IN THE MATTER of the Insurance Act, R.S.O. 1990, Chapter 18, Section 268, and Regulation 283/95 and in the matter of the Arbitration Act, 1991, Chapter, 17, S.O. 1991

AND IN THE MATTER OF AN ARBITRATION BETWEEN

**CGU GROUP (CANADA) LTD.**

**Applicant**

**and**

**ZURICH CANADA**

**Respondent**

# DECISION

**COUNSEL:**

**Matthew G. Duffy, for the Applicant**

**Ian M. Boundy, for the Respondent**

## ISSUE:

1. Are the circumstances of this case such that ("CGU") is entitled to rely upon Section 3 (2) of Regulation 283/95 regarding late notification of ("Zurich") of Mr. Ryan Whittle's claim for accident benefits?

## ORDER:

CGU is not entitled to rely on the provisions of Section 3 (2) of Regulation 283/95 in this matter.

## HEARING:

The hearing of the preliminary issue in this matter was held in the City of London, in the Province of Ontario, on September 28, 2001.

## THE ISSUE:

The issue involved in this matter can be stated very briefly. In the Province of Ontario, all disputes as to which insurer is to pay accident benefits to a person injured in a motor vehicle accident are to be settled in accordance with Regulation 283/95. In accordance with that regulation, the insurer that first receives a completed Application for Accident Benefits is to pay

the benefits and provide any other insurer that it believes is in priority to it with a written "Notice of Dispute between Insurers" within 90 days of receiving the completed application. Section 3 (1) of the Regulation specifies that the unless the written notice is given within the 90 days, the insurer may not dispute its' obligation to pay the benefit.

This requirement is subject, however, to Section 3(2) of Regulation 283/95, that provides that the 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 the another insurer is liable under Section 268 of the Act; and
(b) the insurer made reasonable investigations necessary to determine if another insurer was liable within the 90 day period.

In this case, CGU has conceded that the Notice of Dispute between Insurers was not provided to Zurich within the required 90 days of receiving the Application for Benefits, and accordingly the question to be decided is whether or not CGU can avail itself of the "saving provisions" of Section 3 (2) of the Regulation.

**THE FACTS:**

The relevant facts of this case can be summarised fairly briefly.

On August 3, 1998, Mr. Ryan Whittle was seriously injured while riding on an "ATV". At the time of the accident, Ryan was a nineteen year old student living with his mother and stepfather, Michelle Whittle and Steve Getty.

At the time of the accident, Ryan held no motor vehicle insurance policy of his own, and was not a named insured under any policy. However, approximately one month after the accident, on September 8, 1998, Mr Donald Lescheid, acting as solicitor for Ryan Whittle, wrote to CGU and advised it that Ryan was a dependent of the Getty residence and as such insured, for accident benefit purposes, under a policy of motor vehicle insurance held by Mr. Getty with CGU. The solicitor went on to advise CGU that Ryan would be looking to CGU for the payment of accident benefits.

CGU subsequently provided Ryan's solicitor with an Application for Accident Benefits and the completed application was received by CGU on October 9, 1998.

As mentioned above, at the time of the accident, Ryan was living with his mother and stepfather, however, he had recently moved there, having lived for some period of time with his father, Mr. Jim Whittle. A question therefore arose as to whether Ryan was a dependent of his mother and stepfather, or of his father at the time of the accident.

In order to determine the answer to the issue at hand, it is necessary to briefly review the chronology of events that occurred subsequent to receipt of the first notice letter to CGU, dated September 8, 1998.

CGU, upon receiving Mr. Lescheid's letter, immediately assigned one of its' adjusters, Ms. Becky Ostrom to the file. She in turn hired an independent adjusting firm, Adjusters Canada, to act on its' behalf in investigating and handling the claim. Lisa White, an adjuster with that firm, was assigned to the matter.

It is clear from an examination of a fax memorandum from Ms. White to Ryan's solicitor dated September 17, 1998, that CGU was aware very early on that there was a dependency issue and that Ryan might have been a dependent of his father at the time of the accident. In that memo, Ms. White asked for information regarding any child support that Mr. Whittle might have been paying for Ryan and other questions regarding the issue of dependency.

Subsequent to receiving the actual application, it is clear that CGU did follow up regarding the question of dependency. On September 29, 1998 Ms. White reported to CGU that she had met with Ryan's solicitor, who was noted to be co-operative, and worked out a draft statement that was to be reviewed by Mr Whittle and his lawyer and returned to Ms. White. Ms. White also met with Ryan's mother and father at the hospital where Ryan was staying and reviewed various accident benefit matters. In her letter to CGU of September 29, 1998, Ms. White indicated that it appeared "that financial dependency was on Michelle Whittle and Steve Getty", however she further indicated that she would conduct further investigation and clarify the matter.

On September 26, 1998, a representative of Adjusters Canada's Leamington office, Mr. Bob Lane, met with Michelle Whittle and her husband, Steve Getty and obtained further information regarding the dependency issue. He also became aware of the fact that Ryan's father, Jim Whittle owned a motor vehicle. This information was provided to Ms. White who passed it along to CGU by way of a reporting letter dated October 7, 1998. In that reporting letter, Ms. White indicated that further investigation was required in order to determine the dependency issue, including obtaining legal documentation regarding custody and support as well as income tax returns. On October 26, 1998, CGU wrote Ryan's solicitor and advised that they were still investigating the priority issue, and on December 2, 1998 Ms. White wrote Ryan's solicitor asking for a copy of the custody order from Ryan's parents divorce and income tax returns for the year before the accident.

On December 9, CGU followed this up with a letter to Ryan's solicitor indicating that the priority question was still in issue and suggesting that the solicitor report the claim to Mr. James Whittle's automobile insurer.

There would appear to have been little further activity with regard to the priority issue until January 4, 1999, when CGU wrote an "urgent request" by fax to Ryan's solicitor, requesting details concerning Ryan's father's automobile insurance policy, noting that "we are required to advise the insurer of our intent to dispute priority within 90 days of receipt of the completed Application for Accident Benefits, which was received by our independent adjuster on October 10, 1998".

On January 7, 1999, Ryan's solicitor faxed a letter to Adjusters Canada with a copy to CGU, indicating that he would be meeting with Ryan and Michelle Whittle on January 14, 1999 and would bring the request for information regarding Mr. James Whittle's automobile insurance to their attention and fax the information to Adjusters Canada or CGU.

On January 11, 1999, Ryan's solicitor faxed to CGU a copy of the "pink card" evidencing Jim Whittle's motor vehicle insurance with Zurich, and providing the policy number.

On January 21, Ryan's solicitor wrote to CGU providing the requested divorce and income tax information. This letter was received by CGU on January 27, 1999. On February 15, 1999, CGU provided Zurich with a "Notice of Dispute between Insurers". It is to be noted that the 90 days from the receipt of the Application for Accident Benefits expired as of January 7, 1999.

**ANALYSIS:**

In order for CGU to be allowed to pursue its' claim against Zurich it is necessary, pursuant to Section 3 (2) of Regulation 283/95, to show that 90 days was not a sufficient period of time to make a determination that another insurer was liable under Section 268 of the Act, and the insurer made reasonable investigations necessary to determine if another insurer was liable, within the 90 day period.

As the Honourable P. Gallaghan indicated, in Canadian General Insurance vs. AXA Insurance Company, unreported arbitration decision, December 17, 1996, Section 3(2) of Regulation of 283/95 involves a two-part test. The insurer must first show that 90 days was not a sufficient time to make a determination that another insurer was liable, and also that it made reasonable investigations within the 90 day period to determine if another insurer was liable.

As numerous Arbitrators have pointed out, the onus is clearly upon the party attempting to rely upon Section 3 (2) to show that both tests have been complied with (AXA Insurance vs. Co-operators Insurance, Summary No. 9626, May 3, 2001).

I will deal first with the issue of whether 90 days was a sufficient period of time to decide whether another insurer is liable. In examining this issue, it is necessary to consider what degree of certainty is required before an insurer should proceed to send a Notice of Dispute to another insurer. It is not necessary, in my view, for the insurer to determine, with absolute certainty, that another insurer is liable to pay the benefits before sending out the notice. This would be an unreasonable burden on the insurer and would, arguably, virtually eliminate the need for subsequent arbitration, which Regulation 283 clearly provides for. On the other hand, it would not be desirable to have insurers, once they receive an Application for Accident Benefits, to automatically send Notices of Dispute to all the major automobile insurers in the province, in order to insure that they have complied with Section 3 (1) of the Regulation.

What is required, in my view, is that the insurer must conduct an investigation which would reasonably suggest that there is another insurer that may be responsible to pay the accident benefits in question. The Legislature has, in effect, decided that 90 days is a reasonable time to

conduct such an investigation and is up to the insurer, in each particular case, to show that that was not sufficient time.

In "dependency" type cases, it strikes me that there are normally two essential parts to the investigation. The insurer must determine what other possible insurers may be involved, and some reasonable details concerning the financial situation of the parties.

The facts of this particular case have been already outlined in some detail. The issue of dependency was apparent to CGU even before the Application for Accident Benefits was received, and the adjuster, to her credit, took immediate steps to look into the matter. This was not, however, a situation where the facts were being hidden by a party, or of one side being uncooperative. The solicitor for Ryan Whittle was noted by the adjuster as having been co-operative. In addition, an adjuster actually met with Ryan's solicitor and worked out a draft statement. Furthermore, an adjuster actually met with Ryan, James Whittle and Michelle Whittle at the hospital, at which time various accident benefit issues were discussed. While I appreciate that this was not the perfect setting for an interview on the question of insurance priority issues, it does give some indication of the opportunities available to CGU to obtain the information that it required.

While CGU is to be commended for not simply rushing off to send notices to any number of companies without first investigating the situation, it seems to me that there was ample opportunity to obtain the information required by it. What CGU appears to have been waiting for were copies of Ryan's father's automobile insurance policy, the custody order from the divorce of Ryan's parents and income tax returns for the year prior to the accident.

It will depend upon the facts of each particular case whether this was vital information to have prior to serving a "Notice of Dispute", and how long it should take to obtain the information. In this case, it would certainly be reasonable to obtain the insurance particulars of Ryan's father, and some basic information regarding Ryan's dependency situation. In the normal case, I would not anticipate that this would take more than 90 days to obtain and the onus is, of course on CGU to show that it could not reasonably do so within the 90 day period. It is clear from the above that CGU made enquiries very early on to obtain necessary information. For example, as early as September 17, 1998, CGU was requesting information from Ryan Whittle's solicitor regarding child support. This was followed up by CGU with a further letter to Ryan's solicitor on December 2, 1998 and a fax on January 4, 1999. It was not until January 21, 1999 that the full information was actually provided, well after the 90 day period had run. On the other hand, there is no suggestion by CGU that Ryan Whittle's solicitor was uncooperative.

I am not convinced that the necessary information regarding the financial situation of Ryan Whittle could not have been obtained, with reasonable diligence, within the required 90 days. Mr. Jim Whittle could have been questioned, and Ryan's solicitor contacted by telephone when it became clear that the 90 notice period was expiring.

Dealing with the question of the existence of other possible insurers, it is clear that CGU was aware as early as October 1, 1998 that Mr. James Whittle might have owned a motor vehicle at the time of the accident. It would appear that they made no actual inquiry as to who the insurer

of that motor vehicle actually was until January 4, 1999, or approximately 94 days later. There is nothing to suggest that this information was particularly difficult to obtain, indeed, Ryan Whittle's lawyer was noted to have been "extremely cooperative" by the adjuster. I also note that once the information was requested of Ryan's lawyer, it was provided within a few days. I find that this information could have been obtained within the required 90 days.

While I wish to make it very clear that each case must be determined on the particular facts of that case, I find that in this matter 90 days was sufficient time to make a determination that another insurer might have been liable to pay the accident benefits. While all this information was not ultimately provided until January 21, 1999, there was ample opportunity, in my view, to obtain the critical information prior to the expiry of the 90 day period.

In light of my finding with regard to the sufficiency of the 90 day time period, it is not, strictly speaking, necessary for me to examine the question of whether the insurer made reasonable investigations within the 90 day period, however, as counsel presented the arguments in detail, I will deal with them.

Let me begin by saying that CGU is to be commended for following the Regulation, both in paying the injured party and by investigating the priority issue before sending out a Notice of Dispute. It is clear that the adjuster realised very early on that dependency was an important issue and took steps to clarify the matter. She had an adjuster meet with Ryan's solicitor as well as his parents. She requested that further information be obtained from Ryan's solicitor. Most of this information was requested by December 2, 1998 and the final information requested January 4, 1999, just three days before the end of the notice period. As CGU was aware of the fact that the time period was expiring, it is not clear to me why further efforts such as a phone call to Ryan's solicitor, or to contact Mr. James Whittle personally, were not made in order to obtain the information requested, within the required time frame.

As a result, I find that CGU did not comply with Section 3 (2) (b) of the Regulation in that it did not make the reasonable investigations within the 90 day period.

Accordingly, CGU can not dispute its' obligation to pay benefits under Section 268 of the Insurance Act.

## COSTS:

I may be spoken to in the event that the parties are unable to agree with regard to the issue of cost.

Dated at Toronto this day of October, 2001

**M. Guy Jones**
Arbitrator