COURT FILE NO.: 06-CV-314519-PD2
DATE: December 10, 2007

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER of the *Insurance Act*, R.S.O. 1990,

AND IN THE MATTER of Ontario Regulation 283/95;

IN THE MATTER OF THE *Arbitration Act*, S.O. 1991, c. 17 as amended

IN THE MATTER of an Arbitration

BETWEEN:

LIBERTY MUTUAL INSURANCE COMPANY

Applicant
(Appellant)

- and -

ZURICH INSURANCE COMPANY

Respondent
(Respondent)

COUNSEL:
David Silverstone and Maurice Benzaquen for the Applicant (Appellant)
Chris Blom for the Respondent (Respondent)

HEARING DATE: December 4, 2007

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] On July 4, 2001, while riding a bicycle, Steven Lin, who was thirteen years of age at the time, was struck by a motor vehicle insured by Liberty Mutual Insurance Company ("Liberty").

[2] On July 25, 2001, Liberty received an Application for Insurance Benefits for Steven. The application form stated that Steven lived at 126 Northolt Crescent in

Markham and it indicated – incorrectly - that there was no other insurance policy of any person on whom Steven was a dependent.

[3] Under s. 2 of Ont. Reg. 305/98, the first insurer that receives a completed application for benefits is obliged to pay the benefits pending the resolution of any dispute as to which insurer is required to pay the benefits. The insurer who would have the obligation to pay the benefits is known as the priority insurer. The first insurer may serve a notice on other insurers to dispute its obligation to pay benefits.

[4] Section 3 of Ont. Reg. 283/95, as amended, regulates how long an insurer has to serve written notice. Section 3 states:

> 3 (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.

[5] Thus, in order to give notice to another insurer and to dispute its obligation to pay benefits, Liberty had 90 days; namely until October 20, 2001, unless s. 3 (2) of the regulation applied to permit Liberty to give notice after 90 days.

[6] The 90 days passed, but on December 12, 2001, 55 days past the deadline, Liberty gave written notice to Zurich Insurance Company ("Zurich"). Liberty submitted that Zurich was the priority insurer obliged to pay benefits for Steven Lin.

[7] Liberty sent the notice because it had just recently discovered that at the time of the accident, Steven Lin had been living as a dependent of his natural father, Shui Pak Lam, who lived at 81 Baylawn Drive in Scarborough. Mr. Lam owned a vehicle that was insured by Zurich. At the time of the accident, Mr. Lam lived separate and apart from Steven's natural mother, Xiu Hong Liang, who then lived at 28 Brigadoon Court, Scarborough shortly to move to 126 Northolt Crescent in Markham.

[8] On December 20 and 21, 2005, the matter of whether Zurich was the priority insurer and obligated to pay the benefits was arbitrated by Mr. Guy Jones.

[9] By award dated June 7, 2006, Arbitrator Jones concluded that Liberty had made reasonable investigations but that 90 days had been a sufficient period of time for it to determine that another insurer was liable. The practical effect of Arbitrator Jones' Award

was that Liberty could not dispute its obligation to pay benefits and have the obligation assumed by Zurich.

[10] Liberty now appeals Arbitrator Jones' Award. The arbitration agreement between the parties provides for a right of appeal based on errors of law and/or errors of mixed fact and law. The parties agree that the standard of appellate review from a private arbitration is correctness: *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1995), 23 B.L.R. (2d) 259 (Ont. Gen. Div.); *National Ballet of Canada v. Glasco* (2000), 49 O.R. (3d) 230 (S.C.J.); *Liberty Mutual Insurance Co. v. Commerce Insurance Co.*, (2001), 36 C.C.L.I. (3d) 269 (Ont. S.C.J.); *Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, [2005] O.J. No. 1477 (S.C.J.).

[11] For the reasons that follow, I conclude that Arbitrator Jones' Award was correct and accordingly, I dismiss the appeal.

Discussion and Analysis

[12] Section 3(2) of Ont. Reg. 283/95 may be understood as permitting an insurer to give notice of a dispute after 90 days if two preconditions are satisfied. For present purposes, it is helpful to analyze those preconditions in the reverse order from how they are set out in the regulation. Thus, the first precondition is that the insurer must have made reasonable investigations. In the case at bar, Arbitrator Jones noted that Liberty made nineteen different types of investigation, and he concluded that Liberty had satisfied the requirement to have made a reasonable investigation. The other precondition is that the insurer must show that 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable.

[13] Thus, the issue on this appeal is whether Arbitrator Jones correctly applied s. 3 (2) of the Ont. Reg. 283/95, as amended. The resolution of that issue depends upon understanding the law about s. 3 (2) and then determining whether Arbitrator Jones correctly applied the law to the undisputed facts and the facts as found to be true by him. More particularly, the issue is whether Arbitrator Jones correctly applied section 3 (2)(a) of Ont. Reg. 283/95, because there is no dispute between the parties that Liberty made reasonable investigations and thus satisfied the other of the two preconditions for giving notice after the 90-day period.

[14] The case law of arbitrators and of courts about section 3 (2) establishes several principles. Section 3 (2) is to operate strictly, because an insurer is entitled to know at an early stage that it will be managing and be responsible for the payment of benefits: *Canadian General Insurance Company v. Axa Insurance Company* (Galligan, December 19, 1996); *State Farm Mutual Automobile Insurance Co. v. Ontario Minister of Finance* (2001), 53 O.R. (3d) 436 (S.C.J.); *sub nom. Kingsway General Insurance Company v. West Wawanoosh Insurance Company*, affd. (2002), 58 O.R. (3d) 251 (C.A.); *Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, [2005] O.J. No. 1477 (S.C.J.).

[15] Section 3 (2) is designed to immediately engage the provision of benefits for the insured and to encourage the insurer who is providing the benefits to promptly exercise

due diligence to make a determination whether another insurer should be responsible to pay: *Guardian Insurance Company of Canada v. Wawanesa Mutual Insurance Company* (Malach, August 5, 1999); *Axa Insurance Company v. Co-operators Insurance Company* (Rudolph, May 1, 2000).

[16] It is, however, desirable to interpret s. 3 (2) in such a way as to discourage insurers from issuing notices indiscriminately in the off chance that a priority insurer will be identified: *CGU Group (Canada) Ltd. v. Zurich Canada* (Jones, October, 2001).

[17] The insurer is required to make a reasonable investigation, but perfection is not required and there should be recognition that adjusters are extremely busy handling more than one complex matter at the same time: *Ontario Municipal Insurance Exchange (OMEX) v. Liberty Mutual Insurance Company* (Jones, October 2000); *Coseco Insurance Company v. Allstate Insurance Company* (Malach, November 15, 2001); *Ing Halifax Insurance Company v. Liberty Mutual Insurance Company* (Malach, January 2, 2002); *Federated Insurance Company of Canada* (Malach, September 2, 2003); *Coseco Insurance Company v. Lombard Insurance Company* (June 3, 2004).

[18] The onus is on the party relying on the late notice provisions of s. 3 (2) to show that 90 days was not a sufficient time for the determination.

[19] The circumstances of each case must be examined to determine whether 90 days was not a sufficient time for the determination: *CGU Group (Canada) Ltd. v. Zurich Canada*, (Jones, October, 2001); *State Farm Mutual Automobile Insurance Company v. Lloyd's of London Insurance Company* (Jones, January 2002).

[20] From these principles, the question emerges of how an insurer may satisfy the onus of showing that 90 days was not a sufficient time for a determination. Given the fact-specific nature of the inquiry, it is not surprising that the cases about s. 3(2) are contentious, and there are examples where the insurer has satisfied the onus of showing that 90 days was not sufficient: *Guardian Insurance Company of Canada v. Wawanesa Mutual Insurance Company* (Malach, August 5, 1999); *Ontario Municipal Insurance Exchange (OMEX) v. Liberty Mutual Insurance Company* (Jones, October 2000); *Coseco Insurance Company v. Allstate Insurance Company* (Malach, November 15, 2001); *Federated Insurance Company of Canada* (Malach, September 2, 2003); *Coseco Insurance Company v. Lombard Insurance Company* (June 3, 2004).

[21] And there are cases, where the insurer has failed to meet the onus: *Canadian General Insurance Company v. Axa Insurance Company* (Galligan, December 19, 1996); *Unifund Insurance Company v. Simcoe and Erie General Insurance Company* (Robinson, May 1, 1997); *State Farm Mutual Automobile Insurance* (2001), 53 O.R. (3d) 436 (S.C.J.), *sub. nom West Wawanosh v. Kingsway General Insurance Company*, reversing (Malach, April 6, 2000); *Axa Insurance Company v. Co-operators Insurance Company* (Rudolph, May 1, 2000); *CGU Group (Canada) Ltd. v. Zurich Canada*, (Jones, October, 2001); *Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, [2005] O.J. No. 1477 (S.C.J.); *State Farm Mutual Automobile Insurance Company v. Lloyd's of London Insurance Company* (Jones, January 2002).

[22] However, one situation seems clear. If the insurer shows that it actually was impossible to make a determination within 90 days, then it will have satisfied the onus of showing that 90 days was not a sufficient time for a determination: *Coseco Insurance Company v. Allstate Insurance Company* (Malach, November 15, 2001); *Federated Insurance Company of Canada* (Malach, September 2, 2003).

[23] A review of the case law reveals, however, that something less than proving that a determination was impossible within 90 days will suffice to satisfy the onus. Put somewhat differently, an insurer seeking to deliver a notice after 90 days must show both that it exercised due diligence and also that there was something in all the circumstances that would justify requiring more than 90 days to make a determination about whether to issue a notice to a particular insurer.

[24] Section 3(2) (a) is directed toward the ability of the insurer to gather the necessary facts to make a determination within 90 days: *State Farm Mutual Automobile Insurance Co. v. Ontario Minister of Finance* (2001), 53 O.R. (3d) 436 (S.C.J.); *sub nom. Kingsway General Insurance Company v. West Wawanoosh Insurance Company*, affd. (2002), 58 O.R. (3d) 251 (C.A.); *Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, [2005] O.J. No. 1477 (S.C.J.).

[25] The cooperation or non-cooperation of the accident victim or the insured and any advertent or inadvertent misrepresentations of information are relevant but not in themselves determinative of whether the insurer had sufficient time: *Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, [2005] O.J. No. 1477 (S.C.J.).

[26] In *Primmum Insurance Co. v. Aviva Insurance Co. of Canada, supra*, Ducharme, J. addressed the relevance to the determination of whether the insurer had sufficient time to make an investigation of the circumstance that the insured had misrepresented the facts. Ducharme, J. stated in para. 27:

> Having reached the conclusion I have with respect to s. 3 (2)(a), it should be clear that the principal issue is not whether the non-disclosure or misinformation provided to the appellant was the result of dishonesty or some other more innocent reason. Rather the only issue under s. 3 (2)(a) is whether the receipt of the inaccurate information renders the 90-day period insufficient for the investigation of the particular case. It is for the insurer who seeks to rely on s. 3 (2) to demonstrate why, in the particular case, the non-disclosure or misrepresentation made the 90 day-period inadequate.

[27] In *Primmum Insurance Co.*, Justice Ducharme was commenting about a case where the insurer was confronted with a problem about non-disclosure or inaccurate disclosure of information during the investigation, but I would generalize his comment to say that there may be other factors that are relevant to determine whether the 90-day period was a sufficient time, but the issue remains whether those factors make the 90-day period insufficient in any particular case.

[28] It seems to me that what the insurer knew and did not know, what the insurer did and did not do, and what the insurer could and could not do in the particular circumstances are all relevant factors to the determination of whether the insurer had sufficient time to make a determination that another insurer is obliged to pay the benefits. In *State Farm Mutual Automobile Insurance Company v. Lloyd's of London Insurance Company* (Jones, January 2002), without intending to be exhaustive, Arbitrator Jones identified the completeness and accuracy of the application form, the cooperation provided by the interested parties, the number of potential insurers, and the press of other demands on the adjuster's time as relevant factors.

[29] With this background to the law and before turning to the factual circumstances and to Arbitrator's Jones award in the immediate case, I have three observations about the methodology of applying the law to the facts. First, I think it is important to determine the significance of the facts from the perspective of the insurer, because it is its predicament or circumstances that are the measure of whether there was sufficient time.

[30] Second, it must be kept in mind that while factually interrelated and connected by the general principals that govern s. 3(2) of Ont. Reg. 283/95, the two pre-conditions of that section are mutually exclusive. The onus on the insurer seeking to give notice after 90 days is to establish both preconditions. By this, I mean that the conclusion that the insurer undertook reasonable investigations and did not make a determination within 90 days does not by itself lead to the conclusion that 90 days is not a sufficient time. Similarly, a conclusion that 90 days would not have been sufficient for a determination does not relieve the onus on the insurer to show that it made reasonable investigations.

[31] Third, I think that evidence that there was an available means by which the insurer could have made a determination within the 90-day period is relevant but not in itself determinative of whether 90 days was a sufficient time. The means available to make a determination is just one factor among others to be considered about the sufficiency of the 90-day period.

[32] In this last regard, it seems to me that even if an insurer were shown within the 90-day period to have had access to the information needed to make a determination that another was obliged to pay the benefits, the insurer might still be able to show that in all the particular circumstances, the 90-day period was not a sufficient time. While proven impossibility of finding the information within 90 days may justify a longer period, the identification with hindsight of an overlooked or unused possibility of finding the information within 90 days does not categorically preclude a longer period being justified. In *State Farm Mutual Automobile Insurance Company v. Lloyd's of London Insurance Company* (Jones, January 2002), Arbitrator Jones stated: "It is also necessary to take into consideration that the adjusters involved are dealing with many other files at the same time and that what may appear very obvious and straight forward with the benefit of hindsight, was anything but straight forward at the time."

[33] However, that said, it seems obvious that an insurer may have greater difficulty meeting the onus of justifying an extension when it did not employ obvious or readily

available means that had a reasonable likelihood of finding the information it needed, even when the insurer satisfies the onus of showing that it made reasonable inquiries.

[34] Keeping in mind that the ultimate issue to be determined is whether 90 days was not a sufficient time for Liberty to make a determination that another insurer is obliged to pay the benefits, I now turn to the facts and Arbitrator Jones' Award.

[35] On July 4, 2001, while riding a bicycle, Jia Jun (known as Steven), Lin was injured by a vehicle insured by Liberty.

[36] At the time of the accident, Steven was living with his father at 81 Baylawn Drive in Scarborough, but his father was on a trip to China. Steven's aunt (his father's sister), Shiu Fen Lam also lived at 81 Baylawn Drive.

[37] On July 25, 2001, Liberty received an Application for Accident Benefits. The application indicated, among other things, that the person applying for benefits was Steven (Jia Jun) Lin who lived at 126 Northolt Crescent in Markham, Ontario. The application indicated that Steven was thirteen years of age and could be reached by contacting a lawyer, Rocco C. Lofranco. The form described the accident, and the form indicated that the accident had been reported to the police. A police officer was identified in the form.

[38] The application form indicated – incorrectly - that Steven was not covered by his own or a spouse's insurance policy. It indicated that he was not listed as a driver in any insurance policy, and it indicated that there was no insurance policy of any person on whom Steven was a dependent.

[39] However, notwithstanding what the application form indicated, Liberty shortly began investigations to determine whether there was a priority insurer. As subsequently found by Arbitrator Jones, Liberty undertook 19 different methods to determine whether another insurer was the priority insurer.

[40] Many of Liberty's efforts involved communications or attempted communications with Steven and his mother and with the lawyers who were acting for them and surveillance of vehicles parked at 126 Northolt, which Liberty understood was the home of Steven and his mother, along with her married or common-law spouse. It is now known that Steven had come to live at 126 Northolt with his mother Xiu Hong Liang, and her boy friend, Jian Ting Huang, whom Steven called "Uncle." Mr. Huang's father, Lang Xiang Huang, also resided at 126 Northolt.

[41] As a result of its surveillance of 126 Northolt, Liberty served a notice to dispute on Lloyd's of London with respect to Lloyd's insured Lang Xiang Huang, with whom Liberty mistakenly thought Steven was in a relationship of dependency.

[42] During the time that Liberty was focusing its investigations on 126 Northolt, Steven's mother and Steven's lawyers were non-cooperative or not making themselves available to provide the information that Liberty was seeking about other possible insurers.

[43] During the time that Liberty was focusing its investigations on 126 Northolt, Steven's father had returned from China and was living at 81 Baylawn Drive, where he continually parked his vehicle in the driveway.

[44] On August 22, 2001, Liberty received a copy of the motor accident report that indicated that Steven resided at 81 Baylawn Drive in Scarborough at the time of the accident. Liberty subsequently requested an explanation from Steven's lawyers for this place of residence because other documentation placed Steven at 126 Northolt. It did not receive an explanation.

[45] In early October 2001, Liberty retained a private investigator, Keyfacts, which, amongst other things, on October 30, 2001, sent a representative to meet with the investigating police officer. The officer connected Steven with 81 Baylawn Drive at the time of the accident.

[46] On November 1, 2001, Keyfacts sent its representative to 81 Baylawn Drive, where a vehicle subsequently identified as owned by Steven's natural father was observed. As already noted above, that vehicle was insured by Zurich, and it now appears that Steven was in a relationship of dependency with his natural father at the time of the accident.

[47] On December 10, 2001, Keyfacts' written report to Liberty identified the insurer as Zurich, and on December 12, 2001, Liberty sent its notice to Zurich. It is this notice that Arbitrator Jones, in effect, decided was untimely.

[48] Arbitrator Jones was satisfied that the investigation efforts of Liberty were reasonable but he concluded that Liberty had not shown that 90 days was not a sufficient period of time to make a determination. Before reaching that conclusion, he found that Liberty faced a definite lack of cooperation and spent a great deal of time and effort to overcome this problem. Arbitrator Jones said that this circumstance should be taken into account.

[49] Arbitrator Jones stated: "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." By this comment, I understand Arbitrator Jones to be saying that he found that Steven's mother intentionally misled Liberty but that what is ultimately important is not whether the misrepresentations were innocent or culpable but that Liberty was misled. Arbitrator Jones' comment is similar to that of Ducharme, J. in *Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, *supra*, and the question remains whether under s. 3 (2)(a) the receipt of the inaccurate information renders the 90-day period insufficient for the investigation of the particular case.

[50] Liberty submits that Arbitrator Jones erred in his understanding and application of the law and that he erred because in reaching his conclusion he did not give effect to the extenuating circumstances of the lack of cooperation and misrepresentations of Steven's mother and to the factors that the evidence overwhelming would draw attention to investigating the relationships at 126 Northolt Crescent and not 81 Baylawn Drive and

that Keyfacts required about two months to develop and follow the lead provided by the investigating police officer, all of which indicate that 90 days was not sufficient.

[51] Arbitrator Jones stated in his reasons:

> With the benefit of hindsight, it is understandable how Liberty came to assume that Steven lived with his mother at Brigadoon or Northolt 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 may 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 v. West Wawanosh Insurance Company*, made it clear the notification. Saving provisions were only to be applied sparingly. . . . .
>
> I am in agreement with this principle. 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 in investigative step which may have produced results is not necessarily insufficient to conclude that it did not perform a reasonable investigation during the 90 day period. . . .

> 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 used regularly to pursue their investigation. Despite all their 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 requirements of s. 3(2)(a) of Regulation 283/95.

[52] In my opinion, Arbitrator Jones made no error in this analysis. I saw no error in legal principal, and he did give effect to the extenuating circumstances identified by Liberty, but he concluded, correctly in my view, that notwithstanding these circumstances and notwithstanding that the investigations that Liberty undertook were reasonable, it had not shown that 90 days was not sufficient.

[53] In its factum, Liberty noted that Steven's father was in China at the time of the accident. But, he had returned within 10 days and he and his car were both to be found at the Baylawn address during the remaining 80 days of the 90-day period. Liberty was asking the right questions and was pursing information about who might have a blood or dependency relationship with Steven. It was not impossible for Liberty to find out about Steven's natural father within 90 days, and Arbitrator Jones was correct in concluding that Liberty did not show that in all the circumstances, including the difficulties that Liberty was confronting because of the confusing names, multiple addresses, misinformation, and competing demands of work that 90 days was insufficient to make a determination.

[54] In some cases, any of the factors considered by Arbitrator Jones alone or in combination will lead to the conclusion that 90 days is insufficient, but Arbitrator Jones weighed the factors in this case and concluded that 90 days was not "not a sufficient period," and in my opinion his conclusion was correct.

[55] Accordingly, I dismiss the appeal from Arbitrator Jones' Award.

[56] If the parties cannot agree about costs, they may make submissions in writing beginning with Zurich within 20 days from the release of these reasons to be followed by Liberty's submissions within 20 days.

[57] Order accordingly.

Perell, J.

Perell, J.

Released: December 10, 2007

COURT FILE NO.: 06-CV-314519-PD2
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