IN THE MATTER OF THE INSURANCE ACT, R.S.O. c.I.8,

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

AND IN THE MATTER of an Arbitration between:

CGU GROUP CANADA LTD.

Applicant

- and -

CANADA LIFE CASUALTY INSURANCE COMPANY

Respondent

- and -

LIBERTY MUTUAL GROUP

Respondent

AWARD

Appearances:

Kevin D.H. Mitchell
Counsel for the Applicant

Derek Greenside
Counsel for the Respondent Canada Life Casualty Insurance Company

Suzanne Courtlander
Counsel for the Respondent Liberty Mutual Group

ISSUES:

1. Did CGU Group Canada Ltd. ("CGU") serve the respondents, Canada Life Casualty Insurance Company ("Canada Life") and Liberty Mutual Group ("Liberty") with a notice of intention to dispute within ninety days of receiving a completed application for accident benefits as required by section 3(1) of Regulation 283/95?
2. Did CGU initiate the arbitration within one year of giving the notice under section 3, as required by section 7(2) of Regulation 283/95?

HEARING:

This arbitration was held on January 20, 2004, in the City of Toronto, Ontario.

THE FACTS:

This arbitration arises as a result of a claim for accident benefits made by Ms. Mina Yamada who was injured in a motor vehicle accident on April 29, 1998. Ms. Yamada was not insured, however, her father had a policy of insurance with CGU at the time of the accident and Ms. Yamada forwarded an application for accident benefits to CGU, which was received by CGU's agent on August 18, 1998, on the theory that Ms. Yamada was a dependent of her father.

THE NOTICE ISSUE:

Following the accident CGU retained an independent adjusting firm, Adjustors Canada, to deal with both the tort and accident benefit claims arising from the collision. Mr. Basil Zahed of that company was assigned to the file. Ms. Zahed met with the injured party and her parents at Sunnybrook Hospital on May 7, 1998. As a result of that meeting Mr. Zahed had some concerns as to whether or not Ms. Yamada was a dependent of her father for the purpose of statutory accident benefits. As a result of that, and further investigation, he concluded that Liberty, as insurer of the driver of the motorcycle on which Ms. Yamada was driving or Canada Life, as insurer of the other motor vehicle involved in the collision, might have higher priority pursuant to section 268(2) of the Insurance Act, and therefore be responsible for paying accident benefits.
While awaiting receipt of the application for accident benefits, Mr. Zahed, on August 14, 1998 wrote to both Liberty and Canada Life apparently attempting to put them on notice that CGU was not responsible for paying the accident benefits and that either Liberty or Canada Life should pay the benefits. On August 18, 1998, Mr. Zahed received the actual application for accident benefits from Ms. Yamada.
Section 3(1) of Regulation 283/95 states that:
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 a completed application for benefits to every insurer who it claims is required to pay under that section
The respondents have raised a number of objections to what CGU purports to be the notice given to them.
CGU takes the position that notice was given by way of a letter from Mr. Zahed to Liberty Mutual and Canada Life dated August 14, 1998. The letters were sent by registered mail and both respondents admit to receiving the letter, Canada Life on August 18, 1998 and Liberty on an unknown date. As the contents of the letter are important, I will set them out in their entirety. Both are addressed to the Automobile Claims Department of each insurer and state:
With reference to the above noted claim this correspondence is to serve notice in accordance with the Regulations under the Insurance Act of Ontario.
Also, as of today's date, we have not received the complete S.A.B.S. forms with respect to this loss.
Therefore, our principals take the position that they are not the correct insurers to entertain this claim. The claim should be paid by Canada Life Casualty Insurance or Liberty Mutual Insurance.
The letters were signed by Mr. Zahed, who identified himself as the adjuster. The letters were written on Adjusters Canada letterhead and set out the name of CGU's insured, the name of the claimant, the name of each respondents' insured, Canada Life's policy number, the date of the loss and Mr. Zahed's file number. The letter to Liberty does not contain their policy number as it was not known to Mr. Zahed at that time.

Mr. Zahed testified at the hearing and stated that he had also sent a form entitled "Claimant's Application for Accident Benefits" to both Liberty and Canada Life as well as the claimant, who had requested it. Pursuant to section 4 of Regulation 283/95 such a form must be sent to the claimant when the insurer gives notice to the other insurers of its' intent to dispute. Neither
Liberty nor Canada Life could find any evidence in their files of having receiving the Notice to Applicant of Dispute Between Insurers. Mr. Zahed indicated that he simply mailed the forms with no covering letter. He could not recall if he sent it to the respondents by mail or courier. Given that the purported mailing was over five years ago and that there is no record of it having been sent to anyone other than the claimant, I am not prepared to conclude that it was sent and accordingly the "Notice to Applicant of Dispute Between Insurers" does not play any role in deciding whether or not adequate notice was given to Canada Life or Liberty.
I will now turn to the adequacy of the August 14, 1998 letter. The respondents take the position that the letter was inadequate for a number of reasons. They argue that the letter is defective because it does not come directly from the insurer, it does not identify the insurer, it does not specifically identify Regulation 283/95 and does not specifically state that they are disputing that they are in priority. The also argue that the letter was sent four days before the application for accident benefits was actually received by CGU. Finally they submit that CGU had to serve the form referred to in section 4 of Regulation 283/95 upon the respondents.
I will deal first with the question of whether the insurer must send the notice or whether it can be sent by an agent. Section 3 (1) states that "no insurer may disputeÉunless it gives notice". The respondents argued that the decisions of Justice Northeimer in State Farm Mutual Automobile Insurance Company vs. Her Majesty the Queen, and Kingsway General Insurance Company vs. West Wawanosh Insurance Company (2001) Ontario Superior Court of Justice file 99-171740 support their position. In both those cases the notice came from the injured party's solicitor rather than the insurance company.
We are, of course, in this case dealing with a different situation. The letter was sent by the agent of the insurer and there is no suggestion that Mr. Zahed did not have the authority to act as agent on behalf of CGU. I note that Mr. Zahed mentioned in his letter that "our principals take the position". Mr. Zahed had the power to bind the company in this matter and accordingly the notice provided by the agent of the insurer was sufficient. I am somewhat more troubled by Mr. Zahed's failure to mention who his principal was. He does, however, indicate who his principal's insured was, the name of the claimant, their insured and in Canada Life's case, their policy number.
I also note that Mr. Zahed, on July 9, 1998 called Mr. Doug Cyr, an adjuster at Canada Life and discussed the file with him. In addition, Mr. Zahed's file notes indicate that Mr. Luis De Sousa, an accident benefits adjuster with Canada Life called Mr. Zahed to discuss the file and left a voicemail for Mr. Zahed to call him. Mr. Zahed left a further voicemail for Mr. De Sousa on the same day. It appears that Mr. De Sousa did not return that call.
Mr. Zahed also called Sandra Bell, an adjuster with Liberty Mutual, on August 20, 1998 and discussed the dependency issue and priority question with her. In light of the above telephone messages and conversation, I find it difficult to believe that Liberty Mutual and Canada Life did not know who Mr. Zahed was acting for. When the letter and telephone calls are viewed in their entirety, I am satisfied that the respondents knew or ought to have known who Mr. Zahed was acting for. There is no indication that either party ever questioned who Mr. Zahed was acting for. Accordingly, I find that the letter was sufficient in this regard.

I will now turn to the submission that the letter was insufficient as it did not refer to a specific regulation and did not state that they were disputing the priority for accident benefits purposes. Section 3 or Regulation 283/95 simply requires that the insurer give notice of it's intent to dispute payment of the accident benefits. It does not require any particular wording or reference to the Regulation. While it would have been helpful if the letter had mentioned the specific Regulation, the letter when read in its' entirety makes it clear that they are referring to accident benefit matters and CGU is not the correct insurer to pay and that one of the respondents should pay the claim. It must be remembered that this letter was sent to insurers whose adjusters handle these matters everyday and it seems unlikely that the intent of the letter could have been misunderstood. Accordingly I find that the letter was sufficient in this regard.
The respondents also argued that CGU was required to send the notice in the form as set out in the "Notice to Applicant of Dispute Between Insurers". I am unable to agree with this submission. Section 3, which deals with notice to the insurer by the paying insurer, sets out no such requirement. The only reference to such a form is found in section 4 of the Regulation which deals with notice to the insured by way of the form. It says nothing about giving such notice to the other insurers.
The respondents also submitted that the notice was invalid in that it was sent before the actual application was received by CGU. In fact it was sent on the day that the application for accident benefits was sent by the claimant. It was not received by CGU until August 18, 1998 or four days after the notice letter had been sent to the respondents. Section 3 of the Regulation requires that the notice be given within ninety days of receipt of the completed application. Mr. Zahed had previously met with the family of the insured claimant and had provided them with an application for accident benefits and had every reason to believe that the completed application would be received shortly, as it obviously was. The mere fact that the notice arrived four days before the application is of no particular significance. It would have made no sense to have the adjuster send out yet another similar letter four days letter. Adjusters are very busy individuals dealing with many complex matters. It would not be beneficial to the parties to require further, essentially unnecessary letters, to be written. At best the respondents have raised a very technical defence that has no effect on the matter.
Equally technically, I would note that section 3 does not require that the notice be sent after receipt of the application, only that it be sent within ninety days of receipt. Technically it was within ninety days.
In light of all the above, I am satisfied that the applicant did comply with the ninety day notice requirement as set out in section 3 of the Regulation.

INITIATING THE ARBITRATION:

Section 7 (2) of Regulation 283/95 states:
The insurer paying benefits under section 2, any other insurer against whom the objection to pay benefits is claimed or the insured person who has given notice of an objection to a change in insurers under section 5 may initiate the arbitration but no arbitration may be initiated after one year from the time the insurer paying benefits under section 2 first gives notice under section 3.
The August 14, 1998 notice letter was received on August 18, 1998 and therefore the arbitration must have been initiated by August 18, 1999.
Section 23 of the Arbitration Act, 1991, states:
An arbitration may be commenced in any way recognized by law, including the following:
1. a party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement.

2. If the arbitration agreement gives a person who is not a party power to appoint an arbitrator, one party serves notice to exercise that ower on the person and serves a copy of the notice on the other parties.
3. a party serves on the other parties a notice demanding arbitration under the agreement.

The applicant submits that it initiated the arbitration by way of a letter from Mr. Lee Samis, its solicitor, to the respondents dated August 3, 1999 which enclosed a "Notice Demanding Arbitration" which Mr. Samis indicated he was serving pursuant to the Arbitration Act (see exhibit 1, tab 6 & 7). The enclosed ÔNotice Demanding Arbitration' stated:

Take Notice that CGU Insurance Company of Canada hereby demands that Canada Life Casualty Insurance and Liberty Mutual Insurance Company submit to an Arbitration in accordance with Ontario Regulation 283/95 with respect to injuries sustained by Mina Yamada and policies issued by Liberty Mutual to Erik Tang and Canada Life policy A0046341 issued to Cedric Shim.

The Notice and covering letter were served on the respondents on August 3, 1999. I note that a representative of Liberty Mutual, in a letter dated August 10, 1999, confirmed that Mr. Samis had agreed to provide a waiver on the Notice.

Counsel for the respondents take the position that the applicant did not initiate the arbitration until at least October 2001, when another Notice of Dispute was served. Regulation 283/95 which governs the priority disputes in Ontario does not state how the arbitration should be initiated. It simply states that the dispute shall be resolved through an arbitration under the Arbitration Act, 1991.

One therefore turns to the Arbitration Act, where section 23, quoted above, allows an arbitration to be commenced in any way recognized by law, including three specific ways, one of which is "a party serves on the other parties a Notice Demanding Arbitration under the agreement". It is this method, set out in section 23(3) by which the applicant claims it initiated the arbitration on August 3, 1999.

The respondents take the position that there was no "agreement" in place as of August 3, 1999 and therefore section 23(3) cannot be used to initiate the arbitration.

"Arbitration agreement" is defined in section 1 of the Arbitration Act as:

"an agreement by which two or more persons agree to submit to arbitration a dispute that has risen or may arise between them".

Section 5(1) of the Arbitration Act states:

"an arbitration agreement may be an independent agreement or part of another agreement."

Counsel were able to provide me with only one case where this issue had been addressed, the decision of Mr. Justice Archibald in Gore Mutual vs. Markel Insurance Company [1999] O.J. No. 2688. In that case the applicant took the position that a priority arbitration under Regulation 283/95 could be initiated by way of a letter with a Notice Demanding Arbitration attached. Justice Archibald stated:

Clearly, these two letters constitute a clear notice of the applicant's determination that arbitration should be held. They also constitute clear notice that the arbitration is to be held pursuant to Ontario Regulation 283/95. In this court's determination, the notice is clear and full. It cannot be said that the agreement in the Act is other than the relevant provisions of the Insurance Act and the Regulation in question.

Mr. Justice Archibald specifically disagreed with the respondent's proposition that the arbitration could only be instituted by court order.

The priority dispute resolution process was enacted by way of Regulation after consultation with the insurance industry. It was developed as a simple, expeditious and relatively inexpensive way of determining who the appropriate insurer was for the

purposes of paying accident benefits. There is no alternative way of resolving these disputes. They must proceed to arbitration pursuant to Regulation 283/95 and the Arbitration Act. Accordingly, Regulation 283/95 is, in effect, an agreement to arbitrate. As such, a notice given pursuant to the Regulation constitutes initiation of the arbitration. In my view this is consistent with the objective of making the process simple and inexpensive.
The notice given on August 3, 1999 refers to the Regulation, it names the parties and it demands that the parties submit to an arbitration. In my view this constitutes the initiation of the arbitration pursuant to section 23(3) of the Arbitration Act.

COSTS:

In the event that the parties cannot agree on costs, I may be spoken to.

DECISION:

1. CGU did serve the respondents with a notice of intention to dispute as required by Regulation 283/95.
2. 2. The arbitration was commenced within one year of giving notice in accordance with section 7 of the Regulation and therefore the applicant may proceed with the arbitration.

ORDER:

1. 1. The applicant did provide notice as required by section 3 of Regulation 283/95 within the required time frame.
2. 1. The applicant did provide notice as required by section 3 of Regulation 283/95 within the required time frame.

COSTS:

In the event that the parties cannot agree on the issue of costs, I may be spoken to.
Dated this __ day of February, 2004.

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M. Guy Jones
Arbitrator