IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I.8, s268 and REGULATION 283/95;

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

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

ZURICH INSURANCE COMPANY OF CANADA

Applicant

- and -

ROYAL & SUNALLIANCE INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Mark K. Donaldson for the Applicant

Pamela A. Brownlee for the Respondent

ISSUE:

Is Zurich Insurance of Canada (Zurich) entitled to an extension of the 90 day notice provision pursuant to section 3(2) of Regulation 283/95 and therefore be permitted to pursue its priority claim against Royal & SunAlliance?

DECISION:

Zurich is entitled to an extension of the 90-day notice provision pursuant to section 3(2) of Regulation 283/95 and may proceed with its priority claim against Royal & SunAlliance.

HEARING:

This hearing was held in the City of Toronto, Ontario, on February 22, 2008. Viva Voce evidence was heard and documentation was filed.

FACTS & ANALYSIS:

This priority dispute arises out of an accident which occurred on October 18, 2004. At that time Mr. Cac Xuan Ho was riding his bicycle in the city of Hamilton when he was struck by a motor vehicle insured by Zurich.

Zurich first learned of the accident and injuries suffered by Mr. Ho by way of a letter from his legal representative on or about January 19, 2005. On or about January 28, 2005 Zurich received an Application for Accident Benefits along with a letter from Mr. Ho's representative stating that Zurich was to deal only with Mr. Ho's representative and not contact Mr. Ho directly.

On January 27, 2005, the independent adjuster handling the file, Ms. Elke Paulsen, of McLarens Canada, who had been hired by Zurich to handle the claim, left a message with Mr. Ho's representative requesting a meeting with Mr. Ho to obtain a detailed signed statement as a thorough investigation was required regarding the priority issue. Ms. Paulsen followed this up with a fax to the representative on January 31, 2005.

Ms. Paulsen returned the application for accident benefits to Mr. Ho's representative by way a letter dated February 18, 2005, pointing out that it was incomplete and reminding Mr. Ho's representative that they wish to meet Mr. Ho to obtain a signed statement regarding his injuries and for priority coverage issues.

On or about February 27, 2005 Zurich received the now fully completed application for accident benefits. A considerable period of time was spent at the hearing dealing with the issue whether or not the originally received application constituted a completed application or not. There has been considerable case law developed as to what does or does not constitute a completed application for accident benefits and to a large degree it depends upon the facts of each particular case.

If the first application was complete, the 90-day notice period to put Royal SunAlliance on notice expired on or about April 28, 2005. If the second application was the initial completed application, the 90 days would have expired on or about May 22, 2005. Given that Zurich did not put Royal SunAlliance on notice until December 5, 2005 and nothing transpired regarding the priority issue between April 28 and May 22, 2005, it is not vital to my decision which application constituted the completed application. I do note, however, that the first application was missing important information regarding priorities such as whether the injured party was married, his income tax status, etc. The application was certainly incomplete for priority purposes, however, as will become clear from my comments below, it is immaterial whether the 90 days expired on February 28 or May 22, 2005.

The fact of the matter is that the 90-day notice prevision was missed and the only way that Zurich can precede with this arbitration is if the "saving provisions" of section 3(2) of Regulation 283/95 apply. That subsection states:

> (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.

As numerous arbitrators and the courts have pointed out, section 3(2) is a two-part test and Zurich has the onus of showing: (1) that 90 days was not a sufficient period to make a determination that another insurer may be liable; and, (2) that Zurich made reasonable investigations during the 90-days to determine if another insurer was in priority.

To a certain degree, the facts that apply to each part of the test overlap, and accordingly it is useful at this time to review the facts briefly in order to determine what happened in this particular case.

As noted above, the accident occurred October 18, 2004 and on or shortly after January 28, 2005 Zurich's representative first received the initial application along with a letter from Mr. Ho's representative stating that Zurich was only to contact the legal representative and not Mr. Ho himself. I note that the first application did not indicate Mr. Ho's marital status as the form requires. According to the adjuster Elke Pauslen's log notes, which were filed at the hearing on January 27, 2005 she left a message on the legal representative's voice mail indicating they required a statement from the applicant for priority purposes. She followed this up with a fax to the legal representative requesting a meeting with the client in order to obtain the signed statement for priority purposes.

On February 8, 2005, Ms. Paulsen returned the first application along with a fax, requesting the application be fully completed and again asking for a meeting with the client to among other things, clarify the priority situation.

On or about February 22, 2005, Zurich received the completed application for accident benefits. This indicated that the applicant, Mr. Ho, was separated. Part 4 of the form "Details of Automobile Insurance" indicated that Mr. Ho was not covered under his own policy, his spouse's policy, a policy of a dependant, a policy that listed him as a driver, his employer's policy or a policy insuring long term rental cars. The application also indicated that the applicant was not working at the time of the accident. It further indicated that he was not paying support to any spouse, former spouse and was single for tax purposes.

On March 14, 2005, Ms. Paulsen had a telephone conversation with an employee of Signum Investigation Inc, an investigation firm. She retained them to do a driver's license search on the wife, and also to find out where Mr. Ho lived, as the information in that regard on the application was incomplete. The investigator advised Ms. Paulsen that by coincidence they had done prior surveillance upon Mr. Ho in 1999 for a bodily injury claim and that as of December 24, 1999

Mr. Ho was living with a nephew and may have been dependent upon that nephew. They had run a search with the Ministry of Transportation and confirmed that he was not a licensed driver.

On March 31, 2005 Signum Investigations forwarded their report to Ms. Paulsen. It confirmed the 1999 investigation and showed at that time he had been working at Maple Leaf Pork but was separated from the mother of his children, Nay Bach Le. They confirmed that Mr. Ho did not have a valid drivers license and he was not working at the time of the accident. They did learn that he was living alone at 40 Oxford Street North,, apartment 602, Hamilton and obtained his phone number.

As requested by Ms. Paulsen, the investigator did a Department of Transportation drivers licence search on Mr. Ho's separated spouse, Nay Bach Le and no driver's licence was found.

On March 31, 2005 Ms. Paulsen noted in her log notes "no policies found for this claimant, prior for a b is to this file". In essence Ms. Paulsen decided by the end of March 2005 priority lay with Zurich and after that date Zurich continued to handle the file and make payments.

On November 1, 2005, the claimant's representative called Ms. Paulsen and indicated that they would like to settle the file. A meeting was set up at the representative's office on November 10, 2005. At that time, a signed statement was taken from the applicant, Mr. Ho. Mr. Ho confirmed that he was unemployed at the time of the accident, lived alone, and had been on government assistance at the time of the accident. He confirmed he had no driver's licence and no car. He advised he had been separated from his spouse for about 3 years but still legally married to Nay Le. He said that she was a licensed driver and had been so for about 8 years. He said she presently had a car but did not know its make or whether it was insured. She did not own the car when he had been living with her. Armed with this information, on the same day, Ms. Paulsen recontacted Signum Investigation and re-opened the file and asked them to attempt to find out if Mr. Ho's separated wife had a car and whether if it was insured and if so, by whom.

Signum subsequently reported that searches were conducted by the Ministry of Transportation regarding the spouse, Nay Le, but her driver's licence was not identified under the name provided by Mr. Ho.

Internet searches failed to provide the necessary information regarding Mr. Ho or his wife. A Personal Property Security Registration search also produced no information regarding Mr. Ho or his spouse.

It would appear that the investigator used the telephone directory database for the name "Le" in Hamilton and came up with fifty listings. By the process of elimination they came up with the name Thi Bach Nay Le, along with an address and phone number. Further searches were done with the Ministry of Transportation and she was listed as Thi Bach Nay Le with a driver's license. She had a 1994 Nissan motor vehicle registered in her name. An insurance database search was then conducted that showed that Mr. Ho's spouse had a valid motor vehicle liability policy with Royal & Sun Alliance.

Signum prepared their written report on November 21, 2005.

On December 1, 2005 Zurich served Royal SunAlliance with a Notice of Dispute, which Royal SunAlliance received on December 5, 2005.

THE LAW:

There is no doubt but that arbitrators and the courts have tended to use the "saving provisions" of section 3(2) of regulations of 283/95 very sparingly. The courts have noted that "insurance companies are sophisticated and experienced participants in the insurance industry"…there is therefore no unfairness visited upon them by insisting on strict compliance with the notice requirements. (State Farm Mutual Automobile Insurance Company vs. Her Majesty the Queen; and Kingsway General Insurance Company vs. West Wawanosh Insurance Company, 53 O.R. (3) 436, Nordheimer, J).

Arbitrator Rudolph in Axa Insurance Company vs. Co-operators Insurance Company (unreported decision released May 1, 2000) indicated that it is not enough for a company to conduct a very circumspect investigation in the first instance and at a much later stage complete the investigation and seek relief under section 3(2).

While I'm in total agreement with the above stated principles, the courts and arbitrators have also noted that accident benefits adjusters are extremely busy individuals handling many complex files dealing not only with priority issues, but also handling the injured party's claims for income replacement benefits, medical rehabilitation benefits, attendant care etc, all within very limited time lines. One must remember that what is required is not perfection. With the benefit of hindsight, almost any other insurer that exists could be found if certain steps had been taken. The test is one of reasonableness. The saving provisions of section 3(2) of Regulation 283/95 were put there for a reason, and the test should not be so high as to make it almost meaningless.

What a reasonable adjuster would do may well vary by each individual case. We know that in this instance, with in 90 days Ms. Paulsen had confirmed that Mr. Ho had no car or motor vehicle liability policy of his own, he was not working and therefore had no vehicle available for his regular use, and he was living alone and not a dependent. The completed application for accident benefits indicated that there was no insurance available through the spouse. From all of this one might reasonably conclude that Zurich was in priority. However, Ms. Paulsen went beyond this and hired an investigator who conducted a driver's license search which proved negative for a driver's license for Mr. Ho's spouse. In light of that, it would be reasonable to conclude that there was no motor vehicle liability insurance available through Mr. Ho's separated spouse.

Counsel for Royal SunAlliance submitted that the adjuster could have done more during the 90 days to obtain information. She points out that Ms. Paulsen only made one verbal and two written requests for a signed statement and that she should have pursued this further. She also suggested that benefits could have been denied for failing to provide a sworn statement. While this is all true, one must again return to the basic fact that what is required is that which a reasonable adjuster would have undertaken. In certain circumstances a signed statement may be

essential if section 3(2) is to be relied upon. In other circumstances, it may not be. As Arbitrator Malach noted in Pilot Insurance Company vs. Royal Sun Alliance Insurance Company (decision of Arbitrator Malach dated August 8, 2005, affirmed on appeal – unreported decision of Mr. Justice Belobaba,, dated February 24, 2006), it is not necessary to take a signed statement or a statutory declaration in each case. I agree with this proposition. In our case, Ms. Paulsen conducted a reasonable investigation within the 90-day period and on March 31, 2005 it was determined that Zurich was in priority. In my view this was a reasonable decision arrived after a reasonable investigation was undertaken. To expect the adjuster to do more in the circumstances would be unrealistic and render the saving provisions almost meaningless. In my view, a sufficient investigation was done during the 90-days and the facts obtained at that time led to the decision being made. It was well after 90-days had elapsed that the new facts came to light. Once the new facts came out, Ms. Paulsen moved rapidly and put Royal SunAlliances on notice. For these reasons I will extend the 90-day notice period and allow Zurich to proceed with the arbitration.

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

Dated at Toronto, this _____ day April 2008.

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M. Guy Jones

Arbitrator