

In the Matter of the Insurance Act
R. S. O. 1990 Chapter 1. 8, Section 268(2)
And in the Matter of the Arbitration Act, S. O. 1991
And in the Matter of an Arbitration
BETWEEN:

Canadian General Insurance Company
Lee Samis, counsel for the Applicant

_ and _

Axa Insurance Company Geoffrey
D.E. Adair Q. C., counsel for the Respondent

Heard: May 12, 1997

REASONS FOR DECISION

This is an appeal on a question of law from the decision of an Arbitrator. The applicant takes the position that the Arbitrator wrongly retroactively applied Regulation 283/95 and that that error justifies an order setting aside the Arbitrator's award.

BACKGROUND

Sandra Santos was injured as a result of a motor vehicle accident which occurred on December 14, 1993. At the time of the accident she was a passenger in a motor vehicle insured by Axa Insurance. As of the date of the motor vehicle accident, Sandra Santos was living with her parents, who had a policy of motor vehicle insurance with Canadian General Insurance. An unsigned application for Accident Benefits on behalf of Ms. Santos was presented to Canadian General Insurance on or about December 17, 1993. The parties agreed that this was to be considered a completed application pursuant to s. 22 of the No-Fault Benefits Schedule. Canadian General Insurance commenced payment of benefits to Sandra Santos and payment of those benefits continues to date. Canadian General Insurance did not make any investigation to determine if another insurer was liable to pay benefits under the priority provisions of the Insurance Act until following a file audit which occurred in December of 1995. Axa Insurance received notice of a dispute from Canadian General on or about February 6, 1996. Canadian General Insurance entered into a private arbitration before Arbitrator Galligan. The Arbitrator issued his award on December 19, 1996.

AGREEMENT TO ARBITRATE

The relevant portions of the agreement are these:

The parties hereto, preserving all rights of Appeal on questions of law, and on questions of mixed fact and law, pursuant to the provisions of the Arbitrations Act, S.O. 1991, chapter 17, agree to arbitrate this dispute as follows:

1. The arbitration is brought pursuant to the provisions of the Insurance Act and in particular Regulation 283/95 governing disputes between insurers as to priority of payments.
4. The costs of this Arbitration shall be borne by the unsuccessful party,

and assessed in accordance with Section 56 of the Arbitrations Act, 1991; the issues in the dispute involve a determination of whether Sandra Santos, the claimant, is a dependent as that term is defined in subsection 3(2) of Regulation 672.

5. The insurers agree to proceed on a preliminary point of law to determine whether notice of the dispute was provided to Axa within the time periods mandated in Regulation 283/95. If it is determined that this application is not barred by any applicable limitation period, the matter will then proceed to a determination of dependency, on an as yet unspecified date.

6. The parties agree that the Arbitrator so appointed shall exercise all the powers and rights provided for in the Arbitrations Act, S.O. 1991, chapter 17.

THE ARBITRATOR'S AWARD

The Arbitrator identified the point of law to be considered by him as the following:

whether Canadian General is prohibited from claiming that Axa is liable to pay statutory accident benefits because of the provisions of section 3(l) of Regulation 283/95 made under the insurance Act. He quoted from Section 3 as follows:

3(l) 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.

3(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.

3(3) The issue of whether an insurer who has not given notice within 90 days has complied with subsection (2) shall be resolved in an arbitration under section 7.

The Arbitrator indicated that Canadian General failed to give notice to Axa pursuant to subsection (1) but that Canadian General relied on subsection (2). The Arbitrator concluded that Canadian General had not satisfied the onus resting upon it to show that 90 days was not a sufficient period of time and that Canadian General was not entitled to the saving provisions contained in section 3(2). Accordingly, Canadian General was prohibited by section 3 of the Regulation from disputing its obligation to pay accident benefits to Sandra Santos.

THE ISSUE

Canadian General filed this appeal on the basis of one ground only, namely that since the accident occurred in 1993, the Arbitrator erred in finding that Ontario Regulation 283/95 made under the Insurance Act, which came into force on May 27, 1995, was applicable to dispose of its right to indemnity from Axa.

Mr. Samis pointed out that pursuant to section 45 of the Arbitrations Act, where an arbitration agreement preserves the right of appeal on questions of law or mixed law and fact, a court may confirm, vary or set aside an award or may remit the award to the arbitral tribunal with the courts opinion on the question of law and give directions about the conduct of the arbitration. He also asserts that section 268 of the Insurance Act sets out priority ranking rules, governing the obligations of insurance companies to pay statutory accident benefits where coverage is available to a person under more than one policy of insurance.

Mr. Adair does not take issue with those propositions.

Mr. Samis also points out that prior to May 27, 1995, disputes between insurers arising as to the application of section 268 of the Insurance Act could be resolved through the dispute resolution process at the Ontario Insurance Commission with the co_operation of a claimant. Ontario Regulation 283/95 was designed to provide a process for settling disputes between insurers when it is unclear which insurer is liable to pay statutory accident benefits. The Regulation provides a process by which the dispute is referred to a private arbitration. And Mr. Samis points out that a regulation comes into force on the day it is filed, in this case, May 27, 1995. Again, Mr. Adair does not take issue with those propositions.

Mr. Samis argues that Regulation 283/95 constitutes a substantive, not a procedural change and consequently, it could not have application to an accident which had occurred more than 18 months before it had been filed. To the extent the Arbitrator applied Regulation 283/95 retroactively, he erred in law and his award should be set aside with a declaration that Canadian General is allowed to dispute its obligation to pay accident benefits pursuant to section 268(2) of the Insurance Act.

Mr. Adair's position is that the parties specifically agreed in writing to submit their priority dispute to an Arbitrator acting under the authority of and pursuant to Regulation 283/95 and Canadian General ought now to be precluded from relying on rules against retroactivity to undermine or challenge that consensus.

I agree with the position advanced by Mr. Adair. As indicated in the excerpts from the Arbitration Agreement quoted above, it is clear that the parties anticipated the applicability of Regulation 283/95. Mr. Adair indicated in his factum that counsel for Canadian General had not raised the retroactivity issue during the arbitration. There is no "record" of the proceedings before the Arbitrator and it is unwise to rely on a factum to create a record. However, the Arbitrator's award is silent on this issue. I have no doubt that, had such an argument been advanced, this experienced Arbitrator would have referred to it and disposed of it. Based on the lack of any reference in the award to the applicability of Regulation 283/95, I infer that he did not hear submissions.

The issue therefore becomes whether, in the face of a written agreement referencing Regulation 283/95 and silence about its applicability at the arbitration, the appellant should now be entitled to relief based on principles against retroactivity. Mr. Samis has referred to the cases of Norman D. Smith and General Accident Assurance Company of Canada and Norman D. Smith and Allianz Insurance Company of Canada (OIC A_012681 and A_O 1381 1) where Arbitrator Manji made a preliminary ruling that Regulation 283/95 did not apply to an accident which had occurred in 1992. In that case, the Arbitrator analyzed principles against retroactivity even though counsel had agreed that Regulation 283/95 did not apply. However, the Arbitrator pointed out that the authority of Arbitrators was subject to the express or implied statutory provisions and that it was necessary for the Arbitrator to be satisfied of Jurisdiction even where counsel had agreed.

I agree that the Arbitrator embarked on the appropriate analysis. However, the approach taken in that case has no application here. The authority of Arbitrator Manji rested in the statute. The authority of Arbitrator Galligan rested in the statute and in the agreement made

by counsel for the parties. Parties are able to vest authority in a private Arbitrator pursuant to an agreement to that effect. In this case, paragraph 1 of the Arbitration Agreement clearly so indicates.

Mr. Samis also argues that paragraph 5 of the Arbitration Agreement can be interpreted to give jurisdiction to the Arbitrator to determine the retroactivity issue. He submits that the second sentence of paragraph 5 indicates that Canadian General could have argued retroactivity before the Arbitrator, and if it were open at that point, it remains open to him to rely on it on the appeal. I disagree. One would have to stretch the language of paragraph 5 to achieve that interpretation. And when put in the context of the clear words of paragraph 1, such an interpretation becomes almost impossible.

Even if an argument could be advanced that the language of the Arbitration Agreement raised the prospect of the retroactivity issue, and that in the absence of submissions before the Arbitrator on that point, I have jurisdiction on this appeal to make a ruling on that point, I would be disinclined to accept it. Mr. Adair puts forward a very persuasive argument with which I agree. An appellate court ought not to permit a party to deliberately elect to assert their position in one forum on a consensual basis and, having lost, to seek to attack the very jurisdiction of that Court or body in order to attempt to obtain a more favourable decision in another forum. (*Re National Trust Co. and Bouckhuys et al* (1987) 61 O.R. (2d) 640.) Mr. Adair's alternative argument is that Regulation 283/95 could be seen to have retroactive application in any event because it is a procedural change only. Since I have accepted his main submission, I express no opinion on that point. Accordingly, I can find no error on the part of Arbitrator Galligan. The appeal is dismissed.

Before reserving, I canvassed the issue of costs briefly with counsel. Both were of the view that, if I dismissed the appeal, costs should follow the event. For that reason, the appellant will pay the costs of the respondent on a party and party basis. If counsel are unable to agree on the amount, I will fix them.

Dated at Toronto this 20th day of May, 1997.

"Kiteley J."

Released: 20th May 97