

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
AND IN THE MATTER OF ONTARIO REGULAION 283/95;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

LIBERTY MUTUAL INSURANCE COMPANY

Applicant

- and -

ZURICH INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Maurice Benzaquen for the Applicant

Chris T. Blom for the Respondent

ISSUES:

Is Liberty entitled to pursue the arbitration despite not serving Zurich Insurance Company with a Notice of Intention to Dispute within the 90-day time frame set out in Regulation 283/95?

DECISION:

Liberty Mutual is not entitled to pursue its arbitration against Zurich Insurance Company.

HEARING:

This arbitration took place on December 20 and 21, 2005 in the City of Toronto.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident which occurred on July 4, 2001. Steven Lin, who was then thirteen years of age, was riding a bicycle while crossing a road when he was struck by a motor vehicle insured by Liberty Mutual Insurance Company (“Liberty”). As a result of the injuries suffered in the accident, Steven Lin applied for accident benefits from Liberty. The Application for Accident Benefits was received on July 20, 2001. Liberty then conducted an investigation in order to determine if there was another insurer who might have been in priority to it for the purpose of paying accident benefits. Liberty eventually determined that Steven Lin was a dependent of his father, Shiu Pak Lam, who held a valid motor vehicle liability insurance policy with Zurich Insurance Company of Canada (“Zurich”) at the time of the accident. However Liberty did not serve Zurich with a Notice of Intention to Dispute until December 12, 2001 or approximately 7 weeks after the 90-days required by section 3 (1) of Regulation 283/95. The question to be determined is whether Liberty may rely upon the “saving provisions” as set out in section 3 (2) of Regulation 283/95 which state:

- 3 (2) an insurer may give notice after the 90-day period if,
 - (a) 90 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 reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

There is little doubt but that Liberty conducted an extensive investigation in order to determine if there was another insurer which was higher than it in priority. Counsel for Liberty listed nineteen different methods by which Liberty attempted to determine if there was another insurer responsible to pay the accident benefits, prior to the 90-day expiry date. These included:

1. Ten telephone calls to and from the claimant's lawyer requesting the information.
2. Six letters to the claimant or his lawyer's office requesting information about his parents, other insurers, etc.
3. Three offers to have road adjusters meet with parents, the claimant, or his lawyer.
4. Obtaining a statutory declaration and several investigations arising out of that statutory declaration (motor vehicle license searches, etc.)
5. A letter to the claimant's solicitor pursuant to section 33 of the Statutory Accident Benefits Schedule, threatening to cut off benefits if information regarding priority issues was not provided.
6. Requesting a recorded interview with the claimant.
7. Five requests to the claimant's solicitor for a signed statement.
8. Three requests of the occupational therapist on the case for priority information from her observations.
9. Three driveway checks on the mother's driveway.
10. One "neighbour interview" re: ownership of cars in mother's driveway.
11. Seven license plate Autoplus and insurance policy searches.
12. One call at mother's residence.
13. Four financial background checks on claimant's mother and stepfather.
14. Follow-up with police officer twice.
15. One home ownership search.

16. Review records of family doctor re: motor vehicle related information.
17. Conduct surveillance of claimant's residence (not actually done)
18. Reviewed documents in file regarding address.
19. Put another insurer (Lloyd's) on notice.

All of the above was done prior to October 8, 2001, the 90th day following receipt of the completed application for accident benefits. After that Liberty spent part of 20 separate days investigating the question of priority.

As noted above, it was not until December 10, 2001 that Zurich, the insurer of the claimant's father, was put on notice. With the benefit of hindsight, the problem arose because Steven's parents had separated prior to the accident and it was unclear with whom Steven was living. The vast majority of the documentation suggested that Steven lived with his mother and stepfather at 28 Brigadoon or 126 Northolt Crescent. It was not until an investigator with Keyfacts Canada, an investigation company hired by Liberty, met with the investigating police officer on October 30, 2001 that they learned that Steven's mother allegedly left him with an aunt at 81 Baylawn Drive, Scarborough, prior to the accident. It was the police officer's belief that Steven's aunt may have been his guardian. On November 2, 2001 the investigator attended at 81 Baylawn Drive and noted a blue Toyota motor vehicle bearing license plate number AHJ 208 parked in the driveway. A search was then made with the Department of Transportations and Communications that revealed that the vehicle was owned by Mr. Shiu Pak Lam. In a report dated December 10, 2001 the investigator advised Liberty that Mr. Lam's motor vehicle was insured by Zurich. On December 12, 2001 Liberty served Zurich with a Notice of Intent to Dispute. It should be noted that Mr. Lam is Steven's father.

While conceding that Liberty conducted a very extensive investigation, Zurich takes the position that 90 days was sufficient time to make a determination that another insurer was liable to pay accident benefits.

Counsel for Zurich points out that the motor vehicle accident report prepared by the investigating police officer was received by Liberty on August 22, 2001. This report listed Steven's residence as 81 Baylawn Drive. Had Liberty driven to this address and done a motor vehicle check, and spoken to Mr. Lam, who apparently resided there, they would have learned of the existence of the Zurich policy held by Steven's father well within the 90-day period.

At the hearing, counsel for Zurich cross-examined Mr. Fred Lam, an accident benefit analyst with Liberty. While Mr. Lam did not handle the file himself, he has a great deal of experience handling accident benefit claims and had reviewed this file. On cross-examination Mr. Lam testified that there were three addresses that were potentially important in relation to the priority question, being Northhold, Baylawn and Brigadoon. Mr. Lam testified that one would look at all three addresses as soon as each was revealed. He indicated that if he had been handling the file he would have looked into the Baylawn address right away. He also agreed that he would have expected a reasonable adjuster to do so. The examination for discovery testimony of Mr. Shiu Pak Lam, read in at the hearing indicated Mr. Shiu Pak Lam's car was in the driveway at the Baylawn address at the end of each day, from the date of the accident until at least 2004, thus Zurich argues is that all that needed to be done was for a Liberty road adjuster or investigator to drive by the Baylawn address at any time after the police report had been received on August 22, 2001. They would then have obtained the information that would have led them to Zurich. In addition to the above, Zurich takes the position that Liberty's investigation was lacking in diligence in that:

- (i) it failed to make a diary note in the file on October 18, 2001 to ensure that the priority investigation was completed by that date (the 90th day).
- (ii) When the file supervisor, Ms. Easson, advised the adjuster Ms. Abellera, on October 10, 2001 to "assign investigator to get priority done A.S.A.P.", Ms. Abellera failed to act promptly to complete it by October 18, 2001.
- (iii) Ms. Easson failed direct Ms. Abellera to send an investigator to the Baylawn address.

- (iv) It failed to send someone to the Northhold address, to ask the mother why the Baylawn address was on the police report.

Liberty argues that what is required of it is that they conducted a reasonable investigation and that perfection is not required. I am in agreement with that submission. Insurance adjusters are extremely busy individuals dealing with many files which are often very complex. They are forced to meet various deadlines and deal with matters that are often not within their control. They often meet resistance to requests for information, or at least delay. I am also in agreement with Liberty's submission that one should not simply review the matter with the benefit of hindsight. As Ducharme, J. stated in Primmum Insurance Company vs. Aviva Insurance Company of Canada (2005) 23 C.C.L.I (4th) 131 (Ont. S.C.J.),

When viewed the often omniscient lens of hindsight, it would be the rare investigation that could not be improved upon.

Liberty argues that not only did it do all the investigation listed above, but it was faced with a lack of cooperation by the plaintiff's counsel and was misled, either innocently or deliberately, by Ms. Liang, Steven's mother, and that these factors should be taken into account when determining whether the saving provisions of section 3 (2) of Regulation 283/95 should be applied. I am in agreement that these factors can be taken into account in the appropriate circumstances. It remains to examine the facts of this case in order to determine whether the saving provisions should apply.

There can be little doubt, based on the evidence presented at the hearing, but that Liberty faced a definite lack of cooperation from the plaintiff's counsel in their efforts to determine if there was another insurer in priority to them. As early as July 25, 2001, Liberty requested a meeting with the injured party's counsel and parents to obtain, among other things, priority information. As noted above, there were numerous phone calls and letters to the insured party's counsel requesting a meeting, a signed statement or simply being provided with the required information.

At one point, Liberty threatened to cut off benefits pursuant to section 33 of the statutory accident benefits schedule for failure to provide the required information.

When determining whether the requirements set out in section 3 (2) of Regulation 283/95 have been met, in order to invoke the “saving provisions” one of the factors to be looked at is the degree of difficulty the insurer encounters when trying to obtain the required information. In this particular case Liberty encountered a significant degree of non-cooperation and spent a great deal of time and effort attempting to overcome this problem. This should be taken into account.

Liberty argues that not only were they met with a distinct lack of cooperation, but they were misled either intentionally or inadvertently by the injured party’s mother, Mrs. Liang.

After numerous requests, Liberty received a statutory declaration signed by Mrs. Liang, dated August 13, 2001. This was forwarded to Liberty by the claimant’s solicitor. That declaration states, in part:

I am the mother of Steven (Jian Jun) Lin who resides with me at 126 Northold Crescent, Markham, Ontario.

The statutory declaration also indicated that a claim was being made for “damages” for loss of housekeeping capacity, as he was not able to perform household chores to the extent that he could do before he was injured.

Counsel for Liberty submits that this is evidence of Ms. Liang’s intentionally misleading Liberty, suggesting that her son lived with her rather than on Baylawn, with his father. As further proof of her effort to intentionally mislead, they point to a letter written by the claimant’s counsel in response to a further request by Liberty to clarify the priority situation. That letter, dated November 13, 2001 states:

On July 4, 2001, Steven was visiting his father’s sister who resides at 81 Baylawn Drive, Scarborough. Ms. Liang was

resided with Steven at 28 Brigadoon Court until July 19, 2001, when she moved to 126 Northold Crescent.

While this letter was written after the expiry of the 90-day notice period, it is presented as some evidence of Ms. Liang's desire to mislead Liberty regarding her son's situation. Liberty also relies on the testimony of Ms. Liang given at her examination for discovery, wherein she stated:

Q. Did you ever tell anyone that Steven lived with you at 28 Rigadoon?

A. Yes, I have said that because I have my reason. I don't want my son to see his father.

At the hearing, Ms. Liang testified that her son was not living with her at Brigadoon, but rather he sometimes visited her there. Ms. Liang testified that her son was in fact living with his aunt on Baylawn at the time of the accident.

Zurich submitted that there was no evidence that Ms. Liang misled Liberty prior to the expiry of the 90 days. They submit that the statutory declaration was correct and that after being released from the hospital and prior to the statutory declaration been given, Steven was in fact living with his mother. In addition, Steven, to the extent he did housework, he could have been doing it both at his mother's house on visits, and at his father's or aunt's.

I found Ms. Liang, in her testimony at the hearing to be somewhat evasive and less than forthright especially with regard to Steven's living arrangements. While a letter from Steven's lawyer of November 13, 2001, was of course, after the running of the 90-day notice period, it is perhaps indicative of the problem that Liberty faced. While it may not matter with regard to the notice issue if Ms. Liang intentionally or inadvertently misled Liberty, to the extent that it does matter, I find that it was intentional.

The important point I believe, is that taken with the other facts, it is perhaps understandable that Liberty may have assumed that Steven lived on Brigadoon with his mother. A review of the documents received by Liberty prior to the 90-day period expiring indicates that approximately 90 documents were received indicating that the claimant lived with his mother at 126 Northhold Crescent. These documents include hospital records, family doctor's records, etc. In contrast there were only 3 documents listing Steven's address as 81 Baylawn Drive. The first was a record from the Hospital for Sick Children dated July 5, 2001 which listed Steven's address as 81 Baylawn but this was crossed out and 126 Northolt, Markham, Ontario is written in its place. The second document is a Hospital for Sick Children invoice dated July 10, 2001. The final document is the police accident report received by Liberty on August 22, 2001.

With the benefit of hindsight, it is understandable how Liberty came to assume that Steven lived with his mother at Brigadoon or Northhold Crescent. Furthermore, Liberty should not be criticized for the lengths to which they went in their efforts to locate another insurer. In this regard their efforts were extraordinary. The real issue, in my view, is whether they should have, in the 90 days, made further efforts to locate the father's insurer, especially in light of the police report received August 22, 2001 indicating that Steven lived at 81 Baylawn. There is no doubt that the information was obtainable within the 90 days. The police report clearly indicated that Steven lived at 81 Baylawn and had a Liberty representative attended at that location they would, in all likelihood, have seen the father's car there, obtained its license plate number, done a Ministry of Transportation and Communication search and eventually obtained the insurance particulars which would have indicated that Zurich insured his car.

The Ontario Court of Appeal, in Kingsway General Insurance Company vs. West Wawanosh Insurance Company, c 36235, February 15, 2002, made it clear the notification period saving provisions were only to be applied sparingly. In that case, Mr. Justice Sharpe stated:

The Regulation sets out in precise and specific terms a schedule for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirements for compliance with those provisions. Insurers subject to this

Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. This context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this setting, there is little room for creative interpretations or the carving out of judicial exceptions designed to deal with the equities of particular cases.

I am in agreement with this principal. In this case, however, we are met with a situation where there were extenuating circumstances. The question is, whether they were such that the saving provisions should apply. There is no doubt that with the benefit of hindsight, the information should have been obtained within the 90 days by the use of fairly basic investigative techniques. The police accident report was in Liberty's possession by late August 2001 and it gave an address which, if followed up on would have provided the necessary information. Having said that, Liberty, as noted above, made numerous other efforts to attempt to determine where the father was and, what other insurance was available, etc. There was a great deal of documentation pointing to another address and Liberty was undoubtedly somewhat misled, intentionally or otherwise, by the claimant's mother. In addition it received, at best, minimal cooperation from the claimant's solicitor.

This was not a situation where Liberty sat back and did nothing. They pursued other leads, which while they did not bear fruit, were reasonable steps to take. Simply because Liberty did not take one investigative step which may have produced results is not necessarily sufficient to conclude that it did not perform a reasonable investigation during the 90 day period (see: Coseco Insurance Company vs. Allstate Insurance Company unreported decision of arbitrator Malach, dated November 15, 2002).

In this particular situation, however, Liberty had a very basic investigative tool, the police report which pointed to the Baylawn address. The police report provides information that insurers use regularly to pursue their investigations. Despite all their other efforts, Liberty should have, in my view, have at least followed up with the police officer as to why the Baylawn address was on the report. Had they done so, it would have led them to the father and ultimately to Zurich. This could have been done within 90 days of reviewing the completed Application for Accident Benefits, and accordingly, I find that Liberty has not fulfilled the requirement of s. 3 (2)(a) of Regulation 283/95

Counsel for Zurich has also argued that Liberty's investigation was insufficient for reasons set out above, relating to what the supervisor should have had the adjuster do, as well as setting out timelines etc. While these steps could have been taken, I am of the view that when looked at in its entirety, Liberty's investigation, while not perfect, was reasonable, in this regard.

Counsel for Zurich also submitted that if Liberty had done what was required of it within the 90 days after receiving the application it did not move quickly enough thereafter to allow Liberty to be entitled to a full extension of the time period until the notice was actually served. While this submission is academic in light of my earlier findings, since it was raised by the parties, I will deal with it. The original notice period ran out on October 18, 2001. The Notice of Intent to Dispute was served on December 12, 2001 or approximately two months later. It is true that the time required to send an investigator, to check out the motor vehicle license plate numbers and to do a Department of Transportation and Communication search is quite short. However, one must look not only at that, but what other steps were taken by Liberty during that time frame to find another insurer. Counsel for Liberty noted that there were 63 further documents that pointed to the Northold or Brigadoon address between the time of the 90 day period expiring and when notice was given to Zurich. In addition, Liberty, during that time frame received the November 13, 2001 letter from the claimant's counsel which clearly indicated that the claimant had been living with his mother both before and after the time of the accident.

It is clear that following the expiry of the 90-day notice period Liberty did not simply sit back but rather aggressively looked for other possible insurers. When Zurich was finally identified as another possible insurer they forward a Notice of Intention to Dispute within two days. I would not fault Liberty in this regard.

In light of the above, I hold that the saving provisions of section 3(2) of Regulation 283/95 do not apply, and Liberty may not proceed with the arbitration.

In the event that the parties are unable to agree with regard to the issue of costs, I may be spoken to.

Dated this _____ day of June, 2006, in the City of Toronto.

M. Guy Jones
Arbitrator