IN THE MATTER of a dispute between the Ontario Municipal Insurance Exchange and Liberty Mutual Insurance Company, pursuant to Regulation 283 /95 under the *Insurance Act, R.S.O. 1990, c. 18*, as amended.

AND IN THE MATTER OF an Arbitration pursuant to the *Arbitration Act, S.O. 1991, c. 17*.

BETWEEN:

ONTARIO MUNICIPAL INSURANCE EXCHANGE

Applicant

and

LIBERTY MUTUAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Thomas G. Andrews, for the Applicant

Dwain C. Burns, for the Respondent

ISSUES:

1. Did Liberty Mutual receive written notice of the claim for accident benefits within ninety days of the Ontario Municipal Insurance Exchange (OMEX) receiving the completed Application for Accident Benefits from Mr. Thai Quoc Nguyen, as required by Section 3(1) of Regulation 283/95?
2. Did Liberty Mutual receive notice in some other fashion of Mr. Nguyen's claim?
3. In the circumstances of this case, is OMEX entitled to rely upon Section 3(2) of Regulation 283/95 regarding late notification of Liberty Mutual Insurance Company of Mr. Nguyen's claim?

4. Pursuant to Section 4 of Regulation 283/95, did OMEX give notice to the insured person of a possible dispute between insurers, using the approved form, and if not, what is the effect of such failure?
5. In the circumstances, is OMEX entitled to relief from forfeiture for any failure to comply with the provisions of Sections 3 and 4 of Regulation 283/95?

ORDER:

1. Liberty Mutual did not receive notice of the claim for accident benefits within ninety days of the application being provided to OMEX.
2. Liberty Mutual did not receive notice of the application in any other fashion prior to December 10, 1998.
3. OMEX is entitled to rely upon Section 3(2) of Regulation 283/95 regarding the late notification of Liberty Mutual of Mr. Nguyen's claim.
4. OMEX did not give notice to the insured person of a possible dispute between insurers in the approved format required by Section 4 of Regulation 283/95, however, this failure does not affect their compliance with Section 3 of the Regulation and their right to proceed against Liberty Mutual Insurance Company.
5. In these circumstances, relief from forfeiture is not available to OMEX.

HEARING:

The arbitration was held in the City of Toronto, in the Province of Ontario, on July 12, 2000, before me, M. Guy Jones, pursuant to the provisions of the *Arbitration Act, 1991*.

EVIDENCE:

With one notable exception, the basic facts of this case were not in dispute and can be summarised as follows:

Mr. Thai Quoc Nguyen was involved in a motor vehicle accident on July 14, 1997, while riding his bicycle on St. Clair Avenue West. He was struck by a City of Toronto garbage truck which was insured by the Ontario Municipal Insurance Exchange ("OMEX").

On July 18, 1997, Mr. Nguyen's solicitors, Pace, Johnson, and more specifically, a law clerk by the name of Mr. David Pham, of that office, advised OMEX that they were making a claim on behalf of Mr. Nguyen, and enclosed a completed Application for Accident Benefits. The Application for Accident Benefits was forwarded to Mr. James Kidd of Acclaim Adjusting Services Inc., the adjuster retained by OMEX.

In Part IV of the completed Application for Accident Benefits form, Mr. Nguyen had answered "no" to the following questions:

(a) Are you covered under any of the following automobile insurance policies;

Your own policy?

Your spouse's policy?

The policy of any other person on whom you are dependant (eg. a parent)?

A policy that lists you as a driver (i.e. a company policy)?

As part of his investigation, Mr. Kidd completed a requisition form for a motor vehicle accident report and also for the City of Toronto's internal accident report. In addition Mr. Kidd made certain inquires of Mr. David Pham, the law clerk at Pace, Johnson. This was done as Mr. Nguyen is vietnamese and speaks no english. Mr. Pham speaks both english and vietnamese. The completed Application for Accident Benefits indicated that Mr. Nguyen was divorced and had no dependants and that he was unemployed at the time of the accident. This made it unlikely that Mr. Nguyen would have had access to a company car. Mr. Kidd also assumed that since Mr. Nguyen was divorced, he would have no access to his former wife's motor vehicle insurance policy. There was some disagreement between the parties at the hearing as to what further steps, if any, Mr. Kidd took to ensure that there were no other policies of motor vehicle insurance available to Mr. Nguyen.

Mr. Kidd testified that on September 2, 1997 he had a telephone conversation with Mr. Pham regarding the claim. Mr. Kidd recalls that he discussed the issue of whether there was any other possible motor vehicle insurance available to Mr. Nguyen and that Mr. Pham advised him that there were no other policies available.

In support of this version of the telephone conversation, OMEX relies on a subsequent letter written by Mr.Kidd, dated September 24, 1997 to one of Mr. Nguyen's doctors, Dr. Gollish, in which Mr. Kidd states: "Mr.Nguyen has indicated he has no other insurance policy through which to claim so he has made it to the city's insurer".

Mr. Pham was called to testify on behalf of Liberty Mutual regarding his contact with Mr. Nguyen and Mr. Kidd. Mr. Pham stated that he had interviewed Mr. Nguyen for the purpose of completing the Application for Accident Benefits and had asked Mr. Nguyen the questions in Part IV of the Application for Accident Benefits, regarding the possible existence of any other motor vehicle insurance policies (as quoted above) and that Mr. Nguyen had answered each question in the negative. He also testified that he told Mr. Nguyen of the importance of telling the truth when answering the questions for the Accident Benefits Application. He then had Mr. Nguyen sign the completed application form.

With regard to the September 2, 1997 telephone conversation with Mr. Kidd, Mr. Pham recalled the conversation but did not recall any conversation regarding the availability of other insurance.

The different recollections between Mr. Kidd and Mr. Pham are difficult to reconcile. They both testified in an open and honest manner with regard to a telephone conversation held almost three years previously. On balance, I am inclined to accept Mr. Kidd's

recollection of the conversation as he had reason to ask the questions regarding the insurance, and there is limited collaboration for this in the letter of September 24, 1997 to Dr. Golish, although I am mindful that this does not refer to the telephone conversation itself and could refer to other investigations, including the completed application form.

In some ways, the question of whether Mr. Kidd did ask Mr. Pham about the existence of other insurance is somewhat academic as Mr. Pham testified that he had interviewed Mr. Nguyen and was unaware of any other insurance being available and if he had been asked by Mr. Kidd, he would have replied that to the best of his knowledge there was no other insurance available.

In any event, based on Mr. Kidd's investigation, OMEX proceeded to pay Mr. Nguyen income replacement benefits at a rate of four hundred dollars per week.

By May of 1998, OMEX had become suspicious of the extent of Mr. Nguyen's injuries and retained Profile Investigation Inc. to conduct surveillance of Mr. Nguyen. During the course of the investigation, a motor vehicle search through the Ministry of Transportation was done on Mr. Nguyen, which revealed that subsequent to the motor vehicle accident he had acquired a 1998 Honda Civic motor vehicle insured with Grey Power Insurance. When the investigator contacted this insurer he learned that other motor vehicle insurance might have been available to Mr. Nguyen through a policy held by Liberty Mutual Insurance Company on a 1989 Pontiac Bonneville, which was owned , at the time of the accident, by Mr. Nguyen's former spouse.

On October 23, 1998, the solicitors for OMEX, Borden & Elliott, wrote to Mr. Nguyen's new solicitors, advising that their investigation revealed that Mr. Nguyen did have access to another policy of motor vehicle insurance on the date of the accident and asked that Mr. Nguyen's solicitors confirm this with Mr. Nguyen. On November 19, 1998, Mr. Nguyen's solicitors confirmed that Mr. Nguyen had been a listed driver at the time of the accident under his former wife's policy of insurance, with Liberty Mutual. They also confirmed that Mr. Nguyen and his wife had been divorced since April 23, 1994, or more than three years prior to the accident. It is agreed for the purposes of this arbitration that Mr. Nguyen was apparently unaware that he was a listed driver on his former wife's policy of insurance at the time of the accident.

On December 10, 1998, OMEX's solicitors advised Liberty Mutual of Mr. Nguyen's claim for accident benefits and that they had recently discovered that he had a claim against Liberty Mutual through his former wife's policy. They further advised that they would be seeking repayment from Liberty Mutual as the appropriate insurer.

ANALYSIS OF THE ISSUES:

It has been agreed by the parties that OMEX did not provide written notice of the claim for accident benefits to Liberty Mutual within the ninety days of receipt of the completed application as required by Section 3(1) of Regulation 283/95. It is also agreed that

Liberty Mutual did not receive notice in some other fashion within the time limits required by Section 3(1) of Regulation 283/95.

The next question to be addressed is whether OMEX can rely upon the "saving provision" of Section 3(2) of Regulation 283/95 which states:

> And insurer may give notice after the ninety day period if, (a) ninety days was not a sufficient time to make a determination that another insurer or insurers is liable under Section 268 of the Act: and (b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the ninety day period.

In order to properly understand the function of Section 3(2) of Regulation 283/95 it is first necessary to understand the purpose of the regulation as a whole. The regulation was created to govern the disposition of priority disputes between insurers in accident benefit cases in the Province of Ontario. Prior to the regulation, parties injured in a motor vehicle accident in Ontario were often shuffled between insurers when a dispute arose as to which company was the proper insurer. On numerous occasions the injured parties received no benefits until the dispute between insurers was resolved.

Regulation 283 set up a system whereby the first insurer to receive a completed Application for Accident Benefits was required to pay benefits and the question of which insurer would ultimately pay was to be determined by a subsequent private arbitration between the potential insurers.

The notice provision set out in Section 3(1) of the Regulation states:

> (1) No insurer may dispute its obligation to pay benefits under Section 268 of the Act unless it gives written notice within ninety days of receipt of a completed Application for Benefits to every insurer who it claims is required to pay under that section.

The purpose of this notice requirement was commented upon by Arbitrator Malach, in Guardian Insurance Company of Canada and Wawanesa Mutual Insurance Company, August 5, 1999:

> "Having put the system into effect, the Legislators chose a ninety day period as the appropriate period of time in which the insurer paying benefits has to put another insurer or insurers on notice, if the paying insurer takes the position that another insurer is ultimately responsible to pay benefits in a given case.
>
> It appears that the time limit of ninety days was chosen so that the insurer that ultimately has to pay can take over management of the claim at an early time, since claims can amount to substantial amounts of money. If an insurer has to ultimately pay the benefit, the insurer will want to manage the claim in the way that the insurer manages all claims."

OMEX has argued that in the circumstances of this case strict compliance with Section 3(1) is not appropriate and the "saving provision" of Section 3(2) should apply.

The Honourable P. T. Galligan, in Canadian General Insurance Company and Axa Insurance Company, dated December 19, 1996, in my view correctly set out what the insurer must show in order to rely upon the provisions of Section 3(2). He stated:

> "In order for an insurer to escape the rigours of subsection 3(1) it must comply with the provisions of subsection 2. The plain words of subsection 2 lead me to the view that the insurer must establish both of two things;
>
> 1. That ninety days was not a sufficient time to make a determination that another insurer was liable, and
> 2. That it made reasonable investigations within the ninety day period to determine if another insurer was liable.
>
> It is my view that in order to obtain the benefit of subsection 2 the insurer must establish that, because of the peculiar circumstances of an individual case, the ninety day period was not sufficiently long for a determination of that issue."

In applying this test to our case, it is necessary to determine if OMEX made reasonable investigations during the ninety day period. In this regard the evidence indicates that Mr. Kidd, on behalf of OMEX, did the following:

1. Obtained a motor vehicle accident report from the Metropolitan Toronto Police.

2. Obtained the internal accident report from the City of Toronto.
3. Received the Application for Accident Benefits submitted by Mr. Nguyen and particularly Part IV, which deals with other possible sources of insurance coverage.
4. Spoke to Mr. David Pham, the law clerk in the office of the solicitors for Mr. Nguyen, who had interviewed Mr. Nguyen when completing the application, and confirmed that there was no other insurance available to Mr. Nguyen.

Counsel for Liberty Mutual has submitted that had Mr. Kidd made greater efforts during the ninety day period he might well have discovered the former spouse's policy of insurance within the ninety day period. In this regard Liberty Mutual pointed out that no driver's record search had been made of Mr. Nguyen, and that if it had, it might have revealed the existence of the former wife's policy. While it may be possible that in the right circumstances a driver's licence search might indirectly lead one to discover another policy of insurance, there is no evidence in this case that such a search would have revealed its existence, and I do not consider the failure to do such a search unreasonable in the circumstances.

It was also submitted by Liberty Mutual that the failure by OMEX to meet with Mr. Nguyen and take a statement from him, as offered by Mr. Pham in his letter to OMEX of July 18, 1997 was unreasonable and had it been pursued, OMEX might have discovered the existence of the policy at that time. The difficulty that I have with that position is two fold. To begin with, I found, as a fact, that Mr. Kidd did speak to Mr. Pham regarding the issue of insurance over the telepone on September 2, 1997 and confirmed that there

were no other policies based on Mr. Pham's conversation with Mr. Nguyen. Secondly, and perhaps more importantly, the evidence is clear that at this point in time Mr. Nguyen was unaware that he remained as a listed driver on his former spouse's policy of insurance. Accordingly even if he had been questioned by Mr. Kidd, it is extremely unlikely that Mr. Nguyen would have provided information which would have led to the discovery of the former wife's policy. Finally, Liberty Mutual submitted that had a motor vehicle search been done in the former wife's name, this would have led to the discovery of the Liberty Mutual policy and that Mr. Nguyen was a listed driver under that policy. While I agree that if such a search was done it would have been possible to obtain this information, I do not believe that it was reasonable, in the circumstances, for Mr. Kidd to do such a search when Mr.Nguyen had been divorced from his former spouse for more than three years before the accident. It is important to note that Section 3(2) requires a reasonable investigation, not perfection.

After hearing and considering all the evidence, I am satisfied that OMEX did make reasonable investigations within the ninety day period. I am also satisfied that the ninety days was not a sufficient time to make the determination that another insurer was liable. It is clear that the existence of the former wife's policy only came to light as a result of a subsequent investigation of Mr. Nguyen's injuries and disabilities. It was not reasonable in these circumstances to expect that the disability part of the investigation be undertaken within ninety days of the Application for Accident Benefits being received.

Liberty also argued that there was an undue delay from when OMEX first learned of the ex-wife's policy until Liberty was advised that a claim would be made for reimbursement. It would appear, on the evidence, that OMEX first became aware of the possibility of another policy of insurance being available in late May 1998. By October 1998, OMEX had followed up this lead and had its solicitors write Mr. Nguyen's solicitor in order to confirm that such a policy existed and covered Mr. Nguyen. On November 19, 1998, Mr. Nguyen's new solicitors wrote to OMEX's solicitors confirming that they had investigated and that there was such a policy in which Mr. Nguyen was a listed driver. On December 10, 1998, the solicitor for OMEX gave written notice to Liberty Mutual of its intention to claim reimbursement of accident benefit payments made to Mr. Nguyen.

While I am somewhat concerned about the time it took for OMEX to advise Liberty Mutual after first learning of the possibility of another insurer being available, I am mindful of the fact that this was an unusual situation and that it took some time to confirm the policy with Mr. Nguyen's new solicitors. I am also mindful of the fact that the delay, such as it was, did not occur within the time frame set out in section 3(2) of the Regulation. In my view, Section 3(2) of the Regulation was complied with, Liberty Mutual has suffered no particular prejudice, and accordingly, OMEX is not precluded from making its claim for reimbursement from Liberty Mutual.

It remains to be determined what the effect, if any, is of the failure by OMEX to comply with Section 4 of Regulation 283/95, which states;

> And insurer that gives notice under Section 3 shall also give notice to the insured person using a form approved by the Superintendant.

It is conceded by OMEX that it did not use the form prescribed by the Superintendent to give notice to Mr. Nguyen under Section 3. Arguably, and I accept Liberty Mutual's position in this regard, the notice was first given by OMEX's solicitors by way of carbon copying a letter they had written to Mr. Nguyen's solicitors dated December 4, 1998. Liberty Mutual also points out that the letter did not advise Mr. Nguyen that he had fourteen days to object to the transfer of the claim, as required in the form.

OMEX relies on Section 28 of the *Interpretation Act, R.S.O.1990, c.111*, which states;

> In every Act, unless the contrary intention appears,…
>
> (d) where a form is prescribed, deviations there from not affecting the substance or calculated to mislead do not vitiate it.

OMEX further argues that while it did not use the prescribed form, it did notify Mr. Nguyen of its intention to seek a transfer of the accident benefit claim to Liberty Mutual. It also pointed out that while Mr. Nguyen did have a right to object to the proposed transfer, since Liberty Mutual refused the transfer there was no need for Mr. Nguyen to exercise his right.

In my view, failure to comply with Section 4 of the Regulation is not, by itself, fatal to OMEX's claim for relief under Section 3(2). While the notices are to be given simultaneously, failure to comply with a notice to the insured, at least in these particular circumstances, does not mean that Section 3(2) was not complied with.

OMEX has also argued that I should exercise my equitable jurisdiction to relieve against forfeiture in this case. In light of my findings above, I do not think that it is necessary for me to decide if I have such power in these circumstances, and if so whether I should exercise it. Given, however, that the parties have gone to considerable lengths to make submissions in this regard, I will nonetheless address their arguments.

OMEX's position is essentially that, as an arbitrator pursuant to Section 31 of the *Arbitration Act*, I have the right to invoke equitable remedies.

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 statute or regulation. It is Liberty's position that given the clear wording of Section 3(1) of the Regulation, and the "saving" provisions of Section 3(2), I cannot invoke the equitable relief powers to, in effect, override the Regulation. The Judicial Committee of the Privy Council, in Rex vs. C.N.R. Co. [1923] 3 D.L.R. 719 set out the general proposition that equitable relief provisions cannot 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 repeal statutes."

The limitation of the right to relieve against forfeiture was further commented upon by the Ontario Court of Appeal in McBride vs. Comfort Living Housing Co-operative Inc. 7 O.R. (3rd) 394 wherein Finlayson, J.A., at page 399 stated;

> "By the Judicature Act, …Ontario enacted a general provision giving the courts power to relieve against all penalties and forfeitures…Section 111 (s.98) now sets out the equitable power of the court in much the same fashion…This section apparently does not empower a court to releive against penalties and forfeitures imposed by statute."

Counsel for OMEX has submitted that while there is a general line of authority that a court cannot relieve against statutory mandated penalties, there are numerous cases which have applied relief from forfeiture in insurance contract situations, even when the relief is granted against a statutory condition or provision. In support of this position counsel refers to such cases as Minto Construction Ltd. vs. Gerling Global General Insurance Co. (1978), O.R.(2nd) 617; Morrone vs. CAA Insurance Co. (1995), 17M.V.R.(3rd) 15 (Ontario General Division) and West Wawanosh Insurance Company vs. Kingsway General Insurance Company, Arbitrator Malach, April 6, 2000.

Counsel for OMEX argues that the two lines of authority can be reconciled by considering the purpose and intent of the regulations under the *Insurance Act*. It is argued that they provide a contractual regime for private insurers and insureds which governs their insurance policies. In essence, OMEX argues that these arrangements are contractual, although imposed by statute. This contrasts with taxing statutes and the War

Measures Act, where the government imposes penalties on the public and there is no contractual character whatever.

While counsel has provided a very compelling argument in this regard, I do not think that this is the essence of the difference between the two lines of cases. Those cases where the courts have been prepared to use their equitable powers in insurance cases involving a statute or regulation generally involved cases where Section 129 of the *Insurance Act* is involved. That section states;

> Where there has been imperfect compliance with a statutory condition as to proof of laws to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against forfeiture or avoidance on such terms as it considers just.

Section 129 applies only to proof of loss given by the insured. This is significantly different than in our case, where the notice was given by the insurer. As the court in Minto and in subsequent decisions relied on Section 129 to allow for relief in cases of statutory conditions, I am drawn to the conclusion that such relief is not available in this case. Even though we are dealing with a condition set out in a policy of insurance, it is legislated by statute or regulation, and since Section 129 of the *Insurance Act* does not apply, the general rule against allowing equitable relief to overrule a legislative condition applies.

In the event that I am incorrect in concluding that equitable relief is not available when dealing with Section 3 of the Regulation, the question then arises as to whether this is an

appropriate case to invoke the equitable relief requested. The factors to be considered are set out in Saskatchewan River Bungelow Ltd. et al. vs. Maritime Life Assurance Company, 1 15 D.L.R. (4th) 478 (S.C.C.) in which Justice Majors stated;

> "The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the court in the exercise of its jurisdiction are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach."

The conduct of OMEX, in terms of its investigation of the availability of insurance has already been commented upon at length. I have found that they conducted a reasonable investigation and that the information regarding the ex-wife's insurance policy could not reasonably have been obtained within ninety days of the Application for Accident Benefits being delivered.

One must also consider the gravity of the breach and the disparity between the value of the property forfeited and the damage caused by the breach. These two items are perhaps best dealt with together. The new information was obtained in late May, 1998, or approximately seven months after the normal notice period. While it is true that if Liberty Mutual had been aware of the claim during this time, they might have investigated it differently, I note that OMEX did hire a special investigator in the spring of 1998 to investigate the legitimacy of the claim, and when it determined that Mr. Nguyen should not be receiving continued income replacement benefits, terminated those

benefits on September 21, 1998. While it was not until December, 1998 that OMEX notified Liberty of their intention to have Liberty reimburse them, payments to Mr. Nguyen had been stopped by September of 1998. While I accept that there was some delay between discovering the new policy of insurance and notifying Liberty Mutual, I am also mindful of the fact that payments were stopped just a few months after the discovery was made. I accept that the situation was unusual and that counsel had to be consulted and further confirmation obtained from the new solicitors for Mr. Nguyen. I also note that a final settlement of Mr. Nguyen's claim was made in March 2000 by OMEX, however Liberty Mutual was contacted prior to the settlement and chose to take no position with regard to the reasonableness of the settlement.

When one looks at the value of the property forfeited in this case, it is basically the moneys paid for accident benefits. It would appear that this was approximately $26,110.54 up until September of 1998 and a further $10,250.00 in March 2000. It is those amounts which would, in essence, be forfeited by the breach. In my view the damage done by the forfeiture would outweigh the gravity of the breach, and had I had the power to exercise equitable relief, I would have done so.

In these circumstances, however, I have held that the "saving" provisions of Section 3(2) of the Regulation are applicable and that OMEX may proceed with its claim against Liberty Mutual.

Before closing, I should note that during the course of the arbitration I ordered that the question of the reasonableness of the payments made by OMEX to Mr. Nguyen would not be dealt with at that time, but would be deferred until after this decision. If the parties are unable to resolve this issue between themselves, I may be contacted to reconvene the hearing for that purpose.

COSTS:

I may be spoken to with regard to the issue of costs to be awarded.

Dated at Toronto this day of October, 2000.

M. Guy Jones
Arbitrator