

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, s. 268 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:

LOMBARD CANADA LIMITED

Applicant

- and -

**ROYAL AND SUNALLIANCE INSURANCE COMPANY AND THE MOTOR VEHICLE
ACCIDENT CLAIMS FUND**

Respondents

DECISION

COUNSEL:

Harry P. Brown for the Applicant

Derek Greenside for the Respondent – Royal and Sunalliance Insurance Company

Glen J Williams for the Respondent – Motor Vehicle Accident Claims Fund

ISSUE:

1. Is Lombard entitled to rely upon “ saving provisions” as set out in section 3(2) of Regulation 283//95 in order to allow it to pursue a claim for payment of accident benefits to or on behalf of Eric Shapwaykeesic?
2. Who is responsible to pay accident benefits to or on behalf of Eric Shapwaykeesic?

RESULT:

1. Lombard is not entitled to reply upon the saving provision of section 3(2) of Regulation 283/95. Accordingly Lombard is responsible to pay accident benefits to or on before of Eric Shapwaykeesic.

THE FACTS:

This arbitration arises out of a motor vehicle accident that occurred October 11, 2002. On that date Mr. Eric Shapwaykeesic (“the claimant”) was injured while operating a motor vehicle owned by Mr. Paul Achneepineskum. The claimant submitted an application for accident benefits to Lombard Canada Limited (“Lombard”) c/o Smith Bioshcoff Insurance Limited on December 31, 2002. Lombard took the position that it had cancelled the policy of motor vehicle liability insurance with Mr. Achneepineskum on August 14, 2002 for non-payment of the premium and therefore Lombard was not responsible for payment of the accident benefits. The claimant subsequently submitted an application for accident benefits to the Motor Vehicle Accident Claims Fund (“The Fund”) on January 18, 2003. The fund rejected the application taking the position that Lombard had received the first completed application for accident benefits and that Lombard should therefore respond to the application.

In early October 2003 Lombard retained Shunka, Craig & Moore Adjusters Canada Ltd., to investigate whether there might be another insurer responsible for payment for accident benefits

and as a result of an Insurance Bureau search, determined that Mr. Shapwaykeesic was a named driver under a policy of motor vehicle liability insurance with RSA, issued to Mr. Shapwaykeesic's employer, Marten Falls Forestry Developments, at the time of the accident. On October 16, 2003 Lombard sent a Notice of Dispute to RSA claiming that RSA was responsible for payment of accident benefits to or on behalf of Mr. Shapwaykeesic.

It was not until April 4, 2004 or approximately fifteen months after the claimant first submitted an application for accident benefits that Lombard, as recipient of the first completed application for accident benefits, began to pay the benefits to the claimant.

Lombard takes the position that either the Fund or RSA are responsible to pay the accident benefits in accordance with section 268 of the Insurance Act. The Fund takes the position that it is not responsible for payment as either Lombard or RSA had valid policies of insurance at the time of the accident, and in addition, Lombard failed to serve the Fund with a Notice of Dispute until well after the 90 day requirement as set out in section 3 of Regulation 283/95.

RSA concedes that it held a valid policy of motor vehicle liability insurance with Mr. Shapwaykeesic's employer Marten Falls Forestry Development and would be responsible to pay accident benefits but for Lombard's failure to comply with the 90 day notice provision set out in Regulation 283/95.

WAS THERE A VALID POLICY OF MOTOR VEHICLE INSURANCE WITH LOMBARD AT THE TIME OF THE ACCIDENT AND IF SO WHAT ARE THE IMPLICATIONS?

As mentioned above, Lombard takes the position that it properly cancelled the policy of insurance with Mr. Shapwaykeesic on August 14, 2002 for non-payment of premiums by sending a registered letter to him at his last known address. The acknowledgement of receipt of registered letter was signed on August 19, 2002 by "Sara Ach", which Lombard suggests is Sara Achneepineskum. Ms. Achneepineskum has apparently taken the position that it is not her signature on the receipt form and she did not receive the letter. Mr. Achneepineskum also denies receiving the letter.

Lombard takes the position that whether or not Mr or Mrs. Achneepineskum actually received the registered Notice of Cancellation letter is irrelevant as it complied with its obligation of the Insurance Act by giving the insureds 15 day notice by mail. In support of this position it cites the cases of Clapp vs. Traveller's Indemnity Company [1932] 1 D.L.R. 511, and Lumberman's Mutual Casualty Company vs. Stone [1955] S.C.R 621.

I am prepared, for the purposes of this decision, to accept that the policy was in fact properly cancelled by Lombard in August 2002. The question then becomes what are the ramifications of that cancellation.

Lombard submits that as there was no valid policy of insurance in effect at the time of the accident Lombard is not an "insurer" for the purposes of paying statutory accident benefits in accordance with Regulation 283/95. Section 2 of that Regulation states:

The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the

resolution of any dispute as to which insurer is required to pay benefits under section 268 of the act.

Pursuant to section 1 of the Insurance Act, “insurer” means the person who undertakes or agrees or offers to undertake a contract; “contract” means a contract of insurance and includes a policy, certificate, interim receipt, renewal receipt or writing evidencing the contract, whether sealed or not, and a binding oral agreement”.

“Insurance” means the undertaking by one person to indemnify another person a loss...

Section 224 (1) of the Insurance Act defines “insured” to mean “a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract or not described therein as an insured person.”

Lombard argues that since “insured” within the meaning of the Insurance Act is defined as a person “insured under the contract” then logically that contract must be in force at the time of the accident. In this case, Lombard argues that the policy was cancelled prior to the accident and accordingly Lombard was not an insurer at the time of the accident and the claimant is not entitled to benefits under a contract of insurance with Lombard within the meaning of the legislation. Lombard points out that this would not result in a claimant going without benefits as the Motor Vehicle Accident Claims Funds would then make the payments.

While counsel for Lombard’s submissions have some initial appeal, and internal consistency, their position, was, in my view, rejected by the Ontario Divisional Court in Allstate Insurance

Company of Canada vs. Brown, 40 O.R. (3rd) 610, wherein the Court held that as long as there was a sufficient “nexus”, the insurer receiving the first application should pay benefits and then dispute the payments with the insurer it says should have paid, or if no such insurer, the Fund.

In her Her Majesty the Queen vs. Royal & Sunalliance et. al., (unreported decision released January 2003) I followed the Divisional Court’s decision in a case where the policy of insurance had apparently been cancelled some four years prior to the accident. In this case, as in that case, while I am sympathetic to the insurer’s position when faced with a potentially cancelled policy, the fact remains that there is a sufficient Nexus and in accordance with section 2 of the Regulation, the benefits should be paid. Regulation 283/95 was enacted to avoid situations where an injured party went without benefits while the insurers argued as to which insurance company was responsible. Insurers must realize that when they receive the first completed application for accident benefits, if there is any nexus at all they should pay the benefits and dispute it in accordance with Regulation 283/95

In light of the above, one then has to determine whether Lombard has to comply with the 90 day notice provisions of section 3 of Regulation 283/95 and if so, do the “saving provisions” of Regulation 283/95 apply.

Section 3 states:

- (1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it give written notice within 90 days of receipt of a completed application for benefits to any insurer who it claims is required to pay under that section.

- (2) An insurer may give notice after the 90 day notice 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 whether another insurer was liable within the 90 day period.

The first issue to be determined is whether or not the 90 day notice period applies to cases where an insurer claims that the Motor Vehicle Accident Claims Fund should pay the benefits, and also in cases where the Fund claims an insurer should pay. In our case, Lombard submitted that the 90 day notice provision did not apply to cases involving claims by insurers against the Fund. In support of this position it cited the cases of, Kingsway General Insurance Company vs. Ontario (Minister of Finance) [2005] O.J.No. 268; Ontario (Minister of Finance) vs. ING Halifax [2003] O.J.N o. 6036; and Kalinkine vs. Ontario (Superintendent of Financial Services), [2004] O.J.N o. 5138.

At the time this case was argued both Kingsway and another case with a similar issue, Allstate Insurance Company of Canada vs. Motor Vehicle Accident Claims Fund and Manitoba Public Insurance were under appeal and awaiting a decision from the Ontario Court of Appeal. The Court of Appeal has now rendered its decisions and it is clear that the Fund is an insurer for the purposes of Regulation 283/95 (see: Allstate Insurance of Canada vs. Motor Vehicle Accident Claims Fund, [2007] O.N.C.A. 61; and Kingsway General Insurance Company vs. Ontario [2007] O.N.C.A. 62. Thus, both insurers and the Fund must comply with the notice provisions set out in section 3 of the Regulation. As noted above, Lombard did not give notice to either RSA or the Fund within the required 90 days after receiving the first completed application for accident benefits.

Having decided that the 90 day notice provision applies, the question then becomes whether the saving provisions of section 3(2)(a)(b) apply. As noted above, the Regulation sets out a two part test that Lombard must satisfy if the 90 day notice period is to be extended. Lombard must show that the 90 days was not a sufficient period of time to make the determination that another insurer was liable, and that Lombard made reasonable investigations to determine if another insurer was liable during the 90 day period. Lombard received the completed application for accident benefits on or about January 6, 2002. Accordingly the 90 day notice period would expire on or about April 6, 2003. Lombard sent a Notice of Dispute to the Fund on or about October 8, 2003 and to RSA on October 16, 2003. Lombard submits that the notice period should be extended because in Part IV the completed application for accident benefits the applicant answer "no" to the question:

Are you covered under any of the following automobile insurance policies...a policy that lists you as a driver (i.e.: a company vehicle)?

Dealing first with the issue of extending the notice period regarding service on the Fund, I am of the view that failure by the claimant to mention his employer's insurer does not assist Lombard. Lombard took the position very early on that they cancelled the policy prior to the accident. That being the case, there is no reason why they could not have put the Fund on notice within the 90 days.

If they believed the policy had been cancelled there was nothing that occurred during the 90 day notice period that would have caused them to delay serving notice upon the Fund. Accordingly, I am not prepared to extend the time for service upon the Fund.

With regard to service upon RSA, it would appear that the incorrect answer regarding the insurance viz a viz the employer was an innocent misrepresentation. There is no doubt that in certain circumstances an innocent misrepresentation can be cause to extend the notice period. In Primum Insurance Company vs. Aviva Insurance Company of Canada, [2005] O.J.N o 1477

Mr. Justice Ducharme noted that:

Where an insurer can demonstrate that they were intentionally misled in a material way by an insured, the 90 day limit in section 3(2)(a) might be insufficient in the circumstances.

The question admittedly becomes somewhat more difficult when assessing the relevance of innocent misrepresentations to the 90 day period in section 3(2)(a). However, in my view, the result must be the same. That is, where an insurer can demonstrate that they were innocently misled in a material way by the insured then the 90 day limit may be shown to be insufficient in the circumstances.

Justice Ducharme goes on to note, however, that:

While the duty of utmost good faith means that the 90 day period in section 3(2)(a) may not be sufficient for an investigation where an insurer has been misled as to material facts, it does not preclude a searching assessment of the investigation conducted by the insurer. To hold otherwise would render section 3(2)(b) meaningless...a thorough investigation is required precisely to detect non-disclosure or misrepresentation no matter what its cause.

Even if I were prepared to accept, on the facts, that the innocent misrepresentation created a situation wherein the 90 days was not a sufficient period to make the determination that another insurer was liable under section 268, Lombard would still fall short of complying with section 3(2)(b) of the test. Lombard must show that it made reasonable investigations to determine if another insurer was liable within the 90 day period. Lombard received the completed application for accident benefits on or about January 6, 2003. It sent a Notice of Intention to

Dispute to the Fund on October 8, 2003 and to RSA on October 16, 2003. During the initial 90 days, and indeed until October 2003 it did little, if anything, to determine if there was another insurer responsible for payment of accident benefits. Rather it concentrated its efforts on showing that its policy of insurance with Mr. Achneepineskum had been cancelled. While this was important and necessary work, Lombard failed, at the same time, to conduct a reasonable investigation as to whether another insurer was liable during the 90 days after the receipt of the application and indeed for a considerable time thereafter.

Accordingly I am not prepared to invoke the saving provisions of section 3(2) and Lombard is therefore precluded from continuing with the arbitration. Lombard is therefore responsible for payment accident benefits to or on behalf of Mr. Shapwaykeesic.

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

Dated this _____ day of February 2007.

**M. Guy Jones
Arbitrator**