COURT FILE NO.: 07-CV-331710PD2
DATE: 2008/06/05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Echelon General Insurance Company v. CGU Insurance Company of Canada

BEFORE: Justice Herman

COUNSEL: *John D. Dean*, for the Applicant
Leilah Edroos, Jillian Van Allen, for the Respondent

DATE HEARD: June 3, 2008

ENDORSEMENT

[1] The applicant, Echelon General Insurance Company, is appealing from the decision of the arbitrator, Guy Jones, dated March 31, 2007. The arbitrator refused to extend the 90-day period for providing written note disputing the insurer's obligation to pay benefits.

[2] On May 11, 2002, Anthony Gibbs Jr. was involved in a cycling accident. He was struck by a motor vehicle that was ensured by Echelon. Mr. Gibbs Jr. applied to Echelon for accident benefits and Echelon has been paying him statutory accident benefits.

[3] Echelon takes the position that CGU is responsible for the payment of benefits to the claimant on the basis that he was the dependent of his father, Renford Anthony Gibbs Sr., who was insured by CGU at the time of the accident. However, Echelon did not give CGU notice that it disputed priority to pay accident benefits until after the expiry of the 90-day notice period.

The Issue

[4] Whether Echelon is correct that CGU was responsible for the payment of benefits to the claimant is not at issue in this appeal. Rather, the issue is whether the arbitrator erred when he refused to extend the 90-day period for Echelon to give notice to CGU that it was disputing its obligation to pay.

[5] Section 3 (1) of Ontario Regulation 283/95 provides that an insurer has 90 days after the receipt of a completed application for benefits to provide written notice to another insurer that it disputes its obligation to pay statutory accident benefits. However, section 3 (2) provides that an insurer may give notice after that period if the 90 days was not a sufficient period of time within

which to determine that another insurer was liable; and if the insurer made the reasonable investigations necessary to determine if another insurer was liable within that 90-day period.

[6] It is undisputed that Echelon gave CGU written notice after the 90-day period had expired: the application for benefits was received on July 19, 2002; the 90-day period expired on or about October 17, 2002; and Echelon gave written its written notice of dispute to CGU on December 18, 2002.

[7] Echelon submits, however, that the arbitrator erred when he refused to extend the 90-day period. In particular, Echelon submits that the arbitrator was incorrect when he concluded that Echelon should have contacted CGU or the insurance agent, Timmerman Insurance, prior to the end of that 90-day period to find out whether Mr. Gibbs Sr. had an insurance policy at the time of the accident. Furthermore, the arbitrator was incorrect to conclude that, had Echelon followed up, it "may well have determined" that the insured was covered by a CGU policy.

[8] CGU submits, however, that given the totality of the evidence, the arbitrator did not err when he concluded that Echelon should have followed up with CGU or Timmerman and thereby denied the extension of the 90-day notice period.

Standard of Review

[9] The standard of review of an arbitrator's decision on a question of law is one of correctness. However, the situation is less clear where the arbitrator's decision involves questions of mixed fact and law, as is the case here.

[10] In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 37, the Supreme Court stated that a question of mixed fact and law was subject to "a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law".

[11] Although *Housen* was not a case involving an insurance arbitration, I note that Spence J. in *Aviva Canada Inc. v. The Dominion of Canada General Insurance Company* (Endorsement, Ont. S.C.J., Nov. 2, 2006), an appeal from the decision of an arbitrator under the *Insurance Act*, cited *Housen* as authority for the proposition that the standard of review involving findings of fact was "palpable and overriding error".

[12] Other cases suggest that the appropriate standard of review is correctness even where the decision involves questions of mixed fact and law (see *Liberty Mutual Insurance Co. v. Commerce Insurance Co.*, [2001] O.J. No. 5479 (S.C.J.) at para. 35; *Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, [2005] O.J. No. 1477 (S.C.J.) at para. 16).

[13] It is not necessary to resolve this issue as I am able to make a determination on the basis of the stricter standard.

Investigations undertaken by Echelon

[14] While the crux of the arbitrator's decision was Echelon's failure to follow up with CGU and Timmerman, the arbitrator also considered the investigations that Echelon undertook up to the end of the 90-day period. I will therefore outline those investigations.

[15] Echelon became aware of the accident and the significant injuries suffered by the claimant shortly after the accident of May 11, 2002. On May 15, 2002, Echelon retained Ronald Mustill, an independent insurance adjuster, to investigate the claim.

[16] On May 24, 2002, Mr. Mustill met with Mr. Gibbs Sr. and the claimant's sister, Tanya Darko. Mr. Mustill described the meeting as "awkward and brief". Mr. Gibbs Sr. indicated that he would not provide any particulars regarding his own car insurance until he had retained a lawyer.

[17] Mr. Mustill followed up the meeting with a confirming letter to Ms. Darko, dated May 30, 2002. In that letter he requested that they advise him of the lawyer they had retained and that they request their lawyer to contact Echelon to discuss the primary insurance issue.

[18] On May 27, 2002, Mr. Mustill obtained a report from the Insurance Search Bureau of Canada using the name, "Rumsford Anthony Gibbs". The search indicated that the Ministry of Transportation did not have any records with respect to this individual.

[19] Echelon then retained an investigation firm to attempt to obtain particulars regarding Mr. Gibbs Sr. They learned the proper spelling of his name, that is, "Renford Gibbs". They conducted an Auto Plus search using that name and a driver's license number. The search revealed that Mr. Gibbs had previously had automobile insurance policies with various different companies and that Mr. Gibbs had most recently renewed his coverage with Pembridge in February 2001. Echelon contacted Pembridge and two other insurance companies and was advised that they had no record of a valid policy in effect on the date of the accident.

[20] On July 2, 2002, Mr. Mustill again spoke to Ms. Darko. Ms. Darko advised him that the family had not yet retained a lawyer but would do so shortly and that she would look into her father's insurance situation.

[21] On July 18, 2002, Ms. Darko advised Echelon that the family had retained a lawyer, Mr. James Vigmond, of the firm Oatley, Vigmond. Ms. Patricia Norris from that law firm wrote to Mr. Mustill indicating that she would attempt to obtain and provide information concerning any license plate registered to Mr. Gibbs Sr. Mr. Mustill's file notes indicate that Ms. Norris told him that Mr. Gibbs had a car but no insurance.

[22] On July 24, 2002, Echelon received the claimant's application for accident benefits. In answer to the question whether he was covered by "The policy of any person on whom you are dependent (e.g. – a parent)", the claimant put an "X" in the "No" box.

[23] On August 6, 2002, Mr. Mustill spoke to Ms. Ray Hyde, who had replaced Ms. Norris on the file, to remind her that Echelon was waiting for information regarding Mr. Gibbs Sr.'s insurance.

[24] There is no evidence of anything happening in the month of September 2002.

[25] On October 7, 2002, Mr. Mustill received a letter, dated October 3, 2002, from Ms. Hyde. The letter stated:

> We were finally able to obtain Renford Gibbs' insurance information. It is as follows:
>
> CGU
>
> Agent is Timmerman Insurance (905) 564-8100
>
> Policy #C44338
>
> 1988 GMC Safari
>
> Effective Date: March 8, 2002.
>
> Mr. Gibbs states that he had no insurance at the time of the accident as his payment had lapsed.

[26] Mr. Mustill testified at the hearing that he telephoned Timmerman Insurance, the insurance agent listed in the letter, on or about October 18, 2002 to confirm that Mr. Gibb's policy was not in force at the time of the accident. He also testified that he e-mailed a confirmation of this telephone conversation. The arbitrator found, however, that Mr. Mustill did not contact Timmerman Insurance. Echelon accepts this finding for the purpose of this appeal.

[27] On November 19, 2002, after the expiry of the 90-day period, Echelon held a claims committee meeting. It decided that there was "a question of priority in that it must be verified that his father, whom he may have been dependent on, did not carry insurance".

[28] On December 16, 2002, the notes of Mr. Coulson, an Echelon representative, indicate that "Disc. Mustill- to call CGU a.s.a.p. re: ins. Renford Gibbs, prior 1/3/02".

[29] On December 17, 2002, Echelon requested a further Auto Plus search. It revealed that Mr. Gibbs Sr. had a CGU insurance policy #10254153 at the time of the accident. It should be noted that this is a different policy number than the one referred to in the October 3 letter.

[30] CGU claims that Echelon did the further Auto Plus search as a follow-up to its claims committee meeting and subsequent meetings. Echelon claims that it conducted the search as a result of Mr. Gibbs Sr.'s attendance at their office on December 17, 2002 to pick up a benefit cheque. Echelon claims that it was at this point that it realized that Mr. Gibbs Sr. was still driving and might have insurance. The arbitrator made no finding in this regard.

[31] On December 18, 2002, Mr. Mustill mailed the notice by regular post to CGU. CGU received the notice on January 7, 2003.

Section 3 (2) – General Principles

[32] The arbitrator concluded that the key issue was whether Echelon should have followed up with Timmerman Insurance or CGU after receiving the October 3 letter and within the 90-day notice period. It received the letter on October 7, 10 days before the expiry of the notice period.

[33] Echelon received information on several occasions that suggested that Mr. Gibbs Sr. did not have insurance coverage at the date of the accident. On two occasions, this information was communicated by the claimant's counsel. Should Echelon nonetheless have followed up to verify that Mr. Gibbs Sr. did not, indeed, have insurance coverage with CGU?

[34] The determination of reasonableness under s. 3 (2) (b) is fact-driven. The investigation must be "reasonable", not "perfect".

[35] In *Primmum Insurance Co. v. Aviva Insurance Co. of Canada* at para. 21, Ducharme J. noted that the insurer and the insured owe a duty of utmost good faith to each other. As a result, the insured is obliged to provide the insurer with complete and accurate information.

[36] However, the purpose of section 3 is to encourage insurers to carry out their investigations fully and expeditiously. The insurers are sophisticated parties who deal with disputes of this nature on a regular basis. Depending on the circumstances, it may not be reasonable for the insurer to accept the information that the insured provides without further investigation (see *Primmum Insurance Co. v. Aviva Insurance Co. of Canada* at para.33.; *Axa Insurance Company v. Co-Operators Insurance Company* (Nordheimer J. Endorsement, Ont. S.C.J., May 3, 2001 at paras. 5, 7).

Application of the General Principles to the Facts

[37] The crux of Echelon's argument is that the arbitrator erred when he concluded that had Echelon contacted Timmerman Insurance or CGU prior to the running of the 90-day period, it "may well have determined that CGU was still insuring Mr. Gibbs". Echelon submits that there was no evidence to support the arbitrator's conclusion because Mr. Gibbs was insured by CGU under a different policy than the one mentioned in the October 3 letter. It contends that CGU or Timmerman might well have merely confirmed that the policy referred to in the letter had lapsed, in which case Echelon would have been no further ahead in its investigations.

[38] Does it matter what the result of the further investigation would have or might have been?

[39] Echelon points to the decision of the same arbitrator, Mr. Jones, in *Ontario Municipal Insurance Exchange v. Liberty Mutual Insurance Company* (October 10, 2000). In that case, Liberty Mutual submitted that had the insurer made greater efforts, such as a driver's record search, during the 90-day period it might have discovered the other insurance policy. The arbitrator concluded, however, that there was no evidence that such a search would have revealed the existence of the policy and the failure to conduct such a search was not unreasonable.

[40] CGU refers to *State Farm Mutual Automobile Insurance Company v. West Wawanoosh Insurance Company* (2002), 53 O.R. (3d) 436 at para. 30; aff'd (2002) 58 O.R. (3d) 251 (C.A.). In that case, Nordheimer J. addressed the arbitrator's conclusion that the 90-day period was insufficient for the insurer to make the correct determination. Nordheimer disagreed that this was the test:

> There is nothing in the section that purports to require correctness as part of the determination. It simply stipulates that the insurer must make a determination within 90 days unless reasonable investigations undertaken within that time have made a determination impossible. The section is not intended, in my view, to deal with the issue of the correctness of the determination but simply the ability to make the determination. In that regard, the section is really directed toward the ability of the insurer to gather the necessary factual information to make a determination as to whether its policy or the policy of another insurer should answer for the benefits to be paid. It is not directed at ensuring that, armed with the factual information, the insurer will make the correct determination.

[41] The language of s. 3 (2)(b) focuses on whether the insurer made reasonable investigations. It is not directed to whether those investigations resulted in a correct determination.

[42] I agree with the applicant that there is no reference in the arbitrator's decision to evidence upon which he could conclude that a follow-up with CGU and Timmerman would necessarily have resulted in Echelon finding out about the CGU policy. However, it was not, in my opinion, an error for the arbitrator to conclude that such an inquiry might have resulted in this information nor was it an error to conclude that Echelon should have made such an inquiry.

[43] There was evidence before the arbitrator that Echelon had reason to question the representations of the claimant that there was no other insurance. Echelon had thought it worthwhile to verify information with insurance companies since it did so after its first Auto Plus search. In these circumstances, it would have been reasonable to follow up with CGU or Timmerman Insurance after receiving the information about the CGU policy.

Conclusion.

[44] I therefore conclude that the arbitrator did not err when he concluded that, on balance, Echelon should have contacted Timmerman or CGU prior to the expiry of the 90-day period and when he declined to extend the notice period.

[45] Echelon's appeal of the decision of the arbitrator is therefore dismissed.

[46] If the parties cannot agree on costs, they may make brief written submissions on costs. Those submissions should be no longer than 3 pages in length plus a bill of costs. The respondent's submissions should be provided within 15 days of the release of this decision. The applicant has a further 15 days within which to respond.

Herman J.

DATE: June 5, 2008