DATE: 200010328
COURT FILE NO.: 99-CV-171740

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	*Boyd Critoph*, for the Applicant/Respondent in appeal
Applicant (Respondent in appeal)	
- and -	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE	*Stephen J. Scharbach and John Friendly*, for the Respondent/Appellant in appeal
Respondent (Appellant in appeal)	

B E T W E E N: **COURT FILE NO.:** *00-CV-190259*

KINGSWAY GENERAL INSURANCE COMPANY	*Elizabeth Iwata*, for the Applicant/Appellant
Applicant	
- and -	
WEST WAWANOSH INSURANCE COMPANY	*Lee Samis*, for the Respondent/Respondent
Respondent	
	HEARD: March 23, 2001

REASONS FOR DECISION

NORDHEIMER J.:

[1] I have before me appeals from the decisions of two arbitrators both of which involve the same central issue, that is, what is the proper interpretation to be given to section 3 of Reg.

283/95 under the *Insurance Act*, R.S.O. 1990, c. I.8.

[2] I will briefly set out the factual background of each appeal.

State Farm v. Her Majesty the Queen

[3] Gordon Greig was involved in a single vehicle accident on June 13, 1997. He was seriously injured. Mr. Greig's vehicle was not insured. However, Mr. Greig's father had an insurance policy with the respondent, State Farm. This fact raised the issue as to whether Mr. Greig was covered under his father's insurance policy. Mr. Greig would be so covered if he was a dependant at the time of the accident.

[4] Mr. Greig's lawyer contacted State Farm regarding the accident to determine if Mr. Greig would be covered under his father's policy. At the suggestion of State Farm, Mr. Greig's lawyer also wrote to the Motor Vehicle Accident Claims Fund. The letter is central to the issues raised in this appeal. The letter is dated November 12, 1997 and states, in part:

> "We have placed his father's auto Insurer, State Farm, on notice of a claim for medical and rehabilitation expenses although it has not yet been conceded by the Insurer that Gordon Greig was a dependent at the time of this loss.
>
> We ask that you contact the writer as soon as the file has been opened in order to discuss this matter further. Please accept this as notice that a claim will likely be made against the Fund for medical and rehabilitation expenses or benefits if it is determined that Mr. Greig was not a dependent."

[5] State Farm received a completed application for benefits on October 21, 1997. State Farm continued to investigate whether Mr. Greig was a dependant. By December, 1997, the adjuster had concluded that Mr. Greig was not a dependant. However, it was decided that an opinion from counsel should be obtained. On April 9, 1998, State Farm advised Mr. Greig's lawyer that they had received an opinion and that State Farm would pay the benefits to Mr. Greig but that State Farm intended to dispute the issue of priority with the Fund. On June 2, 1998, State Farm wrote to the Fund enclosing a Notice of Application of Dispute Between Insurers.

[6] The arbitration was heard by Arbitrator M. Guy Jones. Arbitrator Jones found that the letter of November 12, 1997 was sufficient to constitute notice to the Fund as required by section 3(1) of the Regulation. Arbitrator Jones also found that State Farm could not rely on section 3(2)

of the Regulation to extend the 90 day notice period and lastly he found that, if he had the authority to grant relief on equitable grounds, that authority did not allow him to overrule a legislative condition. It is only the first finding that is the subject of this appeal.

Kingsway General v. West Wawanoosh

[7] Herman Verdonk was involved in an accident on July 2, 1998. At the time, he was operating a motor vehicle that was owned by Grant Transport and was insured pursuant to a motor vehicle liability policy issued by Kingsway General. Mr. Verdonk was also an insured person under his own motor vehicle liability policy issued by West Wawanoosh.

[8] An application for benefits was received by West Wawanoosh on July 27, 1998. An application for benefits was also received by Kingsway General on July 31, 1998. West Wawanoosh sought an opinion from counsel as to whether it or Kingsway General should be paying benefits to Mr. Verdonk. The opinion was obtained and concluded that West Wawanoosh should be paying. On August 26, 1998, Kingsway General was advised by counsel for Mr. Verdonk that West Wawanoosh had agreed to pay the claim. Consequently Kingsway General closed its file.

[9] On February 15, 1999, West Wawanoosh delivered a Notice of Dispute Between Insurers to Kingsway General. The delivery of the Notice was triggered by the discovery in February 1999 by counsel for West Wawanoosh of a small body of unreported decisions that suggested that Kingsway General might, in fact, be liable for the payment of the accident benefits.

[10] The dispute came before Arbitrator Stephen M. Malach, Q.C. A preliminary issue was raised as to whether West Wawanoosh had complied with the notice provisions of section 3 of the Regulation. In particular, the issue was whether section 3(2) of the Regulation could be relied upon by West Wawanoosh to extend the 90 day notice period. Arbitrator Malach found that it could be. He concluded that the 90 day period was not a sufficient period of time for West Wawanoosh to a make a determination as to which insurer was liable because the law was unclear at the time of the accident. Arbitrator Malach therefore extended the 90 day notice period in order to permit West Wawanoosh to dispute its liability. Kingsway General seeks leave to appeal from that decision and, if leave is granted, asks that that decision be reversed.

Analysis

[11] In considering the issues raised by these appeals, I begin by setting out the provisions of section 3 of Regulation 283/95. Section 3 states:

> "(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.
>
> (2) An insurer may give notice after the 90-day period if,
>
> > (a) 90 days was not a sufficient period of 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 90-day period.
>
> (3) The issue of whether an insurer who has not given notice within 90 days has complied with subsection (2) shall be resolved in an arbitration under section 7."

[12] In a recent arbitration decision, The Co-operators v. State Farm Mutual Automobile Insurance Company (May 19, 2000), Arbitrator Bruce R. Robinson expressed the rationale for section 3 of the Regulation in the following way:

> "I find that Ontario Regulation 283/95 was put in place to avoid confusion and prejudice in disputes between insurers. It provided a simple procedural scheme to assist insurers in dealing with disputes in a prompt and efficient manner, while ensuring that the injured party received accident benefits. It furthermore put in place a limitation period with a provision to extend or review the reasonableness of that period. This limitation period allows and encourages each of the insurers to deal expeditiously with their disputes."

A similar explanation for the section was provided by Abritrator P.T. Galligan, Q.C. in Canadian General Insurance Company v. AXA Insurance Company (December 19, 1996). I accept the above statement as a fair exposition of the purpose behind the section although, as I will mention later, the 90 day period would be more accurately described as a notice period and not as a limitation period.

[13] In addition, in considering these appeals, I should mention that there was agreement among all counsel that the test or standard on the appeals is that of correctness – see *National Ballet of Canada v. Glasco* (2000), 49 O.R. (3d) 230 (S.C.J.) and *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1995), 23 B.L.R. (2d) 259 (Ont. Gen. Div.).

[14] I now turn to a consideration of the appeals individually.

State Farm v. Her Majesty the Queen

[15] Before turning to the merits of the appeal, I should mention the fact that, as was fairly pointed out by counsel for State Farm, leave to appeal is not necessary under section 45(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17, because the submission to arbitration provided for a right of appeal.

[16] Central to the decision reached by Arbitrator Jones was his adoption of the submission made by counsel for State Farm that the requirements of section 3(1) of the Regulation were vague. He stated, at p. 9 of his reasons:

> "Counsel for State Farm rightly points out that the requirements regarding the notice, as set out in section 3(1) are quite vague. It simply states that the notice must be given in writing, be made by the insurer, be within 90 days of receiving a completed application for benefits, and be sent to every insurer who it claims is required to pay under that section. It does not, as do other sections of Regulation 293/95 or sections of the Accident Benefits Schedule itself, require a specific form to be filled out, with additional information."

[17] Arbitrator Jones then went on to note the fact that State Farm conceded that the notice given (that is the letter of November 12, 1997) "may not have been in strict compliance" with the requirements of section 3(1). He then agreed with State Farm's position that it could rely on section 28(d) of the *Interpretation Act*, R.S.O. 1990, c. I.11 which states:

> "Implied provisions -- In every Act, unless the contrary intention appears,
>
> . . .
>
> (d) deviation from forms -- where a form is prescribed, deviations therefrom not affecting the substance or calculated to mislead do not vitiate it;"

[18] Arbitrator Jones reviewed the facts surrounding the sending of the November 12, 1997 letter including the facts that the letter had not been sent by State Farm itself and that the letter

did not expressly state that State Farm was disputing its liability to pay the benefits. However, he also observed that knowledge and information regarding the accident had been communicated to the Fund. Arbitrator Jones then concluded, at p. 12 of his reasons:

> "In my view, the Fund was well aware of the accident, and that Mr. Greig had been severely injured. It is logical to presume that it also knew that accident benefits were being claimed, that State Farm had put the issue of dependency in question and that a claim would likely be made against the Fund. This, in my view, fulfills the basic requirements of section 3(1) of the Regulation and as such I find that State Farm may proceed with the arbitration."

[19] I have concluded that Arbitrator Jones erred in his analysis and his conclusion. First, I do not accept the proposition that the requirements of section 3(1) of the Regulation are vague. Indeed, Arbitrator Jones, in the above quotation, was able to accurately set out the requirements of the section directly after his acceptance of the proposition that the requirements were vague. Section 3(1) makes it clear that an insurer who wishes to dispute its obligation to pay benefits under section 268 of the *Insurance Act* must itself give written notice to other insurers within 90 days of receipt of a completed application for benefits. There is nothing vague about that requirement. State Farm did not give such a notice. In my view, State Farm cannot rely on the letter of November 12, 1997 as constituting the notice which it is required to give because State Farm did not send the letter. Indeed, the letter does not even say that it is being sent on behalf of or at the direction of State Farm. Further, it does not say that State Farm is disputing its liability and asserting that another insurer, in this case the Fund, is liable. The letter of November 12, 1997 simply does not comply with the express requirements of section 3(1).

[20] I also do not believe that State Farm is entitled to rely on section 28(d) of the *Interpretation Act*. That provision only applies "where a form is prescribed". It is common ground that there is no prescribed form under section 3(1) of the Regulation. Section 28(d) of the *Interpretation Act* cannot therefore have any application to section 3(1).

[21] In *Bannon v. Thunder Bay (City)* (2000), 48 O.R. (3d) 1 (C.A.), Doherty J.A. commented on the rationale behind notice provisions in the following terms, at p. 8:

> "The notice requirement is, however, akin to a limitation period in that failure to comply with the section constitutes a bar to the action just as failure to commence the action within the limitation period constitutes a bar. The notice requirement

> also promotes the same interests served by limitation periods. It prompts the plaintiff to pursue the claim diligently, affords the defendant an opportunity to make timely investigation of the incident giving rise to the action and allows the defendant to proceed with its affairs secure in the knowledge that it will not face claims for which notice was not given as required by the statute: see *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at pp. 562-64, 151 D.L.R. (4th) 429."

[22] I do not see any reason why the parties here should not be held to strict compliance with the requirements of the Regulation. In both of these appeals, we are dealing with three large insurance companies and a branch of the Provincial Government. It goes without saying that these parties are sophisticated and experienced participants in the insurance industry. They have available to them all of the advisors of the highest quality that they could need in order to determine their rights and obligations under the prevailing statutory regime. There is, therefore, no unfairness visited upon them by insisting on strict compliance with the notice requirements. This situation is therefore distinguishable from cases such as *Myshall v. Toronto (City)*, [2001] O.J. No. 481 (C.A.) and *Mattick v. Ontario (Minister of Health)*, [2001] O.J. No. 21 (C.A.) where individual citizens ran afoul of statutory notice requirements but relief from the strict application of the notice requirements was deemed warranted because the individual citizen was unfamiliar with his or her rights and obligations. Further, in cases involving disputes between insurers, strict compliance promotes certainty for the parties in terms of their handling of claims. While it might redound to the detriment of State Farm in this case, it is just as likely that State Farm will be the beneficiary of the strict compliance in some other case.

[23] In my view, absent receipt by the Fund of a proper notice under section 3(1) from State Farm within the 90 day notice period, the Fund was entitled to consider that any claim arising out of Mr. Greig's accident was no longer going to be advanced against it and the Fund was entitled to consider the matter closed. Consequently, State Farm was not, and should not be, entitled to proceed with its dispute with the Fund in the circumstances of this case.

[24] The appeal is therefore allowed, the decision of Arbitrator Jones dated August 11, 2000 is set aside and the dispute of State Farm is dismissed.

Kingsway General v. West Wawanoosh

[25] Unlike the first appeal, in this case there is a need for Kingsway General to obtain leave to appeal. The requirements for leave to appeal are set out in section 45(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17:

> "(1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
> (b) determination of the question of law at issue will significantly affect the rights of the parties."

[26] After hearing the submissions of the parties, I was satisfied that the test for leave to appeal was met in this case. The matter is of importance to the parties given both the amount that is involved and the consequences both for this case as well as for other similar cases that may arise in the future. There are, I am advised, no authorities at this level which have considered the proper interpretation of section 3 of the Regulation. There are however conflicting decisions among arbitrators regarding the issue raised by this appeal. Subsequent to the decision in this case, Arbitrator Bruce R. Robinson in ING Halifax Insurance Company v. Travelers Indemnity Company and Great West Casualty Company (October 27, 2000), reached the opposite conclusion to that reached by Arbitrator Malach here. In doing so, he expressly disagreed with the reasoning of Arbitrator Malach.

[27] In this case, Arbitrator Malach extended the 90 day notice period under section 3(2) of the Regulation on the basis that the notice period did not give sufficient time for West Wawanoosh to make a determination that Kingsway General was liable to pay the benefits to Mr. Verdonk. There was no issue but that West Wawanoosh had made reasonable investigations within the notice period as required by section 3(2)(b).

[28] Arbitrator Malach's analysis of the issue raised is contained at p. 11 of his reasons where he said:

> "In this case, it is obvious that the 90-day period was not a sufficient period of time. That was simply because the law was unclear at the time of the subject

> accident. The law was still unclear in August of 1998, when West Wawanoosh and counsel for West Wawanoosh considered the issue as to which company had to pay the benefits to Verdonk. There were no decisions interpretating s. 66(1) and the interaction with and applicability of the same to section 268 of the Insurance Act, in July and August of 1998. That being so, it is unreasonable to expect that any insurer could have made a determination as to which insurer had to pay, with the possible involvement of a company vehicle, in or about the summer of 1998."

[29] Regretfully, I find myself again in disagreement with the analysis and conclusion of the arbitrator. First, the conclusion by Arbitrator Malach that the 90 day period was not a sufficient time for West Wawanoosh to make a determination seems to be directly at odds with the fact that West Wawanoosh made a determination within that period. It determined, after seeking legal advice, that it was responsible for paying the benefits to Mr. Verdonk. It is difficult to reconcile the fact that a determination was made with the conclusion that there was insufficient time to make a determination.

[30] In fact what Arbitrator Malach appears to have concluded is that the 90 day period was insufficient for West Wawanoosh to make the correct determination. However, that conclusion reads into section 3 of the Regulation a significant requirement that is absent from the express language of the section. There is nothing in the section that purports to require correctness as a part of the determination. It simply stipulates that the insurer must make a determination within 90 days unless reasonable investigations undertaken within that time have made a determination impossible. The section is not intended, in my view, to deal with the issue of the correctness of the determination but simply the ability to make the determination. In that regard, the section is really directed toward the ability of the insurer to gather the necessary factual information to make a determination as to whether its policy or the policy of another insurer should answer for the benefits to be paid. It is not directed at ensuring that, armed with the factual information, the insurer will make the correct determination. Indeed, if there was uncertainty as to which insurer was liable, one would expect, as Arbitrator Malach himself pointed out, that the insurer would deliver a notice of dispute so that a ruling could be obtained.

[31] I also have difficulty with the finding that because the law was "unclear", the notice period was not sufficient to make a determination. The law is frequently in a state of flux. It evolves over time in different areas and with respect to different issues. If the conclusion of

Arbitrator Malach is correct, then it immediately raises the thorny question as to when it can be said that the law is clear. Absent being able to fix that point in time, the application of the section could potentially have unlimited application. I also note that while Arbitrator Malach observes that there were no decisions interpreting section 66(1) in July and August, 1998, the fact is that once decisions interpreting that section were forthcoming, those decisions (at least at the arbitration level) were not in agreement. It does not seem, therefore, that there was necessarily any greater clarity regarding the law after those decisions were known than there existed beforehand.

[32] What is clear is that West Wawanoosh had the necessary factual information to make a determination. It sought legal advice on the issue. West Wawanoosh concluded that it had to pay the benefits to Mr. Verdonk. The fact that arbitrators may have determined in subsequent cases that the insurer of the company vehicle, as Kingsway General was in this case, is the proper insurer to pay the benefits does not bring the matter within the parameters of section 3(2) and I find that Arbitrator Malach erred in concluding that it did.

[33] I have to address two other issues with respect to this appeal. First, counsel for West Wawanoosh submitted before me that notice under section 3(1) had, in fact, been given by West Wawanoosh to Kingsway General within the 90 day notice period and therefore there was no need to rely on section 3(2). Counsel referred to a letter dated July 30, 1998 from the solicitors for Mr. Verdonk which Kingsway General received on July 31, 1998 in which Mr. Verdonk's solicitors advised that the adjuster at West Wawanoosh:

> ". . . is taking the position at the present time that Section 66, subsection (1) of the Statutory Accident Benefits should take precedence here, which would mean that Kingsway General Insurance Company is the primary insurer."

[34] When I inquired why this issue had not been addressed by Arbitrator Malach, I was advised that the point had been argued before him but that he simply did not address it in his reasons. That seems surprising to me given the significance of the issue but, accepting that is what happened, I do not see how the issue can now be brought before me. There is no cross-appeal by West Wawanoosh from that aspect of Arbitrator Malach's decision, which I believe there would have to be in order to properly place the issue before me on the appeal.

[35] However, even if I am incorrect in that conclusion, the notice relied upon by West Wawanoosh for compliance with section 3(1) suffers from the same failing which I have found to be present in the State Farm case. The fact is that the letter did not come from West Wawanoosh. It came from the solicitors for Mr. Verdonk. The letter does not therefore comply with the requirements of section 3(1) and cannot, as a result, constitute a proper notice.

[36] The other issue is the reliance by West Wawanoosh on the equitable jurisdiction to grant relief from forfeiture. This issue did not need to be addressed by Arbitrator Malach in light of his conclusion regarding the application of section 3(2).

[37] I am prepared for the purposes of this appeal to assume that arbitrators under the *Arbitration Act, 1991* have jurisdiction to grant equitable relief. In my view, however, that jurisdiction in the circumstances of this case has been ousted by the provisions of section 3(2) of the Regulation. The government has "occupied the field" by including a provision which allows for relief from the imposition of the 90 day notice period in the particular circumstances set out in section 3(2). Having done so, there is no jurisdiction to invoke other grounds for granting such relief.

[38] In any event, it is questionable whether the court has any jurisdiction to relieve against a penalty or forfeiture that is decreed by statute. This principle is stated in *Story on Equity*, 3rd edition, (1920) at para. 1326:

> "When any penalty or forfeiture is imposed by statute upon the doing or omission of a certain act, then courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred, for it would be in contravention of the direct expression of the legislative will."

[39] The same principle is set forth in the Court of Appeal's decision in *McBride v. Comfort Living Housing Co-operative Inc.* (1992), 7 O.R. (3d) 394 where Finlayson J.A. said, at p. 402:

> "Section 111 (now s. 98) of the CJA now sets out the equitable power of the court in much the same fashion:
>
> > 111. A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

> This section apparently does not empower a court to relieve against penalties and forfeitures imposed by statute: Webb v. Box (1909), 19 O.L.R. 540 (Div. Ct.) (leave to appeal refused (1909), 20 O.L.R. 220 (C.A.))."

[40] However, even assuming there is some residual jurisdiction in the court to relieve against penalties and forfeitures imposed by statute, I cannot see how the jurisdiction could arise in a situation where, as here, the statute has already stipulated for relief to be given in certain defined conditions and the party seeking the relief has been unable to bring itself within those defined conditions.

[41] I have concluded on the facts of this case that West Wawanoosh has failed to establish that it can rely on section 3(2) of the Regulation so as to extend the time period for giving notice of a dispute. The appeal is therefore allowed, the decision of Arbitrator Malach dated April 6, 2000 is set aside and the dispute of West Wawanoosh is dismissed.

[42] If the parties cannot resolve the issue of the costs of these appeals, they may make written submissions on the issue. The appellants' submissions shall be filed within 10 days of the release of these reasons and the respondents' responses shall be filed within 10 days thereafter. No reply submissions are to be filed without leave. I would appreciate it if counsel could keep their submissions brief.

NORDHEIMER J.

Released: March 28, 2001

SUPERIOR COURT OF JUSTICE

Court File No. 99-CV-171740

B E T W E E N:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE

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REASONS FOR DECISION

NORDHEIMER J.

RELEASED: MAR 2 8 2001