IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, s. 275;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

PRIMMUM INSURANCE COMPANY

Applicant

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE MINISTER OF FINANCE,
LOMBARD CANADA, AND LIBERTY MUTUAL INSURANCE COMPANY**

Respondents

DECISION

COUNSEL:

Sheldon A. Gilbert, Q.C. for the applicant

John Friendly for the respondent Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance

Harry P. Brown for the respondent Lombard Canada

Mark K. Donaldson for the respondent Liberty Mutual Insurance Company

ISSUES:

1. Which insurer or is the Motor Vehicle Accident Claims Fund responsible for payment of accident benefits to or on behalf of Steven Throsel?

2. Do the saving provisions of section 3 of Regulation 283/95 apply?

DECISION:

1. Primmum is responsible for payment of accident benefits to or on behalf of Steven Throsel.

2. The saving provision of section 3 of Regulation 283/95 apply.

HEARING:

1. This hearing was held in Toronto, Ontario on January 6 and 10, 2005, before me, M. Guy Jones, arbitrator.

FACTS AND ANALYSIS:

This arbitration arises out of a motor vehicle accident which occurred on October 1, 2000 in which Mr. Steven Throsel was very seriously injured. An application for accident benefits was submitted to Pembridge Insurance Company ("Pembridge") on January 26, 2001. Pursuant to the provisions of the Insurance Act, Pembridge commenced and continues to pay accident benefits to and on behalf of Mr. Throsel.

On February 23, 2001, Pembridge served the Motor Vehicle Accident Claims Fund with a Notice of Intention to Dispute. The Fund put Lloyd's of London on notice on May 9, 2002, however the arbitration was dismissed as against Lloyd's on July 9, 2003. As a result of information subsequently obtained, Pembridge put Liberty Mutual Insurance Company ("Liberty") and Lombard Canada ("Lombard") on Notice on September 18, 2003.

The arbitration in this matter raises a number of issues and sub issues. For the purposes of this decision, however, they may be divided into four general issues, being:

1. Was there a valid policy of motor vehicle liability insurance in place with Pembridge at the time of the accident?

2. Is Pembridge entitled to rely upon the "saving provisions" of section 3 of Regulation 283/95 with respect to late service of the Notice of Intent to Dispute?
3. Was there a valid policy of motor vehicle liability insurance in place with Lombard at the time of the accident?
4. Was there a valid policy of motor vehicle liability insurance in place with Liberty at the time of the accident?
5. Was there a valid policy of motor vehicle liability insurance in place with Pembridge at the time of the accident?

The parties have agreed that if there was such a policy in place with Pembridge, that Pembridge is responsible for the payment of accident benefits to or on behalf of Steven Throsel. The issue of whether there was such a policy in place at the time involves the question of whether or not the policy originally placed by Steven Throsel with Pembridge was properly cancelled or not, and if not, whether it expired with the passage of time. In order to examine these issues it is first necessary to review the facts of this case.

Mr. Steven Throsel had purchased of policy of motor vehicle liability insurance with Pembridge of which Pafco Insurance Company was a division, on September 20, 1999. The policy was to cover a 1997 Ford Explorer and was to provide coverage from 12:01 a.m. on October 1, 1999 to 12:01 a.m. on October 1, 2000. The accident occurred at approximately 6:10 a.m. on October 1, 2000. It is the position of Pembridge that the policy had been cancelled for non-payment of the premium, effective February 13, 2000. Alternatively, Pembridge argues that the policy simply expired at 12:01 a.m. on October 1, 2000 or approximately six hours prior to the accident. Counsel for the other parties involved in the arbitration take the position that the policy was not properly cancelled and was still in place at the time of the accident. This issue revolves primarily around the question of whether or not Mr. Throsel applied for insurance as the owner or lessor of the motor vehicle. At the time of taking out the policy with Pembridge, Mr. Throsel had leased the vehicle in question from Canada Trust. If Mr. Throsel applied for the policy as the owner, then the policy was properly cancelled for non-payment of the premium and Pembridge is not responsible for payment of the accident benefits. If, however, Mr. Throsel

applied for the policy as the lessee and Canada Trust was shown on the application for insurance as the lessor or owner, then the cancellation for non-payment of premiums may not have been effective and that issue would then have to be explored more fully.

Mr. Throsel applied for motor vehicle liability insurance through Clare Shillington and Sons Limited, an insurance broker, on September 30, 1999. Shillington is authorized by Pembridge to process motor vehicle liability policy applications and issue "binder" policies on behalf of Pembridge. There is no doubt, based on the facts of this case, but that Shillington was the agent of Pembridge, with regard to its' dealings with Mr. Throsel.

When Mr. Throsel applied for his motor vehicle liability insurance on September 30, 1999, he dealt with Ms. Shirley Green, who was the office manager at Shillington's at the time. Ms. Green testified that Mr. Throsel had dealt with Shillington's and Ms. Green for insurance as far back as 1990. This particular branch of Shillington's is located in the small town of Blenheim, Ontario, and the evidence indicates that Ms. Green knew Mr. Throsel at that time. A written statement given by Ms. Green indicates that Shillington's had written a motor vehicle policy for Mr. Throsel on January 28, 1997 for a 1995 Ford pick-up truck which in July 1997 was substituted with a 1997 Ford pick-up truck. That policy was eventually cancelled January 28, 1999 for non-payment of the premium. The last policy of insurance was written on September 30, 1999 and was to cover the time frame up to 12:01 a.m. October 1, 2000. In January 2000, Pembridge advised Throsel of a NSF cheque and requested payment of the premium, which Mr. Throsel did on February 11, 2000. There was another subsequent NSF cheque.

While this is the history of Mr. Throsel's policy with Shillington's and Pembridge, the real dispute involves the application for motor vehicle liability insurance made on September 30, 1999. Ms. Green testified that she was the person who dealt with Mr. Throsel and his application on that date. A great deal of time was spent at the hearing covering what did and did not happen at that meeting. Ms. Green testified that a lot of the information that was on the application for automobile insurance may have been obtained in advance of the meeting by way of a telephone conversation with Mr. Throsel. In any event, the application, as it was originally printed out,

shows Throsel as the applicant and lists Canada Trust as the lessor. In response to the form question "Is the applicant 'the registered owner' And the actual owner of the described automobile?" the box "no" has been filled in. Below that there is a box stating, "if no, give details" and "leased vehicle" has been typed in. The application was signed by Mr. Throsel and Ms. Green on behalf of the broker. Ms. Green signed the application in black ink and Mr. Throsel in blue ink. The application was subsequently forwarded to Pembridge, however, before being sent, according to Ms. Green, a copy of the application was made and kept in Shillington's files.

The actual application was filed at the arbitration hearing. It clearly shows that "Canada Trust", in the "lessor" box and "leased vehicle" in the "is the applicant both the registered owner And the actual owner of the described automobile?" as having been crossed out in blue ink. The copy that was kept in the Shillington files does not show any of the answers being crossed out. Ms. Green gave three separate statements prior to the hearing and testified that she forwarded the application to Pembridge with the words in the questions not crossed out. Ms. Green testified in a very forthright fashion. She freely admitted to making a number of mistakes on the application, not the least of which was the failure to add a "OPCF – 5" to the policy change forms, which would normally have been required when a leased vehicle was involved. She also failed to put in the address and phone number of the lessor as required by the form. I will not bother to recite the further deficiencies on the form. Suffice to say, it was not filled out properly, errors which Ms. Green admitted to upon cross-examination.

Ms. Green also testified that after the application for insurance was forwarded and processed by Pembridge, the insurer would then send to the broker the billing notice as well as the certificate of automobile insurance filled in by Pembridge. Ms. Green testified that she did receive these documents and agreed that the certificate of insurance did not indicate that the vehicle in question was leased. Ms. Green indicated that she did not notice this and it was an oversight on her part.

Ms. Patricia Aldred testified on behalf of Pembridge. She was an underwriting assistant with Pembridge at the time the application for insurance was received there and testified that she entered the application information on the computer system. She testified that the application is first received in the mailroom where it is stamped as "received" and then forwarded to her for review and entering. She would circle any deficiencies in the application in red ink. She testified that as an underwriter she would not use blue ink and would not cross out the name of a lessor. Because of this and the fact that the policy application was entered without Canada Trust being shown as the lessor, she was of the view that the two crossed out entries had been crossed out prior to her having received the form.

Ms. Tricia Chandler also testified on behalf of Pembridge. She was an employee of Shillington's since 1999 and is now the I.T. Manager at Shillington's. She testified as to the normal procedures followed at Shillington's when a person requests motor vehicle liability insurance. Ms. Chandler indicated that the application should not have been approved without the address of the lessor and that the OPCF-5 listing was missing from the third page of the application. The OPCF-5 would be required if it was a leased vehicle. It is interesting to note that Ms. Chandler, when questioned as to whether the blue scratching out of the words "Canada Trust" were written over top of the "received" red stamp put on at the Pembridge mailroom, agreed that it was. If so, this would indicate that the words were scratched out after being received at Pembridge rather than by Mr. Throsel, as Pembridge suggests. When questioned, Ms. Aldred testified that she couldn't be sure the blue ink was over top of the stamp mark, but that it was possible. I note that neither of the witnesses is an expert on the issue of whether the writing was placed over the stamp or vice versa.

The question of who scratched out the entries on the application form is crucial in this case, and there is no absolute proof as to what happened. Ms. Green testified in a very open and forthright fashion. She freely admitted to making a large number of mistakes when filling out the application and not noting that the lessor was not put on the certificate of insurance. She was very firm, however, when vigorously cross-examined, that the entries had not been scratched out prior to the application being forwarded to Pembridge. The single copy of the application which

was put in the Shillington file tends to support Ms. Green's assertion that it was not scratched out prior to being forwarded to Pembridge. Ms. Green gave three separate statements in which she stated that the entries had not been scratched out prior to sending the application to Pembridge. It would have been very easy for Ms. Green to simply state that Mr. Throsel had scratched out the entries. It would have allowed her to escape a lot of criticism that followed for not filling out the application properly and not bringing the failure to mention the lack of Canada Trust's name on the certificate of insurance to Mr. Throsel's attention. The fact that she was prepared to admit to the mistakes despite an easy way out, strengthens her credibility.

It became apparent during the course of the hearing, that Pembridge had conducted some tests of the ink that was used to scratch out the entries. The arbitrator was advised that the tests were "inconclusive" however the report in this regard was not filed as an exhibit nor was it provided to the other parties.

We will never know for certain who crossed out the entries. What we do know is that the application itself was badly flawed, containing contradictory information regarding ownership, even after the entries were crossed out. I am satisfied on the evidence, that the entries were crossed out after Mr. Throsel had signed the document and it had been forwarded to Pembridge.

The question then arises to what are the implications of Canada Trust not having been entered as the lessor on the certificate of insurance. Section 232 (4) of the Insurance Act states:

> Where a written application signed by the insured of insured's agent is made for a contract, the policy evidencing the contract shall be deemed to be in accordance with the application unless the insurer points out in writing to the insured named in the policy in what respect the policy differs from the application, and, in that event, the insured shall be deemed to have accepted the policy unless within one week from receipt of the notification the insured informs the insurer in writing that the insured rejects the policy.

I saw no evidence that written notice of the change made to the policy from that set out in the application was brought to the attention of the insured as required by section 232 (4) of the Insurance Act. Therefore the policy is to be deemed to be in accordance with the application. This then means that any notice of termination must be given, not only to Mr. Throsel, but also to the lessor.

Termination of the policy of insurance must be in accordance with section 148(2) 5(1) of the Insurance Act or section 8-paragraph 11 of the Statutory Conditions of the OAP.1- Ontario Automobile Policy. This requires that the insurer give the insured fifteen days notice of termination by registered mail or five days written notice of termination personally delivered. There is no doubt but that Mr. Throsel received the appropriate notice. A registered notice of cancellation for non-payment of premium was sent to Mr. Throsel at his last known address stated on his application, by registered mail on April 24, 2000 with an effective cancellation date of May 13, 2000. The question arises, however, as to whether or not the owner received sufficient notice.

Before delving in to this issue, it should be noted that Canada Trust, or more properly, Canada Trust Acceptance Corporation (CTAC) sold the Throsel vehicle, amongs others, to Transportaction Lease Systems Inc. effective July 21, 2000, some time before the accident in question but after the purported cancellation. Even prior to the transfer, however, PH & H Limited managed the administration of the leases and the tracking of the insurance of Canada Trust, and after the sale, for Transportaction.

Counsel for Pembridge argues that Canada Trust and Transportaction, through PH & H had actual notice of the cancellation of the insurance prior to the accident. In support of this position he points to a list of vehicles apparently prepared for the sale from CTAC to Transportaction which indicates that the Throsel vehicle was uninsured. The list itself is sixteen pages long and covers hundreds of vehicles being transferred. The difficulty that I have with this list is that it is very unclear when the list was prepared. In brief examination of the listed insurance expiry dates of the various vehicles, it shows some vehicles with their insurance expiry as late as 2003. This

strongly suggests that the list was made at some later date and does not assist us in determining when and if notice was received by the owner.

Counsel for Pembridge also points to a letter from Mr. D.W.N. Kuysten, Group Vice-President of Transportaction to Mr. Throsel's lawyer, dated December 5, 2000. In that letter Mr. Kuysten states:

> Like you, we wished to investigate whether notice of cancellation of insurance had been received and we determined that such notice had been received by PH & H, but apparently not acted upon.

This letter must, however, be read in conjunction with other letters written by Mr. Kuysten. For example, Mr. Kuysten wrote to counsel for the Motor Vehicle Accident Claims Fund on July 18, 2002 and stated:

> The insurance tracking or monitoring that a leasing company usually performs was in this case being handling by PH & H Inc. under a contract for services that we inherited when we purchased the CT leased portfolio. When we first heard of the accident in October 2000, we inquired of PH & H for insurance information and were told that they had notification that the insurance had been terminated by May or June (my vague recollection) of that year. In response to a later inquiry, PH & H told us they had no insurance information. We only corresponded with PH & H on this topic verbally and we have no documentation to provide to you.

On September 25, 2003 Mr. Kuysten wrote a further letter to another lawyer and stated:

> We were relying on Throsel to provide the insurance and we were not aware at the time that his policy had been terminated because the tracking

> of lessee insurance policies had been contracted out to a third party who made a sloppy job of it . . .

I note that the Transportaction file in this matter was filed at the hearing. The file does not contain a notice of termination and there is nothing in the file other than the letters mentioned above to support the contention that the notice was received by PH & H, and even if it was, when it was received. In light of all of this I am not prepared to conclude that notice of cancellation was received by the owner in accordance with the provisions of the Insurance Act.

Counsel for Pembridge also pointed to the file note of September 14, 2000 by Ms. Green, of Shillington Insurance Brokers that CT received notice of the cancellation. Ms. Green's note to the file states:

> "Received request for copy of policy from Canada Trust. Advised policy cancelled".

When questioned about this Ms. Green was somewhat vague. She did not have a copy of the request from Canada Trust as she simply wrote on the request that the policy had been cancelled as of May 2000 and mailed it back. She was not sure if she sent it to Canada Trust or their representative. Unfortunately there was no documentation of it in the file to show that the document referred to by Ms. Green on September 14, 2000 was ever received by the owner of the vehicle. It is clear, however, that Ms. Green did not forward a copy of the requested cancellation notice to the representative as Ms. Green herself did not receive a copy.

After reviewing the evidence with regard to the notification of the owner, I am not satisfied that the notice was received such that it complies with the provisions of the Insurance Act. To begin with, it is by no means clear that the owner or its' representative actually received notification of termination. Even if I were to accept that it was received in some fashion, which I am not, there is still the difficulty that the notice would have been received at the earliest, sometime shortly after Ms. Green returned the forms to Canada Trust or its' representative on September 14, 2000.

This is long after the purported termination and did not comply with the provisions of the Insurance Act. As such I find that Pembridge did not properly terminate the policy on May 13, 2000.

Counsel for Pembridge argued that even if the termination of May 13, 2000 was not effective, the policy expired at 12:01 a.m. on October 1, 2000 or approximately six hours prior to the accident. I am unable to accept this proposition. Section 236 (1) of the Insurance Act states:

> If an insurer does not intend to renew a contract or if an insurer proposes to renew a contract on varied terms the insurer shall,
>
> (a) give the named insured not less than 30 days notice in writing of the insurer's intention or proposal; or
> (b) give the broker, if any, through whom the contract was placed, forty-five days notice in writing of the insurer's intention or proposal.

Section 236(5) states:

> Effect of failure to comply – a contract of insurance is in force until there is compliance with subsections (1), (2), and (3).

Counsel for Pembridge argued that the notice given with regard to the non-payment should apply to the termination at the end of the year. With the greatest respect, I do not agree. The notice of cancellation for non-payment was very specific as to the date of termination and the reasons why.

I had the opportunity to review the decision of arbitrator Robinson in Her Majesty in Right of Ontario as Represented by the Minister of Finance vs. Co-operators General Insurance (unreported decision dated November 22, 2004). After reviewing the law with regard to termination of insurance, arbitrator Robinson stated:

> I would also point out that section 236(1) of the Insurance Act imposes a further duty upon an insurer. If the insurer does not intend to renew a contract it must give notice to the names insured not less than thirty days, in writing of the insurer's intention. If it fails to do so, section 236(5) applies and the contract of insurance remains in force until there is compliance with section 236 (1), (2) and (3). Taken together, section 237(1), section 232, section 236 and Statutory Condition 11 dictate that Co-operators cannot simply refuse to renew or cancel the policy as it relates to FCC…. You must comply strictly with those provisions.

I am in agreement with arbitrator Robinson's comments and find that in this case Pembridge did not comply with section 236.

In light of my decision, above, the issues with respect to the other parties are somewhat academic, however, since the parties have raised them, I will deal with them at this time.

NOTICE:

Both Lombard and Liberty Mutual have raised the issue of whether Pembridge served them with a Notice of Intent to Dispute within the required time frame. Section 3 of Regulation 283/95 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 the completed application for accident benefits to every insurer who it believes is required to pay under that section.

(2) An insurer may give notice after the ninety-day period if;

(a) ninety 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 reasonable investigations necessary to determine if another insurer was liable within the ninety-days.

The application for accident benefits was received on January 26, 2001. Pembridge put the Motor Vehicle Accident Claim Fund on notice on February 23, 2001. I was appointed as arbitrator in this matter on February 25, 2002. The Fund put Lloyd's of London on notice on May 8, 2002, however, the arbitration was dismissed as against Lloyd's on July 9, 2003. On September 18, 2003, Pembridge put Liberty Mutual and Lombard on notice. Clearly, Liberty Mutual and Lombard were not put on notice within the ninety-days as set out in section 3(1) of Regulation 283/95. The question then arises as to whether or not Pembridge can fit within the "saving provision" of section 3(2) of the Regulation. The case law in this area has firmly established that in order to fall within these provisions, the parties must satisfy a two-part test:

(a) ninety days was not a sufficient period of time to determine that another insurer was liable, and;

(b) the insurer made reasonable investigations necessary to determine if another insurer was liable within the ninety-day period.

Ms. Veronica Okechuku testified on behalf of Pembridge with regard to what efforts Pembridge made to determine if there were other possible insurers responsible to pay the accident benefits. Ms. Okechuku was the claims consultant with Pembridge who had carriage of the file at the relevant time. Ms. Okechuku has in excess of twenty-five years in insurance claims matters, including accident benefits.

Ms. Okechuku indicated that she initially checked to determine whether Mr. Throsel had coverage with Pembridge and determined that it had been cancelled. She received the file on February 15, 2001 and on February 16, 2001 retained an independent adjusting firm, Cunningham, Lindsay to investigate, among other things, the accident benefits status. She was aware of a possible problem with the application for insurance regarding the leasing issue and asked the adjuster to look into the issue of other possible insurers. She put the Fund on notice February 23, 2001. The independent adjuster reported to Ms. Okechuku on February 27, 2001, that she was arranging to obtain a police report. A motor vehicle registration search was conducted to determined ownership. This revealed that Canada Trust Acceptance Corporation was the lessor and that the lease had been arranged through Paul Cornier Ford Sales and Leasing Ltd. That company was contacted, who referred the adjuster to a Mr. Kuysten of Transportaction. The adjuster also contacted the then solicitor for Mr. Throsel, Mr. James Allin, who apparently advised the adjuster that Mr. Kuysten, who was vice-president of Transportaction, had advised Mr. Allin by way of letter dated December 5, 2000 that there was no other insurance in place on the vehicle other than a "gap" policy covering property damage only. The adjuster received a copy of Mr. Kuysten's letter and forwarded it to Ms. Okechuku. Ms. Okechuku then asked the adjuster to follow-up with Pilot Insurance, the insurer of the other motor vehicle involved in the accident as to whether or not Pilot had received an application for accident benefits.

Ms. Okechuku had the adjuster follow-up with Shillington Insurance Brokers regarding, among other things, any other policies of insurance and also followed up with Pembridge Underwriting regarding the faulty application for insurance. The motor vehicle registration search came back with no indication of other possible insurance. The independent adjuster also followed up with Mr. Kuysten of Transportaction who confirmed that there was no other insurance on the vehicle. All the above was done during the ninety days following the receipt of the application for accident benefits.

Counsel for Lombard and Liberty Mutual have suggested that Ms. Okechuku should have made further inquiries with regard to other possible contingent liability insurance coverage available.

It must be remembered that section 3(2) only requires that a reasonable investigation be done within the ninety days. It does not, and should not, require perfection. The claims consultant conducted, in my view, a very reasonable inquiry for other possible insurance companies in the circumstances. She was advised by the vice-president of Transportaction, who should have known, that no other insurance existed. One must also keep in mind that Ms. Okechuku as the person in charge of this matter, had many other duties to attend to with regard to this file, not the least of which was to ensure that proper care was provided for a catastrophically injured person. In addition, it must be remembered that the consultant is responsible for numerous other files. In the circumstances, I am satisfied that Pembridge took reasonable steps within the ninety days following the receipt of the accident benefit application to determine if there were other possible insurers.

I am also satisfied that ninety days was not a sufficient period of time to determine that another insurer was potentially liable. A Notice of Dispute was not served on Liberty Mutual until September 18, 2003 and upon Lombard on September 24, 2003. The lengthy delay was due in large part, to faulty information having been given on numerous occasions to Pembridge by Mr. Kuysten, vice-president of Transportaction. Mr. Kuysten was asked on a number of occasions to produce copies of any possible relevant insurance policies. It was not until served with a subpoena, issued by myself, on June 8, 2003 that the potential policies with Lombard and Liberty Mutual were disclosed. The policies were not received by Pembridge until nearly the end of 2003. In the circumstance, I am of the view that the saving provisions of section 3 do apply.

THE LOMBARD POLICY:

Pembridge takes the position that there was a valid policy of insurance with Lombard at the time of the accident. More specifically Pembridge contends that an SPF-8 contingent liability policy was in place and should respond. Lombard takes the position that the policy does not apply to this motor vehicle. Alternatively, Lombard argues that it would not apply as it was only to apply for sixty days after the termination of any other policy.

It was agreed by Lombard that the SPF-8 contains a provision which would provide accident benefits if it covered the vehicle in question.

Ms. Barbara Brydon testified on behalf of Lombard. Ms. Brydon is an underwriter with Lombard and was the underwriter involved in the renewal of the policy in question. She testified that this SPF-8 covered the leasing company for claims that arise on leased vehicles where the primary policy has lapsed. It is secondary to the lessee's policy. In this case, Transportaction was in the business of leasing motor vehicles and required that the lessee's have primary insurance on the individual leased vehicles. Transportaction had an existing SPF-8 policy with Lombard which was renewed on July 1, 2000. At that time Lombard was not aware that Transportaction was taking over the CTAC leased vehicles. Transportaction took them over on July 14, 2000 and it would appear that Lombard was not aware of the transaction until on or about September 6, 2000. Ms Brydon took the position that Lombard was still negotiating with the broker for Transportaction, Mr. Dan McDonald, as to covering the vehicles taken over from CTAC when the accident occurred. Indeed it was Ms. Brydon's position that Lombard had still not agreed to cover the CTAC vehicles until a renewal of the policy took place in July 2001. In support of that position Ms. Brydon presented a number of documents relating to correspondence between herself and the broker which she, and her counsel, maintain show that there was no intention to cover the leased automobiles that had been the subject of the purchase by Transportaction. Ms. Brydon also took the position with so many vehicles involved, this would have amounted to a material change of risk and an additional premium would have been charged. Since there was no additional charge before the July 2001 renewal, Lombard takes the position that their policy was not in effect for the accident in question.

I have some difficulties with Lombard's position. It is clear, based on the documents file as well as the evidence of Ms. Brydon and Mr. McDonald, that the Lombard policy was to cover a large number of vehicles, something in the range of 8000 vehicles. It was anticipated that vehicles would be added and removed from the policy during the life of the policy.

It is clear that the Hunter, Keilty, Murtz and Beatty broker, Mr. Dan McDonald, was of the view that the Lombard policy was in place and covered the vehicles involved in the sale. On December 6, 2000 Mr. McDonald wrote to Ms. Brydon confirming a telephone conversation with her and asked her written confirmation that in the event of a loss the contingent liability coverage policy with Lombard would respond (see exhibit 5, tab K-25). While Ms. Brydon did not respond to the memo, she did nothing to challenge Mr. McDonald's statement prior to the renewal.

If there was any doubt as to whether the Lombard policy was in place at the time of the accident, it is answered by the "Commercial Insurance Summary for Transportaction Lease Systems Inc." document dated June 26, 2000. In the last page of that document entitled "Premium Summary" it states that "additional premium to add (effective September 2000) CT Acceptance lease portfolio has been waived for the 2000-2001 term".

To me, this makes it clear that there was an intent to have the policy apply to the CT Acceptance lease portfolio during the time in question and there was to be no additional premium.

At the hearing, Lombard took the position that if the Lombard contingent liability policy was in place at the time of the accident there was still a requirement in the policy that:

> The insured agrees to obtain written evidence of the insurance required by the lessee's insurance undertaking within sixty days of the date of the delivery of the automobile to the lessee and obtain written evidence of the renewal or replacement of such insurance within sixty days of each subsequent expiry or termination of coverage . . .
>
> The insured further agrees that if the requirements herein respecting written evidence of insurance are not met then coverage, as indicated herein, standard lessors contingent automobile of the policy declaration with respect to the automobile, will cease without further notice, unless the insured notifies the

> insurer within sixty days after delivery of the automobile to the lessor within sixty days after the expiry or termination date of insurance.

If the policy cancellation by Pembridge had been done properly, it would have been effective on May 14, 2000. If that were to mark the start of the sixty day notice under the Lombard policy, then the timeframe would have expired on or about July 14, 2000 or approximately ten weeks prior to the accident. In fact, Transportaction did not take over the lease in question until July 21, 2000, and it makes no sense for the notice period to run prior to that date. If that is the appropriate date then the sixty days expired on or about September 21, 2000 or approximately nine days prior to the accident.

It is clear from the evidence of Donald McDonald, the broker who dealt with Lombard in this matter, who's examination for discovery was filed at the hearing, that Transportaction did advise Lombard that there were some 79 vehicles for which primary insurance could not be confirmed. More specifically, on September 6, 2000 Mr. McDonald faxed a note to Ms. Barbara Brydon of Lombard which stated:

> Transportaction has acquired a portfolio of leases from CT Acceptance Corporation. The leases have been transferred into the name of Transportaction. The insurance tracking has been done by PHH for CT Acceptance Corporation. Transportaction has requested each lessee to amend their policies to show Transportaction and the appropriate limits of insurance. Until such documentation has been received it is necessary for us to recognize that a claim be presented under the lessor contingent with documents showing CT Acceptance Corporation as lessor. Please note your file accordingly.

On November 22, 2000 MS. Brydon wrote to Mr. McDonald:

> With respect to the insured's acquisition from CT Acceptance we are prepared to extend standard contingent lessor's liability to this portfolio

> subject to confirmation of the thirty-nine leases lacking insurance documentation are not otherwise in default and that the insured is taking action to repossess these vehicles. We do not wish to assume liabilities for leases in default prior to the insured's acquisition. Please keep us informed as to status of these leases as the files are documented or the vehicles are repossessed. . . .

I accept Mr. McDonald's interpretation of the phrase not "otherwise in default" as to refer to being in default of lease payments. I am also satisfied that Transportaction was not aware specifically that Mr. Throsel's insurance had allegedly been cancelled until sometime after the accident. As such, I am satisfied that Transportaction had complied with the notice provisions of the insurance policy. In light of this I find that the contingent liability policy was in place at the time of the accident, however, in light of the fact that I have found the Pembridge policy was still in effect at the time of the accident, the Pembridge policy takes priority and must respond.

THE LIBERTY MUTUAL POLICY

Liberty Mutual issued a contingent automobile liability and umbrella policies for the period June 1, 2000 to June 1, 2001 to their named insured's, Toronto Dominion Banks/CT Financial et al including CT Acceptance Corporation (CTAC). A corresponding certificate of insurance was issued with Transportaction Lease Systems Inc. (Transportaction) in order to confirm coverage that was afforded to CTAC and was in place until the date of transfer of assets to the purchaser, Transportaction. On July 21, 2000 there was a general conveyance of the leases and vehicles formerly held CTAC to Transportaction, including the Throsel vehicle. The vehicle ownership pertaining to the 1997 Ford Explorer in question, effective August 14, 2000 was amended such that Transportaction Lease Systems Inc. was shown on the vehicle portion, while Steven Throsel remained on the permit portion.

It was the position of Pembridge, Lombard, and the Motor Vehicle Accident Claims Fund that despite the asset sale, the Liberty policy had not been cancelled at the time of the accident and

was therefore still in place and should respond. Liberty takes the position that the ownership of the assets have been transferred and since CTAC no longer had an insurable interest, the policy was no longer in effect at the time of the accident.

I have some difficulty with Liberty's position in this regard. While there is a general concept that one must have ownership in order to have an insurable interest, this rule is not absolute. Mr. Justice Rapson, in Tame vs. Canadian Surety Company [1981] O.J. No. 246, reviewed the law as it relates to ownership, insurable interests and statutory accident benefits. Without reciting the facts of the case, suffice to say that he held that coverage for statutory accident benefits remained even though the named insured had no insurable interest in the vehicle insured. I am in agreement with Justice Rapson in this regard. In our case, Liberty did not cancel the policy in accordance with the provisions of the Insurance Act and received the premium for the entire period. While other parts of the policy may or may not have lapsed with the transfer of ownership, the entitlement to statutory accident benefits did not. Accordingly there were statutory accident benefits available through the Liberty policy, however in light of my findings with regard to the continued existence of the Pembridge policy, the Liberty policy need not respond.

THE MOTOR VEHICLE ACCIDENT CLAIMS FUND

In light of the complex fact situation in this matter the Motor Vehicle Accident Claims Fund was understandably put on notice and included in this arbitration. They would only be responsible for payments, however, if no other insurer were liable to pay. In light of my comments above, it is clear that there are insurers responsible for payment of accident benefits to or on behalf of Steven Throsel. Accordingly the Motor Vehicle Accident Claims Fund is not responsible for payment of accident benefits in this matter.

In light of the above, I find that Pembridge is responsible to pay accident benefits to or on behalf of Mr. Throsel.

In the event that the parties are unable to agree as to costs, I may be spoken to.

Dated this _____ day of August, 2005.

_____

M. Guy Jones

Arbitrator