katharine Northcott, an accident benefits adjuster with its mediation unit. The parties also filed various documents, which were referred to at the hearing.

I will summarise the evidence provided by each of the witnesses below:

Jason Ramnarine

9. Mr. Ramnarine testified that he purchased a car from one of his father's co-workers in December 2009. It was his first car, and he was a few months away from his eighteenth birthday. His parents do not drive, and he explained that it was the first car purchased in his household. A few months after obtaining the vehicle, he began inquiring into the cost of insurance coverage.

10. The Claimant stated that he had received a flyer in the mail from Easyway Assurance Insurance Brokers, advertising low rates for auto insurance. He called the number provided, and testified that both he and his father were advised that coverage would be provided through State Farm. He was invited to check the Easyway website, and stated that he did so. He then compared the premiums offered with quotes from other insurers that he was able to get online.

11. Mr. Ramnarine testified that he had a second conversation with someone at Easyway and that he was offered coverage for his vehicle in exchange for monthly premiums of $135. As these premiums were significantly lower than the quotes he had received online, he opted to obtain the coverage offered by Easyway. He stated that he was told to make monthly payments by credit card via Paypal, and that his father did so.

12. A copy of the Claimant's father's Visa bill was filed at the hearing, indicating payments of $135.57 were made to Easyway in April and May 2010. When asked if he was surprised by the request to pay the premiums via Paypal, Mr. Ramnarine responded that he was not, explaining that it was the first time that he had made arrangements for car insurance.

13. Under cross-examination, the Claimant stated that he was not aware of the difference between an insurance company and a broker or agent. When asked whether he had been suspicious of the fact that the quote provided by Easyway was significantly lower than those of the other insurers he had contacted, Mr. Ramnarine claimed again that it had been his first experience with car insurance, and he had not known what to expect. While he did not provide a clear answer to the question, he acknowledged under cross-examination that in retrospect, the low premiums should have caused him to be suspicious.

14. Mr. Ramnarine received various documents from Easyway, copies of which were filed at the hearing. Aside from the initial brochure promising low rates, counsel filed a "Certificate of Automobile Insurance" that provided a policy number and identified the details of the vehicle covered and the coverage provided. There is no reference to State Farm on this document.

15. Mr. Ramnarine advised that he also subsequently received a "pink slip", but could not recall whether State Farm's name appeared on that. He stated that the police officer had taken it from him at the scene of the accident, and had not returned it. He recalled the officer commenting at the time that the policy number did not seem like a State Farm policy number. He explained that when the officer appeared at the hospital to discuss the matter further, he advised him that his insurance "is a fraud". He recalled that he was shocked when he heard that, as he had believed that the insurance was valid.

16. Mr. Ramnarine was charged with operating a motor vehicle without insurance under section 2(1)(a) of the *Compulsory Automobile Insurance Act*.

17. One further document on "Easyway Assurance" letterhead was filed at the hearing. While it is dated June 23, 2010, a day after the accident, the Claimant testified that he had received it prior to the accident. It provides details of the vehicle owned by Mr. Ramnarine, and states – "this memorandum is to certify that Jason Ramnarine (provides address) was insured with a Basic Insurance policy of (limit) $200,000 as of May 28, 2010 policy No. C917522 with Easyway Assurance. "

18. Mr. Ramnarine testified that he advised his representative that the woman he had spoken to at Easyway had told him that they were "part of State Farm". He confirmed that they then submitted an OCF 1 form to State Farm on his behalf in July of 2010. When he was cross-examined aggressively by counsel for State Farm on why he had done so, he provided vague answers but ultimately admitted that he had understood after speaking with the police officer that Easyway was not an insurance company, and that he had likely not been insured with State Farm.

Frank Mercado

19. Mr. Mercado is an underwriter working for State Farm, and has worked in that capacity for the past nineteen years. He explained that State Farm only uses 'dedicated agents' to sell its products, and that independent brokers cannot issue State Farm policies. In other words, in order to obtain coverage with State Farm at the relevant time, the Claimant would have had to deal with an agent who was licensed to sell State Farm policies. If he had agreed to purchase the policy for the premiums quoted, the agent would then bind coverage.

20. Mr. Mercado testified that State Farm had no association with Easyway Assurance, and that Easyway had no authority to bind State Farm coverage.

21. Interestingly, Mr. Mercado also stated that while the policy number cited on the Easyway documents produced was not a State Farm policy number, it was a claim number in State Farm's

system. When questioned further on this point, he explained that the policy number provided by Easyway to the Claimant was the same number as that assigned to a theft claim filed by a different person with a different date of loss.

Katharine Northcott

22. Ms. Northcott confirmed that no benefits have been paid out to Mr. Ramnarine, as he was considered not to have been insured with State Farm. The rest of Ms. Northcott's evidence was not germane to the 'nexus issue' and I will not review it in this award.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this preliminary issue:

Ontario Regulation 283/95

> **2.** *The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act.*

Insurance Act - Section 268

> *(2) The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> *1. In respect of an* ***occupant*** *of an automobile,*
>
> *i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,*
>
> *ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,*
>
> *iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,*

PARTIES' ARGUMENTS:

State Farm submissions:

23. Counsel for State Farm contended that his client was not obliged to respond to Mr. Ramnarine's application for benefits, as no nexus existed between the parties. While he acknowledged that the decision in *Brown v. Allstate Insurance Co.* (1997) (FSCO Arbitrator Rotter, upheld by Div. Ct. (1998) 40 O.R. (3d) 610) establishes that an insurance company may still be found to be an "insurer" for the purpose of section 268 of the *A*ct after its policy has lapsed or been cancelled, he submitted that cases involving fraud, such as this one, call for a different analysis.

24. Counsel noted that section 2 of the Regulation speaks to the obligation of "the first insurer" to receive a completed application for benefits. He contended that if no policy was ever in existence, and the insurer receiving the application has had no contact with the alleged policyholder, no nexus exists between them and it is not an "insurer". He acknowledged the "pay now, dispute later" policy underlying the priority regulation, but argued that absent a nexus between the parties, there is no obligation to respond in these circumstances.

25. Mr. McGoey cited the decisions by arbitrators at the Financial Services Commission of Ontario (FSCO) in the cases of *Danilov v. Unifund Assurance and Economical Mutual* and *Ahmed v RSA*, in which the nexus question is considered in the context of insurance fraud. He submitted that this case law establishes that no nexus should be found between a claimant and an insurer when it is determined that the claimant is a participant in the fraud. If the claimant is not a participant in the fraud, he or she must show both that they subjectively believed that they were insured under the policy, and that on an objective basis, a 'reasonable person' would also believe that the policy in question provided coverage.

26. Counsel questioned whether the rulings in the FSCO cases cited above would apply, noting that I am not bound by a decision of an arbitrator at the Commission. He submitted that in any event, this case is distinguishable from the circumstances in both the *Danilov* and *Ahmed* cases in that no reference to State Farm appears on any of the documents provided to Mr. Ramnarine. He emphasized that there was only one oral communication from the Easyway

representative to the Claimant regarding State Farm's involvement, and contended that a dangerous precedent would be set if that is determined to be sufficient to establish a nexus between these parties.

27. Mr. McGoey argued in the alternative that if I am inclined to follow the rulings in the FSCO cases noted above, the facts in this case do not meet either the subjective or objective tests set out. He noted that the Claimant had initially been told by the police officer at the scene of the accident that the policy number appearing on the pink slip he provided did not seem to be a State Farm policy number, and that the officer later confirmed to him that his insurance "was a fraud". He also noted Mr. Ramnarine's evidence that he thought he was insured by Easyway Assurance (and not State Farm)), all of which should lead to the conclusion that the 'subjective test' was not met.

28. Counsel also contended that given the police officer's comments and the fact that the Claimant was charged with driving without insurance, a reasonable person would not have believed at that point that Mr. Ramnarine was covered by a State Farm policy. He argued that in light of these facts, it is clear that no nexus existed between Mr. Ramnarine and State Farm.

Economical's submissions:

29. Counsel for Economical submitted that the facts of this case must be viewed through the lens of Mr. Ramnarine's young age and the fact that it was his first experience with car insurance. He emphasized that he was not complicit in the fraud, and that he had applied to State Farm for benefits on the basis of the information that was available to him.

30. Mr. Strigberger noted that section 2 of the regulation requires the first insurer who receives an application for benefits from a claimant to pay the benefits and dispute its obligation to do so "later". He emphasized that the rationale for this requirement is that claimants who are injured and in need of benefits or treatment should not be left waiting until a final determination on which insurer is in priority is made. Courts have developed the 'nexus test' for determining when the obligation to respond is triggered under section 2, and that as long as there is some

nexus or connection between a claimant and an insurer, that insurer must pay benefits to which the claimant is entitled.

31. Counsel submitted that the jurisprudence in this area has established that the threshold for meeting the 'nexus test' is low. He cited Justice Laskin's comments in *Kingsway General Insurance Co. v. Ontario (Min. of Finance)* 2007 ONCA 62 (CanLii) that "the nature of the nexus or connection required …will vary from case to case" but that it is "only in the most extreme cases, where the connection with the insurers is totally arbitrary should the insurer refuse to pay".

32. Mr. Strigberger then referred to Arbitrator Bujold's decision in the *Danilov* case, in which he explicitly rejected the argument that there must be some "apparent objective indicia of a relationship" in order for a nexus to be found. He focused instead on the fact that Mr. Danilov had turned his mind to the choice of insurer, and had applied to Unifund on the basis of the information that was available to him. The arbitrator found that despite the fact that the information turned out to be false, the decision to apply to Unifund was made based on information contained in the police report and was "clearly not arbitrary or random". In his view, that was sufficient to establish a nexus between the parties and trigger Unifund's obligation to respond.

33. Finally, counsel cited the decision in *Zurich Insurance v. Chubb Insurance* (2012) ONSC 6363 (November 13, 2012) in which Justice Goldstein overturned an arbitrator's finding that there was no nexus between the claimant and Chubb. The claimant in that case had rented a vehicle from a company called Wheels4Rent, and had declined the optional coverage provided on the vehicle by Chubb. After being involved in an accident, the claimant applied to Chubb for benefits under the optional policy. Chubb declined to provide benefits to her, and Arbitrator Tessis determined that Chubb was not an insurer for the purposes of the *Act* and *Regulation*.

34. The court overturned the arbitrator's decision. Mr. Strigberger noted the court's statement that the concept of remoteness must be distinguished from the notion of arbitrariness, and that Justice Goldstein found that a nexus may be found when the connection between the parties is

remote, but not in those where the claimant's decision to apply to a particular insurer for benefits is arbitrary. Counsel contended that the evidence in this case is sufficient to satisfy the 'nexus test' and trigger State Farm's obligation to pay, as it is clear that Mr. Ramnarine had turned his mind to the choice of insurer to apply to, and had opted for State Farm on the basis of the information that was provided to him.

ANALYSIS & FINDINGS:

35. When the evidence in this case is considered against the backdrop of the jurisprudence on the issue of nexus, I find that a sufficient nexus existed between State Farm and the Claimant in these circumstances. State Farm should have accepted Mr. Ramnarine's claim and paid all benefits to which he was entitled under the *Schedule.*

36. Section 2 of *Regulation 283/95*, the regulation that sets out the rules and parameters for priority disputes between insurers, requires the first insurer that receives a completed application for benefits to pay benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the *Act*. This is often referred to as the "pay now, dispute later" rule. The rationale underlying this provision is perhaps best expressed by Justice Laskin in *Kingsway General v. Ontario, supra,* as follows - "accident victims should not be denied statutory accident benefits simply because the first insurer applied to for benefits thinks another insurer should pay".

37. Recognising that some safeguard is needed to avoid abuse of the system, Justice Laskin went on to say that as long as there was "some nexus - some connection - between the insurer receiving an application for benefits and the insured, the insurer must pay pending the determination of its obligation to do so". He did not see the need to be precise about the extent of the connection required, as he agreed with the arbitrator's finding in that case that the evidence was sufficient to establish a nexus between Kingsway and the claimant. He did, however, state that he agreed with Arbitrator Jones' finding in *Ontario (Minister of Finance) v. Royal & SunAlliance* (unreported decision, January 2003) that "only in the most extreme cases where the connection with the insurers is totally arbitrary should the insurer refuse to pay".

38. Given the above pronouncements from the Ontario Court of Appeal, I agree with Economical's submissions that the threshold for establishing whether a nexus exists is very low. That does not mean that a nexus will be found in every case, however. In the aftermath of that ruling, courts and arbitrators have determined that if a claimant's decision to apply to an insurer (or the Fund) is arbitrary, there is no obligation to respond. I note the FSCO arbitrator's decision in the *Valauskas v. MVACF* case [2009] O.F.S.C.D. No. 12 (upheld by the Director's Delegate on appeal) that as the claimant took no steps to determine whether a policy of insurance might be available to him, his decision to apply for benefits to the Fund was arbitrary, and no nexus was found.

39. The recent decision in *Zurich v. Chubb*, *supra*, expands on this idea and further clarifies the difficult question of where the "line in the sand" should be drawn. The facts of that case are outlined above. Ms. Singh rented a car from Wheels4Rent, and declined the optional coverage offered on the vehicle, provided by Chubb Insurance. After being injured in an accident, she submitted an application for benefits to Chubb. Chubb did not accept the application, and the arbitrator determined that no nexus existed, resulting in a finding that Zurich was the priority insurer. Zurich appealed the decision, and the arbitrator's findings were overturned.

Justice Goldstein found as follows:

> *In my respectful view, the Arbitrator erred by simply distinguishing the facts in the nexus cases from the facts in this case rather than determining whether Ms. Singh's choice of Chubb was arbitrary. The Arbitrator did not apply the advice set out by Laskin J.A. in Kingsway.*

40. I pause here to note the judge's instruction that the statements excerpted above in the *Kingsway* case are the standard against which all scenarios are to be compared. State Farm's submission that fraud cases should be approached on a different basis than cases in which a valid policy had once existed but was subsequently cancelled, must therefore fail. Justice Goldstein goes on to state - (at para. 34):

> *I think it is helpful to distinguish between the concept of remoteness and the concept of arbitrariness. The connection must not be arbitrary to establish a nexus. The connection may well be very remote. Remoteness vs. arbitrariness*

> *is also consistent with the twin policy objectives of providing benefits now and paying later, and of encouraging certainty and predictability in the dispute resolution system....In effect, what the Arbitrator did was to apply a remoteness test rather than an arbitrariness test, and in doing so he erred. The connection between Ms. Singh and Chubb may have been remote, but it was not arbitrary...Although Ms. Singh did not take up the optional policy, the obvious inference that the parties agree can be drawn is that she learned of it through Wheels4Rent when she rented the vehicle.*

41. While the nexus test must be applied to the facts of each case, there are strong parallels between the circumstances in the Zurich case and those involving Mr. Ramnarine and State Farm. While there was no allegation of fraud in the Zurich case, it was clear that Ms. Singh had never had a policy with Chubb. As stated by Justice Goldstein, she "learned of it" through the agency from whom she rented the vehicle. He found that fact to be sufficient to create a nexus between them, as her decision to submit an application for benefits to them was not arbitrary. In our case, Mr. Ramnarine also "learned of" State Farm through his contact with Easyway Assurance, and it was that contact that led him to submit his application to State Farm. Following the reasoning expressed by Justice Goldstein, that was not an arbitrary decision and is sufficient to create a nexus.

42. Counsel for State Farm emphasized that none of the documents provided by Easyway contained any reference to State Farm, and in that way, this case is distinguishable from the others cited in which a sufficient nexus was found. I note, however, that this was also true in the *Zurich v. Chubb* case, as the claimant there had declined the optional coverage offered by Chubb. Further, there was no evidence in that case to suggest that Ms. Singh was under the impression that having declined the coverage offered, she would have had a valid policy with Chubb. While Mr. Ramnarine's evidence about whether he continued to believe that he had a valid policy with State Farm when he submitted the application, in light of the police officer's statements to him that his insurance was "a fraud" was inconsistent, Justice Goldstein's comments render that fact irrelevant.

43. I am bound by the ruling in the above case, and must heed the judge's instruction to arbitrators to apply the 'arbitrariness test' rather than the 'remoteness test'. Whether or not the

Claimant in this case legitimately felt that he was covered by a State Farm policy when he instructed his representative to submit the application, his decision to apply to State Farm was not a random or arbitrary event. He had been provided with information, albeit false and misleading, that the coverage on his vehicle would be provided by State Farm. On this basis, he forwarded the application to them. Following the reasoning in the cases referenced above, this was not an arbitrary decision, and was therefore sufficient to trigger an obligation under section 2 of the regulation on State Farm to respond.

CONCLUSION:

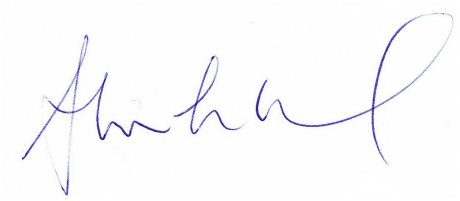
44. For the reasons set out above, I find that a sufficient nexus existed between Mr. Ramnarine and State Farm, and that its decision not to pay benefits to him was incorrect.

45. I will have my assistant schedule a further pre-hearing call with counsel so that we can discuss how any further issues in this case can be addressed.

COSTS:

46. State Farm is responsible to pay the legal costs incurred by Economical at a partial indemnity rate. If counsel cannot agree on the quantum to be paid, I will hear the submissions on the matter.

DATED at TORONTO, ONTARIO this _22_ DAY OF JANUARY, 2014.



Shari L. Novick
Arbitrator