IN THE MATTER OF REGULATION 283/95 TO THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, and THE *ARBITRATION ACT*, S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

BELAIR DIRECT INSURANCE COMPANY OF CANADA

Applicant

- and -

SECURITY NATIONAL INSURANCE COMPANY

Respondent

ARBITRATION AWARD

COUNSEL:

David F. Murray for the Applicant

Derek Greenside for the Respondent

ISSUE:

1. Is Belair precluded from pursuing this priority dispute against Security National because it failed to provide the Claimant with a copy of the Notice to Applicant of Dispute Between Insurers as required by section 4 of *Regulation 283/95* ?

RESULT:

1. Yes, Belair is precluded from pursuing this priority dispute.

BACKGROUND:

1. Racquel Letts was injured when the vehicle in which she was an occupant was involved in an accident on May 6, 2006. That vehicle was insured by Security National. The other vehicle involved in the accident was insured by Belair. She submitted an application for payment of accident benefits to Belair, and they paid benefits to her and on her behalf.

2. Belair provided notice to Security National of its intention of dispute its obligation to pay benefits to the Claimant within ninety days, as required by section 3 of *Regulation 283/95.* It asserts that as the insurer of the vehicle in which she was an occupant, Security National is in higher priority to pay Ms. Letts' claim in accordance with section 268(2)1(ii) of the *Insurance Act*. It did not, however, provide a copy of that notice to Ms. Letts, as required by section 4 of the regulation.

3. Security National did not accept priority for the claim. Belair commenced arbitration in July 2007 in accordance with section 7 of the regulation.

4. Ms. Letts settled her accident benefits claim with Belair on a full and final basis on March 27, 2008.

5. Security National concedes that it would be in priority to pay the claim in accordance with section 268(2)1(ii) of the *Act*. It contends, however, that Belair's failure to provide a copy of the notice to Ms. Letts precludes them from pursuing this dispute. Belair acknowledges that it did not send a copy of the notice to Ms. Letts, but asserts that it should not be barred from proceeding.

THE EVIDENCE:

6. The parties filed an Agreed Statement of Facts, the relevant parts of which are outlined above.

RELEVANT PROVISIONS:

The following provisions are relevant to the determination of this matter:

Insurance Act

> ***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,*
> >
> > > *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,*

Arbitration Act

> ***31.*** *An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.*

Ontario Regulation 283/95

> ***3.*** *(1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.*
>
> **4.** *An insurer that gives notice under section 3 shall also give notice to the insured person using a form approved by the Superintendent.*

5. (*1) An insured person who receives a notice under section 4 shall advise the Insurer paying benefits in writing within 14 days whether he or she objects to the transfer of the claim to the insurers referred to in the notice.*

(2) If the insured person does not advise the insurer within 14 days that he or she objects to the transfer of the claim, the insured person is not entitled to object to any subsequent agreement or decision to transfer the claim to the insurers referred to in the notice.

(3) Subject to subsection 7 (5), an insured person who has given notice of an objection is entitled to participate as a party in any subsequent proceeding to settle the dispute and no agreement between insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or 14 days have passed since the insured person was notified in writing of an agreement and the insured person has not initiated an arbitration under the Arbitration Act, 1991.

11. *If the Motor Vehicle Accident Claims Fund receives an application for benefits, sections 4 and 5 do not apply and the insured person is not entitled to initiate or participate as a party in an arbitration under section 7.*

Counsel also referred to parts of the Notice to Applicant of Dispute Between Insurers form. I attach the relevant portions of the form below:

Notice to Applicant of Dispute Between Insurers

This notice is to inform you that the insurer to whom you have applied for accident benefits claims that another insurer is responsible for paying these benefits. You may be required to assist the insurers in resolving their dispute by providing them with any information that may be needed to determine which insurer should be paying your accident benefits claim.

You will continue to receive accident benefits that you are entitled to from the insurer that you applied to while the insurers attempt to resolve their dispute.

You also have the right to object to your claim being transferred to another insurer. If you wish to object please complete Part 5 of this form and send it within 14 days to the insurer that is currently paying you accident benefits. If you object, you are entitled to participate in any

proceeding that may take place to determine which insurer is responsible for paying accident benefits to you.

If you do not object, you will not be permitted to dispute the transfer of your claim to another insurer. If you have any questions about this notice, or about the process that insurers use to determine who is responsible for paying your claim, please contact the representative of the insurance company that is paying your accident benefits claim. The name and telephone number of the representative is listed in Part 1.

Part 5:

You can object to your claim being transferred to the insurer(s) referred to in Part 2 by completing this section and returning the form to the insurer that you applied to in Part 1 within 14 days.

If you object, you are entitled to participate in any proceeding that may take place to determine which insurer is responsible for paying accident benefits to you. If you do not object, you will not be permitted to dispute the transfer of your claim to another insurer.

Please check the box below and return this form to the insurer listed in Part 1 within 14, days only if you wish to object to your claim being transferred to another insurance company.

PARTIES' ARGUMENTS:

7. The parties framed their arguments around two main themes – the consequences of Belair's failure to provide a copy of the notice to Ms. Letts in light of the directive language in section 4 of the regulation, and whether, if I find that the language in section 4 prevents Belair from proceeding with this priority dispute, I can and should apply the equitable remedy of "relief against forfeiture" to permit Belair to proceed.

Belair's submissions:

8. Counsel for Belair contended that his client's failure to provide a copy of the notice to Ms. Letts should not affect Belair's right to pursue a priority dispute against Security National. He noted that Ms. Letts' claim was adjusted by Belair and benefits were paid to her without interruption, as contemplated by *Regulation 283/95*. He also

noted that Ms. Letts reached a full and final settlement of her claim with Belair in March 2008, despite its assertion that Security National was in higher priority to pay .

9. Mr. Murray highlighted the difference in wording between section 3 and section 4 of the regulation. He noted that section 3(1) states that "No insurer may dispute its obligation to pay benefits…unless it gives written notice within 90 days", indicating a clear prohibition to proceeding. Subsection 3(2) acts as a 'saving provision' by outlining certain defined circumstances in which an insurer will be permitted to proceed despite its late notice. Conversely, section 4 contains neither the express prohibition against proceeding that section 3(1) does, nor a 'saving provision'. He submitted that the prohibition against proceeding in section 3 cannot be imputed into section 4.

10. Counsel contended that the difference in wording between the sections makes it clear that the drafters of the regulation turned their minds to the possibility of an insurer not providing notice to a claimant, and intentionally chose not to use the same language as appears in section 3. He submitted that it can therefore be concluded that a breach of the obligation outlined in section 4 should not operate as a bar to an insurer proceeding with a priority dispute.

11. Counsel acknowledged that section 4 requires that an insurer providing notice to another insurer under section 3 "shall give notice to the insured person" with the approved form. He submitted, however, that sections 4 and 5 of the regulation provide procedural guidelines for the participation of an insured who objects to the potential transfer of a claim to another insurer. As they do not speak to the rights between the two (or more) insurers involved in the dispute, he contended that a breach of that requirement should not be a bar to proceeding.

12. Mr. Murray also submitted that while the Claimant may have an interest in that issue, the focus of *Regulation 283/95*, named Disputes Between Insurers, is on the dispute between the insurers involved. Counsel contended that while section 4 provides that an insured who wants to participate in the priority dispute may do so, the ultimate

determination of priority is dictated by the provisions in section 268(2) of the *Act*. He pointed out that had Ms. Letts been provided with notice in this case, she would not have been able to dictate the result, and that neither she nor Security National suffered any prejudice by Belair's inadvertent failure to provide her with a copy of the notice.

13. Finally, Mr. Murray submitted that if I interpret section 4 to mean that Belair is barred from proceeding with the dispute, it would be appropriate for me to exercise the authority granted by section 31 of the *Arbitration Act* to invoke the equitable remedy of relief against forfeiture. He noted the Court of Appeal's endorsement of Justice Nordheimer's findings in *Kingsway General Insurance v. West Wawanosh Insurance Co.* (2002) 58 O.R. 3d 251, [2002] O.J. No. 528 (C.A.*)* that an arbitrator's jurisdiction to relieve against forfeiture in circumstances in which late notice is provided is ousted by the 'saving provisions' in section 3(2), as the government has "occupied the field" by including a provision allowing for relief from the 90 day notice period in very particular circumstances. He emphasized, however, that as there is no saving provision or explicit consequence stated in section 4 for a failure to provide notice to a claimant, the field has not been "occupied" and it is therefore open to me provide that remedy.

14. Counsel submitted that the principles enunciated in the case law on relief against forfeiture (*Maritime Life Assurance Co. v. Saskatchewan River Bungalows Ltd*. [1994] 2 S.C.R. 490) suggest that I should consider the following factors – the Applicant's conduct, the gravity of the breach, and the disparity between the value of the property forfeited and the damage caused by the breach. He argued that when these factors are applied to the circumstances at hand, the fact that no prejudice has been suffered by Ms. Letts, and that Security National is in higher priority to pay the claim by virtue of section 268(2)1(ii) of the *Insurance Act,* should lead me to grant Belair relief against forfeiture and conclude that it may proceed with the priority dispute.

Security National's submissions:

15. Counsel for Security National noted that section 4 states simply that an insurer who gives notice under section 3 "shall also give notice to the insured person" using the approved form. He contended that these words are clear, and that their plain meaning should be given effect. He submitted that they impose a mandatory obligation on the first insurer receiving the application to provide notice to a claimant, and that a failure to do so is fatal and renders the notice invalid. Counsel argued that there is no language in the regulation that permits an arbitrator from dispensing with this obligation, and that Belair should accordingly be barred from proceeding with its priority dispute against Security National.

16. Mr. Greenside disputed counsel for Belair's contention that the different wording and lack of a saving provision in section 4 suggests that an insurer who has breached the requirement to provide notice to a claimant is not barred from proceeding. He contended that the different wording is explained by the very different obligations placed on the first insurer by the two sections. He noted that an insurer who asserts that another insurer is in higher priority to pay a claim must conduct investigations into priority, which can be complex and time consuming. The legislators chose ninety days as the outside time limit for these investigations, but provided the 'saving provision' in section 3(2) for the exceptional cases in which a longer period of time is required. Conversely, all that an insurer must do in order to comply with section 4 is to forward the notice prepared to the claimant, which does not require any investigation.

17. Counsel for Security National also emphasized that the form that must be sent to both the other insurer(s) and the claimant is titled Notice to Applicant of Dispute Between Insurers. He noted that the explanatory portion at the top of the first page of the form uses language that is clearly directed at claimants, and outlines to them the purpose of the notice, his or her right to object to the proposed transfer, and the timeline for objecting. Counsel submitted that the focus of the form is clearly on the claimant's role in the process, and that the obligation to provide this notice to a claimant is central to the priority scheme.

18. Mr. Greenside acknowledged that no prejudice was suffered by Ms. Letts by virtue of her not having received the notice of dispute in this case. He submitted, however, that there could well be other circumstances in which a claimant would want to participate in the process as his or her claim was ongoing, and that a failure to provide notice in those cases may cause prejudice. He contended that the language of the regulation should be applied consistently, and that the question of whether a claimant suffered prejudice should not be a determining factor.

19. Counsel contended that the equitable remedy of granting relief against forfeiture is not available in these circumstances. He noted Justice Nordheimer's comment in *Kingsway v. West Wawanosh, supra,* that it is questionable whether a court or arbitrator has the jurisdiction "to relieve against a penalty or forfeiture that is decreed by statute". He contended that this is consistent with the principle espoused by the court in that case that insurers are sophisticated litigants with expert advisors, and that strict compliance with the technical requirements of the regulation are to be encouraged, in order to promote certainty. He noted in particular the judge's comment (at para.22) that "no unfairness is visited upon them by insisting on strict compliance with the notice requirements".

20. Mr. Greenside also submitted that this theme has been adopted by many arbitrators in the aftermath of this decision. He noted Arbitrator Samis' statement in the *Economical v. Belair* decision (May 2, 2006) that "the courts have indicated that we should apply the procedural requirements of …the regulation".

21. Alternatively, counsel contended that if the power to grant relief against forfeiture is available to me in this case, I should decline to exercise it in these circumstances as the gravity of the breach – namely the failure to provide notice to Ms Letts - is significant in that she was never given the opportunity to object to the transfer of her claim, which is a fundamental right extended to her by the regulation.

Reply submissions:

22. In response to counsel's contention that a claimant may be prejudiced if he or she does not receive a notice when their claims are ongoing, Mr. Murray pointed out that even if a claimant with an ongoing claim is not provided notice and therefore does not participate when he or she would have wanted to, their benefits continue to be paid.

23. He also noted that Justice Nordheimer's comments in the *Kingsway v. West Wawanosh case, supra,* regarding strict compliance with the technical requirements in the regulation were made in reference to the obligation on insurers to provide notice within ninety days under section 3. He contended that their impact should be restricted to that section, given that the consequences of non-compliance are clearly spelled out in the regulation.

ANALYSIS:

24. While the Priorities Regulation has been in force for over eighteen years, this question has not previously been determined by a court or arbitrator. Both counsel made cogent and well-thought out submissions in support of their clients' positions, referring to the overall purpose of the regulation and grappling with how the language in question should be considered in light of that. I have reviewed all of the arguments carefully, and after much consideration, have reached the conclusion that Belair is precluded from proceeding with this dispute as a result of their failure to provide notice to Ms. Letts of their intention to dispute priority.

25. I acknowledge some reluctance in having reached this conclusion. In my experience, the "theory" of *Regulation 283/95* often does not match with the nature and reality of the disputes in practice. While the regulation was brought in to ensure that claimants do not suffer a delay in receiving benefits when insurers dispute priority, it is rare for a claimant to object to a proposed transfer of their claim to another insurer. This is not surprising, given that there are rarely (if ever) any consequences to a claim being transferred. More importantly, the fact that a claimant has made an objection pursuant to

section 5 does not have any bearing on the outcome of the priority dispute, which is dictated by the provisions of section 268(2) of the *Act.*

26. That said, the regulation was clearly drafted with the potential participation of claimants in mind. Of the eleven sections contained in the regulation, five of them address the rights and obligations of "the insured person" or claimant. Aside from the requirement in section 4 to provide the notice, the three parts of section 5 spell out the process to follow in the event of an insured person's objection. Section 6 addresses the insured person's obligation to provide relevant information on priority, and section 7(2) provides that an insured person who has provided notice of an objection may initiate arbitration. Finally, section 11 spells out that an insured person is not entitled to participate if the MVACF receives an application for benefits.

27. As well, the prescribed form for providing notice is titled Notice to Applicant of Dispute Between Insurers. The text of the notice is quite detailed, and is clearly directed to the applicant or insured person. It is clear that the drafters of the regulation intended that the rights of an insured person would be given special consideration in the process.

28. It is also clear that the regulation is intended to clarify the rules that insurers must abide by when they are involved in priority disputes. In that sense, the courts have expressed strong views on the manner in which the provisions of the regulation are to be interpreted and applied. The best example of this are the decisions of both the Superior Court and Ontario Court of Appeal in *Kingsway v. West Wawanosh, supra.* .

29. Both counsel relied heavily on the comments in those decisions. The facts are worth repeating in order to appreciate the context in which those comments were made. West Wawanosh failed to provide notice to Kingsway of its intention to dispute its obligation to pay benefits to the claimant within the allowable ninety days. The arbitrator was persuaded that the saving provisions in subsection 3(2) should be applied, but this finding was overturned by Justice Nordheimer on appeal to the Superior Court.

30. West Wawanosh then submitted that the court should grant relief from forfeiture, and permit it to proceed with the dispute. Justice Nordheimer stated that he was prepared to assume that arbitrators in this context have jurisdiction to grant equitable relief. However, he stated that the jurisdiction to do so in that circumstance was ousted by subsection 3(2) of the regulation, because the government had "occupied the field" by including a provision that allows for relief from the imposed notice period in defined circumstances. He added that it was questionable whether a court has jurisdiction to relieve against a penalty or forfeiture that is decreed by statute, but that if it did, he could not see how the jurisdiction would arise in a situation where the statute has stipulated for relief to be given in "certain defined condition and the party seeking the relief has been unable to bring itself within those defined conditions".

31. West Wawanosh sought leave to appeal Justice Nordheimer's decision to the Court of Appeal, and to have the decision overturned. The court granted leave, but dismissed the appeal. It agreed with Justice Nordheimer's comments about courts not having a general discretion to relieve against forfeiture where the regulation in issue explicitly provides for certain circumstances. Justice Sharpe, writing for the court, noted that insurers are sophisticated litigants who deal with disputes under the regulation on a daily basis, and that "clarity and certainty of application are of primary concern". He went on to make the oft-cited statement – "Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases".

32. While these comments arose in the context of a dispute about whether the savings provisions in subsection 3(2) should apply, the general message from the Court of Appeal is clear – the rules are to be applied as stated in the regulation, and exceptions should not be made to deal with the equities of a particular case. I take this to mean that while an arbitrator may consider an argument based on equitable principles, interpretations of the regulation that are either "creative" or based on purely equitable considerations must be avoided.

33. Arbitrator Samis addressed this issue in his decision in *Economical v. Belair, supra.* When faced with the argument by Economical that no prejudice would result by its late delivery of notice to Belair, he referred to the above decision and stated that the courts have made it clear that the lack of prejudice should not be a factor, as Economical's obligation was to comply with the Regulation. He stated that while he was sympathetic to the argument that a technical defence might lead to Economical being required to pay a claim that it would otherwise not be liable to pay, the courts have indicated that the parties involved in priority disputes are presumed to be sophisticated litigants with access to expert advisors, who are "engaged in conducting business of this nature on a regular basis" and that the procedural requirements of *Regulation 283/95* should be applied strictly.

34. I have kept these comments in mind as I considered the parties' submissions in this case. Section 4 states that an insurer giving notice (to another insurer) under section 3 "shall also give notice to the insured person" using the prescribed form. Both sides agree that the use of the word "shall" creates a mandatory obligation on the first insurer who received the application. Belair claims, however, that it should not be barred from proceeding with the dispute because it has not complied with this obligation. Given the manner in which the courts have directed that the requirements of the regulation be interpreted, I must disagree. As Arbitrator Samis allowed in the above case, I am sympathetic to Belair's submission that a technical defence will result in them being required to pay a claim that they would otherwise not be liable to pay. It is clear, however, that the requirements in the regulation must be applied strictly, despite the fact that no prejudice has been suffered.

35. I also find that despite the authority provided to me by section 31 of the *Arbitration Act* to apply equitable remedies, these circumstances do not justify me granting relief against forfeiture in favour of Belair. The words of section 4 are clear, and create a mandatory obligation on the first insurer. In my view, for the reasons expressed above, that ends the discussion.

36. Accordingly, I find that Belair's failure to provide notice to Ms. Letts of its intention to dispute its obligation to pay benefits leads to the conclusion that it is precluded from proceeding with this dispute.

ORDER:

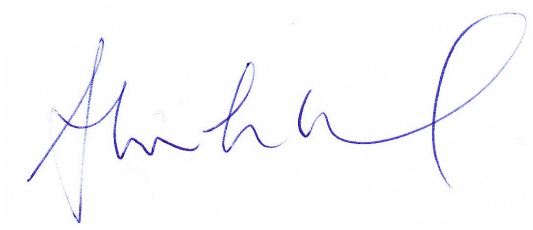
For the reasons expressed above, the Arbitration is hereby dismissed.

COSTS:

Given the result, Security National is entitled to its costs of the arbitration. If counsel cannot agree on the quantum of costs payable, I will convene a further teleconference to discuss the matter.

I will forward my account to Mr. Murray, counsel for Belair, under separate cover.

DATED at TORONTO, ONTARIO this __11__ DAY OF APRIL, 2014.



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Shari L. Novick
Arbitrator