IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended

AND IN THE MATTER OF an Arbitration

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

AS REPRESENTED BY THE MINISTER OF FINANCE

(a.k.a. MOTOR VEHICLE ACCIDENT CLAIM FUND)

Applicant

and

BELAIR DIRECT INSURANCE COMPANY

Respondent

AWARD

Heard: May 15, 2013, May 16, 2013 and January 9, 2015

Counsel:

Stan J. Sokol for the applicant, Her Majesty the Queen (“HMQ”)

David Murray for the respondent, Belair Direct (“Belair”)

SCOTT W. DENSEM: ARBITRATOR

Introduction

This priority dispute arises out of an incident[1] occurring March 14, 2009.SohrabMohammadian ("the claimant") alleges that a vehicle insured by Belair Direct Insurance Company ("Belair"), being operated by VinkoMadirazza struck and injured him while attempting to park.

The claimant advanced a claim for SABS to HMQ. HMQ has paid SABS to the claimant. HMQ submits that Belair, as the insurer of a vehicle which was involved in an accident with the claimant, is a higher priority insurer than HMQ. HMQ seeks reimbursement from Belair of the SABS paid to the claimant, and its claims handling expenses.

Belair submits that the claimant was not involved in an "accident" as defined in the SABS, to entitle him to the payment of SABS. Alternatively, Belair submits that HMQ failed to comply with the requirements of subsection 3 (1) of Regulation 283/95 which, under the terms of the SABS in force at the time of the accident, required an insurer (including HMQ) to serve a Notice of Dispute between Insurers ("NDBI") within 90 days of having received a claimant's application for SABS (OCF 1).[2] Belair submits that HMQ has not satisfied the saving requirements of subsection 3 (2) of Regulation 283/95 which provides for relief from the consequences of subsection 3 (1). Those consequences are that even if there is a higher priority insurer pursuant to section 268 of the *Insurance Act* to the insurer which first receives the OCF 1, if the insurer which

[1] I have used the word "incident" here because there is an issue as to whether an accident occurred as defined in subsection 2 (2) of the SABS. This issue is addressed later as part of my Award.
[2] Regulation 283/95 was amended in September, 2010 to exempt HMQ from the 90 day notice requirement. See subsection 3 (2.1).

first receives the OCF 1 is unable to satisfy the terms of section 3 of Regulation 283/95, it is left without a remedy to transfer responsibility for the payment of SABS and seek reimbursement for the payment of SABS.[3]

To the extent this arbitration deals with the interpretation of the applicable version of section 3 of Regulation 283/95, it is concerned with an issue that would not be relevant subsequent to the September, 2010 amendments to Regulation 283/95. Subject to the issue of whether an "accident" occurred,the September, 2010 amendments to Regulation 283/95 would make Belair responsible to take over the claimant's SABS claim from HMQ and properly reimburse HMQ. In this situation however, I must apply the legislation that was in effect at the time of the incident. Therefore, the issue of whether HMQ complied with the terms of section 3 of Regulation 283/95 as it then was is relevant to determining the priority insurer in this case.

With respect to the issue of whether there was an "accident", HMQ first submits that I do not have jurisdiction to determine that issue, arguing that this issue of law is reserved for either FSCO arbitrators or the courts. HMQ further submits that in the event that I do have jurisdiction to determine the issue, the evidence is more than sufficient for me to find that there was an "accident" to satisfy the SABS definition.

HMQ submits that Belair ought to be found responsible for the claimant's SABS claim because its conduct (or perhaps more accurately – misconduct) constructively deflected the claimant's SABS application to HMQ.

[3] The September, 2010 amendments to Regulation 283/95 found in subsection 3 (2 .1) also exempted HMQ from compliance with the terms of subsection 3 (2).

Finally, HMQ raises a further argument that Belair has either waived its rights, or is estopped from disputing responsibility for the claimant's SABS claim and to reimburse HMQ for SABS paid.

For the purposes of this introduction, suffice it to say that Belair takes the opposite position to HMQ in respect of all of the issues.

The Issues

The overriding issue for determination is which of HMQ and Belair is the priority insurer pursuant to section 268 of the *Insurance Act* responsible for the payment of SABS to the claimant.

Resolving this issue will involve addressing the sub-issues discussed in the Introduction.

The Evidence

The evidence in this case took the form of *viva voce* testimony from three witnesses, and the following documents:

Exhibit 1: Transcript from the examination under oath of Daria Ilona Majewska, April 18, 2013.

Exhibit 2: Undertakings response letter, May 10, 2013, from examination under oath of Daria Majewska.

Exhibit 3: Transcript of examination under oath of John Buenavides, April 18, 2013.

Exhibit 4: Exhibit book of Belair Insurance Company, tabs 1 – 12.

Exhibit 5: Exhibits to examination under oath of John Buenavides, tabs 1 – 4.

Exhibit 6: Compendium of HMQ, tabs 1 – 15.

Exhibit 7: Belair affidavit of documents and productions, tabs 1 – 28.

Exhibit 8: Arbitration Agreement dated and signed May 15, 2013.

Exhibit 9: ISB order history, pages 1 – 9.

Exhibit 10: September 8, 2009 email exchange between Sabrina Kakaletris and Lilya Kogut.

Exhibit 11: HMQ SABS payments.

Analysis

I will address first the issue of whether there was an "accident", and whether I have jurisdiction to determine that issue.

The essence of the argument against a private arbitrator having jurisdiction to interpret a definition in the SABS is that this is an exercise in determining a pure question of law which goes to the heart of a claimant's entitlement to SABS which should be reserved for the courts or FSCO arbitrators.

I have dealt with the issue of a private arbitrator's jurisdiction to determine a question of law in an earlier decision, TTC v. Lombard.[4]In my award in that caseI expressed the opinion then that a private arbitrator appointed pursuant to The *Arbitration Act* has jurisdiction to determine the issue of whether an "accident" has

[4] Award May 29, 2012.

occurred. I am not persuaded by HMQ's argument in this case that I should change my opinion. I will make reference to some passages of my decision in *TTC v. Lombard* here.

In my view, Justice Brown in *Primmum Insurance Co. v. ING Insurance Co. ofCanada* (*Primmum v. ING*)[5] made it clear that anarbitrator appointed under Regulation 283/95 has authority to determine anyquestion of law that arises in connection with the dispute.

Primmum v. ING dealt with a challenge to the jurisdiction of an arbitratorappointed pursuant to Regulation 283/95. The issue was whether the arbitratorhad the jurisdiction to determine if a person was a "named insured" under apolicy issued by Primmum. This was a pure question of law involving statutoryinterpretation, and would bear directly on the issue of the claimant's entitlement to SABS.

In upholding the arbitrator Philippa Samworth's decision that she had authority to determinethe question of law in those circumstances, Brown J. conducts a thorough review of the broad scope ofan arbitrator's powers under the *Arbitration Act*.It is noteworthy that Brown J.'s analysis starts by citing section 1 of Regulation283/95 and section 7, of the *Arbitration Act*:

> Section 1 of the Dispute Regulation provides that 'all disputes as towhich insurer is required to pay benefits **under section 268 of theAct** (arbitrator's emphasis) shall be settled in accordance with thisRegulation.' Section 7 goes on to provide: (quotation of section

[5](2007) CarswellOnt 616, Ont. Sup. Ct.

> 7omitted) On their face, these provisions give broad jurisdiction to anarbitrator to deal with questions related to a priority dispute. Norestrictions are placed on the type of question that an arbitrator mayconsider in the course of dealing with a dispute.

Brown J. goes on to cite the provisions of section 8 (1) and (2), of the *Arbitration Act*, whichstate that an arbitrator may determine "…**any** (Brown J.'s emphasis) question oflaw that arises during the arbitration, and that questions of law are to bedetermined by the arbitrator unless the arbitrator applies to the court fordetermination.

Brown J. concludes by stating:

> When onecombines the powers given to an arbitrator under the Dispute Regulation withthose under the Arbitration Act, in my view an arbitrator appointed to deal with aSAB priority dispute possesses the jurisdiction to consider and decide anyquestion regarding the dispute, including any question of law or mixed fact andlaw, **such as those that arise in the course of interpreting a statute.**

The dispute resolution process requires the arbitrator to examine thecriteria set out in section 268. As noted by Brown J. in *Primmum v. ING*, the veryfirst section of Regulation 283/95 refers to the requirement of an insurer to paybenefits **under section 268**. Section 2 (1) of Regulation 283/95, the pay anddispute section, also refers to the requirement of an insurer to pay benefits **undersection 268**.The references are to section 268 as a whole. Therefore, in my view, anarbitrator must consider the application of all parts of section 268 in resolving asection 283/95 dispute between insurers.

Paraphrasing Section 268 (1), it states that every Ontario motorvehicle liability policy shall provide SABS, **subject to the terms, conditions,provisions, exclusions**

and limits set out the SABS. In my opinion,this means that I must consider whether on the facts of this case the relevantconditions specified in the SABS exist that would render Belair liableto pay SABS.

One of the preconditions to the payment of SABS to any claimant is that there must have been an accident as defined in subsection 2 (1) of the SABS. An incident must have occurred in which the use or operation of an automobile directly causes the claimant an impairment. Without such an event, there is no obligation on an insurer to pay SABS, whether that insurer is the first insurer to which the claimant applies, or a subsequent insurer which was served with an NDBI.

I do not wish to be understood to say that only a private arbitrator can decide whether there has been an “accident” giving rise to an obligation to pay SABS. Clearly FSCO arbitrators have the jurisdiction to determine that issue, as do the courts. The fact that FSCO arbitrators and the courts have such jurisdiction however, does not exclude the jurisdiction of a private arbitrator appointed pursuant to the *Arbitration Act* to decide the issue as well for the reasons I have outlined.

In this case, when presented with the claimant’s SABS claim HMQ had the option of challenging at FSCO or in the courts the claimant’s entitlement to SABS on the basis that no accident had occurred. HMQ was satisfied that an accident had occurred because it commenced paying SABS to the claimant. Indeed, HMQ’s position in this arbitration is that there is no doubt an accident occurred.

The fact that HMQ was satisfied an accident occurred and commenced payment of SABS to the claimant while initiating the priority dispute process with Belair does not

however, foreclose Belair's right to raise the issue as to whether an accident occurred in the priority dispute proceedings. It was argued by HMQ in this case, and by TTC in the *TTC v. Lombard* that if Lombard/Belair wished to take the position that no accident had occurred it should assume responsibility as the priority insurer, and then dispute the accident issue if so advised at FSCO or in the courts.

I disagreed with that argument when the TTC advanced it and I still disagree with it. An insurer on the receiving end of a NDBI can hardly accept priority for the payment of SABS, and obligate itself to reimburse the insurer which served the NDBI for SABS paid, and then challenge the claimant's entitlement to the payment of benefits which it has just agreed to assume responsibility to pay and to reimburse.

An insurer who elects to begin paying SABS when presented with an OCF 1 without challenging a claimant's entitlement, in my opinion does so at its own risk. It cannot pass off the obligation to challenge entitlement to the insurer which it serves with an NDBI. If the insurer receiving the NDBI is unable to raise the issue of whether an accident has occurred with the insurer serving the NDBI, and accepts priority, then in my view it is faced with a *fait accompli* created by the decision of the first insurer to begin the payment of SABS without challenging the claimant's entitlement.

Therefore, on the issue of jurisdiction, I conclude that I have jurisdiction to determine the issue of whether there was an "accident" giving rise to the obligation of either HMQ or Belair to pay SABS to the claimant in this case, and Belair is entitled to raise in these priority dispute proceedings the issue of whether an accident occurred.

I will now review the evidence on the issue of whether there was an “accident” as defined in the SABS.

I did not have the benefit of hearing the principal accident witnesses testify. In this case, because the version of events differs between the claimant, and Mr. Madirazza (and his wife), it would, of course, have been preferable to hear their *viva voce* testimony.

In spite of that however, I am of the view that there is sufficient evidence for me to come to a conclusionwith reasonable confidence in its correctnesson the issue of whether an accident occurred.

I would emphasize here that both the *Arbitration Act* and the *Statutory Powers Procedure Act* empower me to consider evidence in a format that may or may not be admissible in court, including hearsay evidence, and documentary evidence.[6]

Nevertheless, in my view it is important that an arbitrator be satisfied that the evidence being considered is reliable enough to support the conclusions drawn from it. In this case, I am satisfied that the evidence to which I will be referring has adequate reliability to support my conclusions.

In my opinion, in deciding this issue the most important evidence for me to consider are the statements and/or reports about the incident provided by the claimant, Mr. Madirazza, and Mr. Madirazza’s wife concerning what occurred.

[6] See *Arbitration Act* section 21, and *Statutory Powers Procedure Act*, section 15.

I will review first the version of events given by the claimant. The claimant did not give a statement to the police the day of the incident. After the incident occurred he left the scene before the police arrived. Although there is some suggestion that the claimant reported the incident to the police the day after it occurred[7], no evidence has been put before me of any statement given by the claimant to the police.

The claimant provided a statement to ClaimsPro, claims adjusters representing HMQ, on July 14, 2009, at the offices of his counsel, Jeffrey Gray.[8] The claimant had retained Mr. Gray a couple of months earlier, in May, 2009. I will make reference to Mr. Gray's second-hand account of the incident after discussing the claimant's evidence.

The claimant described the incident as follows:

> I was looking around for my friend on the intersection of Queen Street and Niagara Street. I was standing on the sidewalk when suddenly a van backed off (sic) on me. It hit me on my left knee and ran over my left foot. It knocked me over. I did not lose consciousness. I hit back (sic) of my head with the impact and I hurt my lower back, left ankle, left hip, left knee and foot. The car was a Dodge Caravan 1998 and had two people in the car. They continued to park the car and then they got out and started yelling at me. The weather was clear. The other driver was acting pretty aggressive. I called my dad and he asked me to leave the scene and get his plate #.

Documentary evidence establishes that the claimant retained counsel, Jeffrey Gray, in May, 2009. Mr. Gray wrote a notice letter to Mr. Madirazza dated May 15, 2009.[9] Mr. Gray's letter states (in part) as follows:

[7] See Exhibit 7, Tab 14, page 2.
[8] Exhibit 4, tab 9.
[9] Exhibit 6, tab 3.

> I am advised that, at about 6:50 p.m. on March 14, 2009, Mr. Mohammadian was crossing Queen Street West, at the Intersection. As Mr. Mohammadian was leaving the sidewalk to cross Queen Street West…you, while reversing into a parking spot on Queen Street West in your 1998 Dodge van, bearing Ontario license plate ACTL-540…struck my client, throwing him, violently, onto the roadway. You struck Mr. Mohammadian twice, despite the fact that he was yelling at you to stop and pounding on the Van.

The source of Mr. Gray's information was the claimant. Mr. Gray's second-hand account of the incident described in his March 14, 2009 letter is different with respect to some details from the version provided by the claimant in his July 14, 2009 statement, but it accords substantially with the claimant's July 14, 2009 statement. It also has some common features to the description of the incident provided by Mr. Madirazza and his wife which I will review shortly.

In my opinion, it is not necessary for me to go through a lengthy discussion of the claimant's medical attendances and treatment following the incident of March 14, 2009. The statement given by the claimant confirms that he attended for medical treatment the day following the incident and continued to attend thereafter on a regular basis. Other documentation in evidence also confirms that the plaintiff received medical treatment following the March 14, 2009 incident. His statement further confirms that the injuries he alleges that he sustained as a result of the March 14, 2009 incident caused an impairment of functioning and limited his daily activities.

For the purposes of deciding whether an "accident" occurred, I do not believe it is necessary for me to make any determination of the extent of the claimant's impairment. That would be a job for a FSCO arbitrator or a judge who would have to determine the

extent of the claimant's impairment when deciding quantum issues in connection with entitlement to SABS.

For the purposes of the issue before me in this priority dispute arbitration, in my opinion, I simply have to be satisfied that an incident occurred on March 14, 2009 that directly caused any level of impairment to the claimant, even if that impairment was determined to be no more than in the *de minimis* range.

The evidence establishes that Mr. Madirazza reported the incident to the police on the date it occurred, March 14, 2009. Although the parties to this proceeding did not come into possession of the police motor vehicle accident report until months after the incident, the report appears to have been completed within days of the incident by the investigating officer, on March 18, 2009.[10]

In the investigating officers synopsis of the occurrence, the officer states, "*V1 (Mr. Madirazza's vehicle) reverses and runs over P1's (Mr. Mohammadian) foot.*" The source of the officer's information for this synopsis is not identified. I conclude however, that this information must have come from either Mr. Madirazza or his wife when they reported the incident to the police officer who attended the scene after it occurred. As I indicated earlier, there is no evidence that Mr. Mohammadian gave a statement to the police.

I do not reference this synopsis in the police report to suggest that this conclusively proves Mr. Madirazza struck Mr. Mohammadian with his vehicle on the basis that this synopsis should be construed as an admission by Mr. Madirazza or his

[10]Exhibit 6, tab 1.

wife. As will be seen from the statements given by Mr. Madirazza and his wife about the incident they do not believe Mr. Mohammadian was struck by their vehicle. It seems more likely to me that this information provided to the police was the Madirazzas' summary of what Mr. Mohammadian alleged had occurred in his verbal exchange with them immediately following the incident.

I do find it significant however, that Mr. Mohammadian made an immediate complaint to the Madirazzas asserting that he was struck by their vehicle. It is not a version of events that he appears to have concocted later, after he had had time to consider that it may be to his advantage to do so.

Mr. Madirazza's wife, Ivana Madirazza prepared a written summary of her recollection of the incident and subsequent events.[11] Although there is no direct evidence on the point, the summary appears to have been prepared shortly after the incident on March 14, 2009. It begins with Ms. Madirazza's summary of her recollection of the event. Then under the date and time reference, April 30, 2009, 3:30 p.m., there is a discussion of events subsequent to the accident which relate to actions taken by the Madirazzas to follow up with the investigating police officer, and their conclusion that they were "*victims of a scam*".

The most relevant part of this summary prepared by Ms. Madirazza for the issue of whether there was an "accident" is the part dealing with her recollection of the event. She describes how her husband was attempting to parallel park their vehicle. When they were about 1 metre away from the sidewalk, "*…we heard a light pounding on the*

[11]Exhibit 6, Tab 4.

right back window area and Vinko immediately stopped the car. I looked back and then opened the door. I saw a tall young man standing behind the car. I asked him 'What are you doing?' and he answered 'You guys stepped on my foot."

Ms. Madirazza exited the vehicle first, and conversed with the claimant. Ms. Madirazza's account of this exchange is as follows:

> …I started to talk to the young man but he immediately took his cell phone and he told me that he was going to call his lawyers. He went a few steps forward to see our plate number while talking to someone on the phone and then telling them our license plate number. He did not seem to be hurt, and he did not show any sign of pain, yet he told me he needed to go to the hospital. I told him that we'll accompany him if he needs to go. His answer to this was that he does not want to go immediately, but later on his own time.
>
> In the meantime, my husband parked the car and came out. When the young man told him that he talked to his lawyers, my husband said 'You need to call police (911), if you do not want, I will call'. When Vinko started to dial 911, the young man walked away (walking normally) towards the west direction on Queen Street and disappeared.

Mr. Madirazza gave a statement to Belair September 13, 2009.[12] His account is very similar to that given by his wife. He stated as follows:

> We were on our way to a shoe store on Queen Street, West, approximately 20 metres from Niagara Street on the north side…I backed my van up to parallel park into the (parking) space…I pulled forward to straighten the angle and then backed up again. My van was approximately 30 to 40 centimetres from the curb. I was backing up very slowly when I heard a tapping on the right back of my van. I stopped immediately. My wife…got out of the van. There was a pedestrian standing on the side of the road facing south west on an angle. I heard my wife talking but I could not hear exactly what they were saying…I finished parking…to

[12]Exhibit 6, Tab 10.

> get out of the car and there was a young man standing in front of my car on the sidewalk, on a cell phone. He was looking at my license plate…My wife told me that this person had been on the phone to his lawyers, so he said. He told my wife he needed to go to the hospital. My wife offered to go with him. I could see nothing wrong with him. This person said 'I stepped on his foot'. There was no mark on his shoe. He was very calm and told (sic) with absolutely no indication of pain. After I called the police, this man very calmly walked away…He was not limping.

I am satisfied based on the statements given by the Madirazzas that they were attempting to accurately describe the incident to the best of their ability. Their respective descriptions are sufficiently similar in material respects, and yet not so similar as to arouse suspicion, that I accept them as truthful accounts.

I conclude on the totality of the evidence before me however, that there was an "accident" within the meaning of the SABS whereby there was contact between the Madirazza vehicle and the claimant which caused some level of impairment to the claimant.

Although I accept the accounts given by the Madirazzas as true, the one notable fact that neither Mr. nor Mrs. Madirazza was able to speak to in their statements relates to whether either of them saw any contact between their vehicle and the claimant. In fact, their evidence is to the contrary. Neither Mr. nor Mrs. Madirazza noticed the claimant at the back of their vehicle until they heard a banging noise coming from the rear area of the vehicle which noise was caused by the claimant banging his hand on their vehicle. By that point, accepting the claimant's version of events, the contact had already occurred or was imminent. Situated in the driver and front passenger seat neither Mr. nor Mrs. Madirazza would have been able to see, and they did not see,

whether the rear tire of their vehicle had contacted the claimant. Since the Madirazza vehicle was being parked, it was traveling at a very low speed.Contact could well that occurred between the vehicle and the claimant without the Madirazzas feeling the contact while inside the vehicle.

Their conclusions that their vehicle had not struck the claimant were based entirely upon their observations of, and their discussion with, the claimant after they had exited their vehicle. The fact that they formed an opinion from these observations and discussions that since the claimant did not appear to them to be injured they must not have struck him with their vehicle does not prove there was no contact and no injury.

Of course it is conceivable that Mr. Mohammadian could have long before devised a plan to fraudulently “stage”an accident, orhe may have hit upon the idea when he happened across the Madirazzasthat day. This would of course mean that he continued a charade by attending upon physicians and medical providers regularly since then, all for the purposes of obtaining money deceitfully.

In my opinion, to find that Mr. Mohammadian acted fraudulently requiresmore compelling evidence than is available in this case. In my view, there is insufficient evidence to conclude that the claimant has fabricated not only his version of the incident, but has continued fraudulent conduct in seeking out and continuing medical treatment, and advancing his SABS claim.

Weighing all of the evidence, I am prepared to give the claimant the benefit of any doubt on the issue of whether there was an accident, and accept his version of events that an accident did occur.

As I have stated earlier, in reaching this conclusion I make no finding as to the extent of any impairment suffered by the claimant. My conclusion goes only to the point of accepting that there was an accident involving the Madirazza vehicle and the claimant which resulted in sufficient impairment to satisfy the SABS test as to whether an accident occurred.

I will now deal with the issue of whether HMQ has satisfied the requirements of subsections 3 (1), and (2) of Regulation 283/95 as it existed on March 14, 2009.

The determination of the issue raised with respect to subsection 3 (1) turns on a finding of when HMQ had a complete, or functionally adequate Application for Accident Benefits (OCF 1).

The evidence confirms that HMQ received the claimant's OCF 1 and important related documents on June 2, 2009.[13] HMQ received the documents with a May 28, 2009 letter from the claimant's counsel, Jeffrey Gray. This letter bears HMQ's date stamp showing receipt of the documents June 2, 2009.

It is common ground that HMQ did not receive a police report with Mr. Gray's May 28, 2009 letter. Even though the police report was completed within a few days of the accident, HMQ did not receive the police report until it was provided with a further letter from claimant's counsel dated October 5, 2009.[14] This, of course, is well outside of

[13]Exhibit 4, Tab 1.
[14]Exhibit 4, Tab 12.

the 90 day period from HMQ's receipt of the OCF 1 and related documents, which time period expired, according to the parties, September 2, 2009.[15]

HMQ takes the position that it did not have sufficient information in the documents sent to it by claimant's counsel received June 2, 2009 to determine that a motor vehicle – pedestrian accident had occurred on March 14, 2009, and to determine the identity of the insurer of the vehicle involved. HMQ submits the 90 day NDBI notice period in subsection 3 (1) did not begin to run against HMQ until September 8, 2009. That is the date its adjusters adverted to the results of an Insurance Services Bureau Canada ("ISB Canada") search identifying Belair as the insurer of the vehicle involved in the accident with the claimant on March 14, 2009, and after the accident information had been recorded in the official records of the Ministry of Transportation (this occurred August 27, 2009[16]).

HMQ argues in the alternative, that if the 90 day notice period did begin to run on June 2, 2009, it should be given the benefit of the saving provisions in subsection 3 (2) because 90 days was not a sufficient period of time to determine that another insurer or insurers could be liable to pay SABS, and that it made the reasonable investigations necessary to determine whether another insurer was liable within the 90 day period.

Belair submits that the 90 day period in subsection 3 (1) began to run against HMQ on June 2, 2009. Belair notes that on June 2, 2009 HMQ received not only the claimant's OCF 1, but amongst other documents it also received HMQ's own specific

[15] By my calculations, the 90th day from the June 2, 2009 receipt by HMQ of the claimant's OCF 1 was actually August 31, 2009. For the purposes of the issue before me nothing turns on this two day difference.
[16] See Exhibit 6, Tab 5.

application for SABS in the form of a document entitled “The Motor Vehicle Accident Claims Fund Application for Statutory Accident Benefits” (MVACF SABS Application”).

Belair submits that the combination of information contained in the OCF 1 and the MVACF SABS Application received by HMQ on June 2, 2009 contained all the information HMQ required to confirm that an accident had occurred and more importantly, to determine the identity of the insurer of the vehicle involved in the accident.

With respect to the subsection 3 (2) issue, Belair submits that HMQ cannot satisfy the requirements of the subsection to be relieved of the 90 day NDBI service requirement. Belair submits that the fact alone that the evidence confirming the identity of Belair as the insurer of the vehicle involved in the accident was determined and available to HMQ’s adjustersseveral weeks before the expiry of the 90 day NDBI notice period means that HMQ cannot establish that 90 days was not a sufficient period within which to identify another insurer. Belair argues that in any event HMQ did not conduct the necessary reasonable investigations in a timely fashion to ensure that it could comply with the 90 day time limit.

Both the subsection 3 (1), and (2) issues were the subject of much *viva voce* evidence at the hearing provided by two of the three witnesses, and the examination under oath of another witness. I do not think it is necessary to review at length all of the evidence of thesewitnesses on the subsection 3 (1) issue. I will refer to what I consider to be important parts of the testimony of some of these witnesses in my analysis and conclusions on the subsection 3 (1) issue.

In my opinion, Belair is correct in its argument that HMQ had the necessary information available to it on June 2, 2009 to determine the identity of Belair as the insurer of the vehicle involved in the accident with the claimant.

In Part 3 of the claimant's OCF 1 – Accident Details and Health Information the claimant provided the date of the accident (March 14, 2009), the time of the accident (6:45 p.m.), the location of the accident (Queen Street West/Niagara Street, Toronto Ontario), the name of the investigating officer and department (P.C. Ferreira, Badge No. 9503, 14 Division), and the date the accident was reported to the police (March 15, 2009). In Part 4 of the OCF 1 – Details of Automobile Insurance, the claimant answered several questions confirming that he had no insurance available to him, and confirmed that he was struck by a passenger vehicle while a pedestrian. The wording of this section is such that it indicates the claimant is seeking insurance coverage under the vehicle which struck him, and hence would obviously direct the recipient of the OCF 1 to want to make inquiries concerning insurance on that vehicle.

There are no details of the identity of the owner of the vehicle involved in the accident, or the insurer of the vehicle in the OCF 1. In Part 11 of the OCF 1 however, the claimant indicates that he has attached a completed and signed MVACF SABS Application as he is required to do when applying to HMQ for SABS. The MVACF SABS Application very clearly sets out the claimant's name, the identity of his counsel, the date of the accident, that the plaintiff was a pedestrian at the time of the accident, and significantly, it states the following:

3. The claimant has investigated and determined that the following vehicles were involved in the accident:

a) vehicle which struck me plate number: ACTL-540

b) make: Dodge van

c) driver name: VinkoMadirazza

The document also contains more confirmation that the claimant did not have access to a motor vehicle liability policy apart from the insurance available to the striking vehicle. It is signed by both the claimant and claimant's counsel under the acknowledgment that they understand it is an offense to make a false or misleading statement or representation.

I do not accept HMQ's argument that it was necessary, for the purposes of HMQ or any first insurer being required to take steps to identify the existence of another possible prior insurer, that there must be evidence in the possession of the first insurer in the form of an official document such as a police report, or a recording of the accident in the Ministry of Transportation Records, before the 90 day time limit in subsection 3 (1) for service of a NDBI on another possible prior insurer begins to run.

The case law does not support this argument. As will be seen, for the purposes of the commencement of the subsection 3 (1) 90 day time limit, the question the courts seek to determine is when the first insurer received a "functionally adequate" SABS application. The law is clear that this does not require a police report, nor does it require "official" confirmation of an accident. The focus is on when the first insurer had sufficient

information available to it to complete the necessary inquiries relevant to determining the identity of a possible prior insurer.[17]

Sabrina Kakaletriswas an HMQ witness at the hearing. At the time of her testimony she had been a claims administrator for five years, and prior that an assistant to the senior manager of the Motor Vehicle Accident Claims Fund.

Ms. Kakaletris testified that because HMQ is the “payor of last resort” in the SABS system, one of HMQ’s first priorities when presented with a SABS claim is to determine whether another insurer could be responsible for the payment of SABS. She was also familiar with the requirement to serve a NDBI on an insurer which HMQ sought to have determined as a priority insurer.

In this case Ms. Kakaletris confirmed that HMQ received the claimant’s OCF 1, and the accompanying documents – including the MVACF SABS Application from the claimant’s counsel on June 2, 2009. She acknowledged that she was aware of the details in the MVACF SABS Application confirming the identity of the driver involved in the incident with the claimant, and the license number of his vehicle.

Using the information in the OCF 1 and the MVACF SABS Application, Ms. Kakaletris conducted a plate search and a driver’s record search on June 5, 2009.[18]The searches confirmed that VinkoMadirazza was the registered owner of the vehicle described by the claimant as having been involved in the accident with him. The search results also provided additional information such as Mr. Madirazza’s driver’s license

[17] The "functionally adequate" issue and the relevant case law is discussed in more detail starting at page 26 of this Award.
[18] See Exhibit 4, Tab 4.

number. She testified that she did not conduct the insurance search which would have confirmed the identity of Belair as Madirazza's insurer. The essence of her evidence on this point was that she was not familiar with the information required to conduct insurance searches as she did not conduct them. It was not HMQ's practice to conduct such searches. HMQ would assign SABS claim files to its independent adjusters – ClaimsPro in this case, who would be asked to conduct the necessary searches to determine the identity of any insurer. She was aware however, that insurance searches were routinely conducted to determine the identity of insurers of vehicles involved in accidents.

Ms. Kakaletris assigned handling of the claimant's file to Deepali Shah of ClaimsPro on June 30, 2009. Ms. Shah was specifically asked to investigate whether the vehicle involved in the accident was insured, and if so to serve that insurer with an NDBI.

Apart from the fact that she simply followed the institutional practice of HMQ in handling this claim, part of that practice being to assign conduct of insurance searches to its independent adjusters, Ms. Kakaletris did not testify as to any reason why HMQ could not conduct such searches itself.

Ms. Shah proceeded with her investigation, which included, amongst other things, interviewing the claimant and taking a statement from him on July 14, 2009. The statement did not provide any additional information that would have been required to conduct the insurance search. The documentary evidence and Ms. Kakaletris' testimony

make it clear that Ms. Shah was well aware of her mandate to determine whether there was any insurance on the vehicle involved in the accident with the claimant.

The evidence indicates that approximately a month after receiving the assignment from HMQ, Deepali Shah performed searches with ISB Canada on July 28, 2009. Ms. Kakaletris' evidence, and the documentary evidence[19] confirm that Vatsia Dubey of ISB Canada received Ms. Shah's request for the insurance search on July 28, 2009 at 8:49 p.m. The resulting search document[20] confirming Belair as the insurer of Mr. Madirazza's vehicle at the time of the accident was emailed to Ms. Shah and available to her the next day by 12:05 p.m. on July 29, 2009. A complete insurance history on Mr. Madirazza's vehicle was emailed to Ms. Shah at 12:19 p.m. on July 29, 2009.

The most important point to note here is that Ms. Shah initiated the insurance search with the same information that was available to HMQ when it first received the claimant's OCF 1 and related documents on June 2, 2009. It may be that Ms. Shah was able to provide Mr. Madirazza's driver's license number to obtain the more detailed insurance history on Mr. Madirazza's vehicle, but that information was available through the results of a driver record search that Ms. Shah performed prior to the insurance search with ISB. That is the very same search that Ms. Kakaletris of HMQ had performed as early as June 5, 2009.

[19] See Exhibit 9.
[20] See Exhibit 4, Tab 7.

These details were all corroborated in the evidence of Cheryl Young, a seven-year employee of ISB Canada, who also testified at the hearing. Ms. Young also testified that a customer can access ISB Canada's database directly to obtain insurance information, or the customer can do what Ms. Shah did – request that ISB Canada perform the search and provide the information(the customer will be invoiced accordingly in either case).

The documentary evidence, and the testimony of Ms. Kakaletris clearly establish that although the results of the insurance search conducted by Ms. Shah of ClaimsPro were available to her on July 29, 2009, she did not consider the results of the search until September 8, 2009, some six weeks later.It was at that point Ms. Shah adverted to the fact that Belair was the insurer of Mr. Madirazza's vehicle at the time of the March 14, 2009 accident. The following day, September 9, 2009, she served Belair with a NDBI on behalf of HMQ.

There is no explanation in the evidence for this delay. HMQ, in its submissions, suggested that a possible reason for this delay could have been that Ms. Shah was away on summer vacation and simply did not see the insurance search until she returned to the office in September, 2009.

This submission is speculative. There is no evidence on the point. I will say however, that even if it was established that Ms. Shah was absent from the office on vacation, or for some other reason during this six week period, that is an insufficient legal reason to stop the running of the 90 day time limit within which HMQ was required to identify another possible insurer and serve that insurer with an NDBI.

HMQ argued that the case law supports its position that I should find it did not have sufficient information available to it to identify Belair as the insurer of Mr. Madirazza's vehicle at the time of the March 14, 2009 accident until it had at the very least obtained the results of the insurance search conducted by Ms. Shah on July 29, 2009, and arguably until Ms. Shah had an opportunity to advert to the results of that search on September 8, 2009. Of course if the 90 day NDBI time limit began on either of those dates, the NDBI served by HMQ on Belair September 9, 2009 would be within time.

I do not agree that the law supports HMQ's submission on this point. In fact, in my view, the Court of Appeal has clearly confirmed that the 90 day time limit in subsection 3 (1) begins to run when the first insurer has sufficient information available to it to facilitate a search to determine the availability of insurance, not when the insurer has obtained the results of the insurance search and knows the identity of another insurer.

In *Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance v. Pilot Insurance Company*[21], the issue was whether an NDBI served by HMQ on Pilot complied with the requirements of Regulation 283/95, subsection 3 (1) (as it then was – and is in this case), and if not, did the saving provisions of subsection 3 (2) apply? This is the same issue, dealing with the same version of the legislation, as is before me in this case.

[21]2012 ONCA 33, ("*HMQ.v. Pilot*").

The facts of the case are important in respect of the court's analysis as it applies to this case so I will outline them in some detail.

An accident occurred on November 30, 2006 involving a cyclist and a vehicle. The vehicle and its operator were unidentified. The cyclist submitted an OCF 1 to HMQ on March 7, 2007. Unlike this case, there was no information in the documents submitted to HMQ identifying the driver and/or the vehicle involved in the accident. Like this case a police report was not submitted with the OCF 1. As is its practice as payor of last resort HMQ took steps to determine the insurer of the vehicle.

HMQ obtained a statement from the cyclist on May 8, 2007. The information in the statement informed HMQ that the driver of the vehicle who struck the cyclist made a 911 call on her cell phone to inform police of the accident. HMQ was able to identify the police officer who investigated the accident and spoke with the officer in September 2007. The officer advised that his notes had gone missing and he may not have prepared an official accident report regarding the incident.

At that point it was clear that the only way the motorist and/or the vehicle involved in the accident might be identified would be through the information provided by the motorist in the 911 call. The investigating officer confirmed to HMQ that there were only two ways to obtain information about the 911 call – either make a Freedom of Information request, or seek a court order.

HMQ's investigator made two, unsuccessful requests under the Freedom of Information Act to obtain the 911 call records. The last request was denied January 7, 2008. For a while HMQ pursued another line of inquiry to determine whether Kingsway

General Insurance Company may have priority insurance coverage for the cyclist but as it turned out that was not the case.

Eventually HMQ, through counsel, obtained an unopposed court order on September 4, 2008 to provide the particulars of the 911 call. On September 8, 2008, HMQ received the 911 call records from the police. The judgment of LaForme J.A. states:[22]

> The records identified the driver of the vehicle that struck the cyclist. On September 12, 2008, a driver record and insurance search provided contact information for the driver. On October 8, 2008, the driver confirmed her involvement in the accident and that Pilot was her insurer.

The issue before the court turned on a determination of when HMQ had a "functionally adequate" application (OCF 1) as that term had been interpreted by the case law. At first instance, the arbitrator determined that the 90 day time limit for HMQ to serve a NDBI on Pilot commenced in February, 2008, because at that point HMQ was aware that it could probably obtain information concerning the identity of the motorist and/or vehicle involved in the accident through the 911 call records, and the only way to get those records would be to seek a court order. The arbitrator held that because HMQ had not been diligent in pursuing a court order for the records – it did not do so until September 2008, it should be treated as having had acompleted application by February 2008, and thus failed to comply with the 90 day time limit in subsection 3 (1).

[22] At paragraphs 22 and 23.

At the first level of appeal, the judge disagreed with the arbitrator's conclusion that HMQ had even a functionally adequate application in February 2008. The judge concluded that HMQ's application was not functionally adequate until September, 2008 when it had the information from the 911 call records as to the identity of the motorist. The judge did not feel that HMQ had done too little between February 2008, and September 2008 to justify the conclusion that the application it had should be deemed a completed application back in February 2008.

The Court of Appeal reinstated the arbitrator's decision. It approved of the approach taken by the Ontario Superior Court in *Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance v. Lombard Insurance Company of Canada* [23] on what constitutes a "functionally adequate" and a "complete" application for the purposes of commencing the 90 day time limit in subsection 3 (1).

The first, and most important point to note for the purposes of the case before me is that at all levels, especially the Court of Appeal, in *HMQ v. Pilot*it was determined that HMQ had sufficient information available to it to determine the identity of the motorist involved in the incident, and thereby determine the insurer of the motorist's vehicle once it had the information contained in the 911 call. As the Court of Appeal's judgment indicates, the 911 call information identifying the driver enabled HMQ to conduct the necessary searches to confirm the insurance details of the vehicle involved in the incident.

[23]2010 ONSC 1770, Perell J. ("*HMQ v. Lombard*").

Justice LaForme states:[24]

> The Fund had sufficient information to give written notice to Pilot for the purpose of s. 3 when the 911 call information was obtained in September 2008. Before this, the Fund did not know the identity of the motorist who struck the cyclist and so could not determine the insurer of the motorist's vehicle. Once it obtained the missing information of the **motorist's identity**[25], the Fund had sufficient external information to supplement the standard OCF -1 form and make it complete. At this point, the Fund had an application that was functionally adequate for the purpose of notifying Pilot.

For the purposes of this case, in my view the analysis can stop here. It is not necessary to go on to consider the Court of Appeal's endorsement of the arbitrator's conclusion that HMQ should be treated as having had a completed application as of February 2008 because it was not diligent in pursuing the 911 call records *via* court order. This reasoning will lend support however, to my conclusion on the subsection 3 (2) issue.

It is clear to me from the Court of Appeal's judgment in *HMQ v. Pilot* that once HMQ had sufficient information available to it to be able to identify the driver of the vehicle involved in the incident, it had a functionally adequate OCF 1 because it could use that information to conduct the necessary search to determine the identity of the insurer of the vehicle.

In my view, it is undisputed in this case that HMQ received, on June 2, 2009, more than sufficient information providing not only the identity of the driver involved in the accident, but also the license plate number of the vehicle involved in the accident. It

[24]At paragraph 56.
[25]Arbitrator's emphasis.

had the necessary information available to it on that date to be able to conduct the appropriate search to determine the insurer of the vehicle, and thus make the OCF 1 a complete application.For the purposes of notifying Belair, HMQ had a functionally adequate application on June 2, 2009.

Therefore, I conclude that the time limit provided in subsection 3 (1) for the service of a NDBI on Belair began to run on June 2, 2009, and expired before HMQ, through its adjusters – ClaimsPro, served its NDBI on Belair on September 9, 2009.

I will now address the subsection 3 (2) issue. Subsection 3 (2) contains a two part test, both branches of which must be complied with if the party seeking the benefit of the saving requirements of subsection 3 (2) can be found to have satisfied the requirements of the subsection.

The first part of the subsection 3 (2) test to be considered is 3 (2) (a). To satisfy this part of the test HMQ must prove that 90 days was not a sufficient period of time to make a determination that another insurer was liable under section 268 of the *Insurance Act*.

In my opinion, the simple chronology of events makes it impossible for HMQ to satisfy this part of the test. Even with the delay of approximately 3 weeks between the assignment to ClaimsPro of the claim by HMQ and the completion of the insurance searches by ClaimsPro on July 28, 2009, the information confirming the identity of Belair as the insurer of the vehicle involved in the accident with the claimant was available to HMQ's agents, ClaimsPro, by July 29, 2009, approximately six weeks before the 90 day time limit for serving the NDBI expired. On these facts alone one is

compelled to conclude that 90 days was a sufficient time to determine the identity of another insurer who could be liable for the claim.

The conclusion I have come to on the (a) part of the subsection 3 (2) test technically makes it unnecessary for me to consider subsection 3 (2) (b). I will do so however in the event that I am found to be in error on my subsection 3 (2) (a) conclusion.

In my opinion, HMQ has not satisfied the subsection 3 (2) (b) part of the test either. It is arguable that the investigations conducted by HMQ's agents, ClaimsPro, within 90 days of HMQ's June 2, 2009 receipt of the claimant's OCF 1 were reasonable in the "effective" sense of the word in that they did result in the identification of Belair as the insurer of the vehicle involved in the accident with the claimant within the 90 day time period.

In my view however, the Court of Appeal's analysis in *HMQ v. Pilot* also requires an examination of how the insurer has gone about conducting its investigation in determining whether it has acted reasonably. In this case, I conclude that HMQ did not conduct reasonable investigations within the meaning of subsection 3 (2) (b) for two reasons.

First, on the facts of this case, in my opinion a reasonable investigation required that HMQ itself conduct the simple insurance search through ISB Canada, especially considering it is capable of conducting vehicle record searches and driver record

searches.[26]There was never any additional information generated by HMQ's agents, ClaimsPro, that was necessary to conduct the search. The necessary information was available to HMQ from the first day it received the claimant's SABS application.

The evidence demonstrates that there is no special knowledge or skill required to conduct the insurance search that would be beyond the capabilities of HMQ personnel. It can be performed by literally anyone for the requisite fee, either with or without the assistance of the ISB Canada personnel. In my opinion, the fact that it is not HMQ's operational policy to conduct insurance searches, but rather to delegate that task to agents,does not, on the facts of this case, satisfy the reasonable investigation requirement of subsection 3 (2).

Had Ms. Kakaletris (or one of her colleagues) at HMQ conducted the insurance search more or less contemporaneously with the other searches she did perform, the evidence suggests that she would have been able to receive a response that confirmed Belair as the insurer of the vehicle involved in the accident with the claimant even before she had delegated the investigation of the matter to ClaimsPro.

The second reason I find that HMQ did not conduct the necessary reasonable investigations to satisfy the subsection 3 (2) (b) is that it is not reasonable, in my view, that ClaimsPro conducted what everyone knew to be the essential search concerning the availability of insurance on the Madirazza vehicle, but then failed to advert to the results of this search for over six weeks when the results were available the day after the search request was made.

[26] On and even broader scale than its agents, ClaimsPro, are able to do, according to the evidence of HMQ's witness, Ms. Kakaletris.

The professionals from HMQ and ClaimsPro were well aware of the importance of determining, within the timeframe specified in subsection 3 (1) (as it then was), whether there was any insurer who would be in priority to HMQ. I make no criticism in a general sense of Ms. Shah of ClaimsPro for either taking a vacation, or perhaps for simply having too much on the go to be able to keep a close enough eye on the applicable time limit in this case. Unfortunately, neither of those explanations is a legal excuse justifying the application of the saving provisions of subsection 3 (2).

In my opinion, the approximate six week time period between when the information was available confirming Belair to be the insurer of the vehicle involved in the accident with the claimant, and when HMQ's agents got around to noticing it and serving a NDBI on Belair is the equivalent of HMQ (in *HMQ v. Pilot)* failing to move expeditiously to seek a court order for disclosure of the information it knew it required to be able to determine the identity of the insurer of the vehicle involved in the accident in that case. In *HMQ v. Pilot*, the Court of Appeal found that this conduct justified the arbitrator's conclusion that HMQ should be deemed to have received a completed application in February 2008 because it failed to act diligently to obtain the necessary information until September 2008.

In my view, Justice LaForme's characterization of the situation in *HMQ v. Pilot* could just as easily be a description of the situation in this case. Here HMQ had the necessary information in its possession to determine the insurer of the vehicle involved in the accident with the claimant from the first day it received the claimant's SABS application. HMQ could have immediately determined the identity of the insurer by using the information to conduct an insurance search, but it did not do so. Instead, it

delegated the investigation to agents who did not move expeditiously to conduct the insurance search. It took them three weeks to do so, and when they did, they failed to advert to the positive result that the search revealed six weeks before the expiry of the 90 day time period set out in subsection 3 (1).

Justice Laforme put it this way:[27]

> The Fund was required to exercise reasonable diligence in pursuing the missing information. The Fund was one step away from turning an incomplete application into a functionally adequate application, but did not act to obtain the court order for more than seven months after the Freedom of Information route proved unsuccessful. Given the short notice period established by s. 3, it would be contrary to the legislative intent to allow the Fund to sit on the application without adequate investigation for months at a time.

In this case the solution to the insurance question required nothing approaching the complexity of engaging counsel to undertake a motion seeking the release of information protected under the Freedom of Information Act. As I have indicated, a simple search by HMQ, which could have been done with the assistance of ISB Canada personnel, using information that the claimant himself had provided in his SABS application, would have answered the insurance question quickly and easily – in plenty of time to serve a valid NDBI on Belair.

From the first day that HMQ received the claimant's SABS application it was "one step away" from making a functionally adequate applicationcomplete. It had the information and ability to easily complete that step long before the expiry of the relevant time period, but it failed to do so. In my opinion, HMQ's handling of the matter, and that

[27] At paragraph 64.

of its agents, does not reflect the reasonable diligence necessary to satisfy the requirements of subsection 3 (2) to relieve HMQ of its failure to serve Belair with its NDBI within the 90 day time period specified in subsection 3 (1).

HMQ raised two further arguments in support of its position that Belair should be found to be the priority insurer in this case.

The first of these arguments is what was termed by counsel for HMQ as "constructive deflection" on the part of Belair in respect of the claimant's SABS application.

The foundation for this argument, HMQ submits, is that Belair's insured, VinkoMadirazza, reported the March 14, 2009 accident involving the claimant to Belair on at least two occasions before the claimant applied to HMQ through his counsel for SABS, and Belair failed to comply with its obligations under section 258 of the Insurance Act thereafter.

The evidence does confirm that Madirazza contacted Belair by telephone on May 13, 2009, and again on May 19, 2009. There are both handwritten and computer log notes from Belair's files confirming the May 13, 2009 contact.[28] There is a computer log note confirming the May 19, 2009 contact.[29]

The May 13, 2009 computer note indicates that Mr. Madirazza told Belair that he thought he was involved in some type of "*scam*" where the claimant fraudulently asserted Madirazzahad struck him with his car. He told Belair that the claimant had filed

[28] See Exhibit 7, Tab 26, and Exhibit 7, Tab 2.
[29] See Exhibit 7, Tab 2.

a police report, and that he wanted to notify Belair in case this might affect his insurance. Belair advised Madirazza that it had made a note of his report.

The handwritten note for May 13, 2009 contains more detail as to how the accident occurred including the comment that the claimant asserted Mr. Madirazza had "*rolled over his foot*".

The second computer note of May 19, 2009 appears to have been generated following receipt by Mr. Madirazza of a letter from claimant's counsel dated May 15, 2009.[30] This letter is what might be termed in the insurance business as a typical "notice" letter which indicates that the claimant's counsel, Jeffrey Gray, has been retained to commence an action for damages on behalf of the claimant arising out of the March 14, 2009 accident. The letter also indicates that the provisions of the *Insurance Act* require Mr. Madirazza to provide a copy of the letter to his insurer so that it may respond on his behalf.[31]

The May 19, 2009 Belair computer note indicates that Mr. Madirazza was calling again regarding his "*previous situation*" where he believed himself to be the "*victim of fraud*". The note does indicate that Mr. Madirazza wanted to fax to Belair all of the documents he has accumulated "*over the course of this incident*". In parentheses, the note indicates that these documents include "*(police reports/lawyers requests)*".

[30]Exhibit 6, Tab 3.
[31] Section 258.3 (4) of the *Insurance Act*requires the sender of a notice letter to indicate in the letter that the recipient has a legal obligation to give a copy of the letter to his insurer within seven days of receiving the notice letter, which requirement is found in section 258.3 (2) of the *Insurance Act.*

The note indicates that he was told by Belair that the faxing of these documents "*will not be necessary at this time, however if in future he is rated for (*the*) accident, he can provide proof to state otherwise*."

HMQ argues that claimant's counsel and Mr. Madirazza did what they were required to do pursuant to the *Insurance Act*. Mr. Gray's notice letter contained the instruction to Mr. Madirazza that he was required to send the letter to his insurer. After Mr. Madirazza received the letter he contacted Belair (for a second time) indicating his willingness to send all documents, including the notice letter, to Belair.

It is Belair, HMQ submits, which has failed to comply with the requirements of the *Insurance Act* by telling Mr. Madirazzathat he did not need to send Belair at least the notice letter he had received. HMQ argues that had Belair complied with the section 258*Insurance Act* requirements, not only would Belair have asked Mr. Madirazza to send it the notice letter right away, but it would have contacted Mr. Gray, confirmed that Belair insured Mr. Madirazza at the time of the accident, and commenced dealing with him in respect of Mr. Mohammadian's claim.[32]

HMQ emphasizes that Mr. Madirazza's contact with Belair indicating that he wished to send them "*police reports/lawyer's requests*" in connection with the March 14, 2009 accident occurred 9 days before Mr. Gray sent his May 28, 2009 letter to HMQ enclosing the SABS application and related documents. HMQ argues that had Belair conducted itself properly in accordance with the section 258 *Insurance Act*requirements,

[32] Section 258.4 of the *Insurance Act* requires an insurer who receives a notice from a plaintiff under section 258.3 to promptly inform the plaintiff whether there is a motor vehicle liability policy issued to the defendant (its insured), and if so the liability limits under the policy and whether the insurer will respond under the policy to the claim.

claimant's counsel would not have sent the claimant's SABS application to HMQ. Instead, the claimant's counsel would have commenced dealing with Belair with respect to all of Mr. Mohammadian's claims, and directed his May 28, 2009 letter initiating the claimant's SABS claim to Belair.

Therefore, HMQ submits, it would never have been involved in the claimant's SABS claim since the only reason it was sent to HMQ in the first place is that claimant's counsel, not having been contacted by an insurer on behalf of Mr. Madirazza, was under the impression that the vehicle involved in the accident with the claimant was uninsured when he sent the SABS application to HMQ.

This latter assertion is confirmed, HMQ submits, by the fact that as late as June 29, 2009 claimant's counsel, Mr. Gray, told Ms. Kakaletris of HMQ in a telephone conversation that "…*the third party* (Mr. Madirazza) *not insured as far as he knows his* (May 15, 2009) *letter was just a standard letter*."[33]

The assertion is further confirmed, HMQsubmits,by evidence which establishes that claimant's counsel would have dealt with Belair rather than HMQ in respect of Mr. Mohammadian's SABS claims had he known of Belair's existence.Mr. Gray knew that his client did not have insurance, and that any tort or SABS claim to be initiated on behalf of Mr. Mohammadian would have to be advanced against the owner and insurer of the vehicle involved in the accident (or HMQ if there was no insurer). Claimant's counsel's initial letter to Belair's insured, Mr. Madirazza, clearly stated that Mr. Madirazza should provide the notice letter to his insurer. Mr. Gray submitted the

[33] See Exhibit 4, Tab 6.

claimant's SABS application to HMQ believing that Mr. Madirazza was uninsured. The evidence also indicates that once claimant's counsel knew of Belair's existence, he telephoned Belair, wrote to Belair, and submitted documents to Belair in respect of the claimant's SABS claim.[34]Claimant's counsel even commenced mediation proceedings against Belair for which FSCO declined jurisdiction because the claimant's SABS application had been sent first to HMQ.[35]

HMQ's argument does raise a very interesting question. Can an insurer deflect a SABS claim arising from an accident involving its insured vehicle about which it has knowledge by failing to comply with section 258 *Insurance Act* requirements – which failure results in the insurer not acquiring knowledge of the claimant's intention to advance a SABS claim from the accident, and causes the claimant to applyfor SABS to a different insurer? I am not aware of any arbitral or court authority directly on point, nor was I directed to any by counsel.

I can see merit in HMQ's position on the issue. As a general matter, jurisprudence on SABS issues is replete with comments by arbitrators and judges that the SABS system is intended to operate on the basis that the interests of the claimants are paramount. Any issues – especially priority issues between insurers are to be argued separately between the insurers while claimants receive benefits in the most expeditious way possible, without being caught in the middle of the dispute.[36]

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[34] These communications are detailedat pp. 56 and 57 in my analysis of the waiver/estoppel argument advanced by HMQ.
[35]Exhibit 7, Tab 24.
[36] See, for example, the comments of Laskin J.A. in *Kingsway General Insurance Company v. Her Majesty the Queen in Right of Ontario As Represented by the Minister of Finance*, 2007 ONCA 62, at paragraph 19.

With this statement of policy as a framework, arbitrators and courts have stated that SABS insurers should not “stick their heads in the sand” when a claim comes along and either hope it goes away or that some other insurer deals with the claim. Insurers should be proactive in dealing with claimants, and if there is an issue to be argued as to whether that insurer has ultimate responsibility for the claim, that issue should be dealt with as part of the Regulation 283/95 process.

Sections 258.1 to 258.6 of the *Insurance Act*, although they might arguably focus more on claims for tort damages, seem to me to have been added to the *Insurance Act* to ensure that bodily injuries arising out of motor vehicle accidents – whether they could give rise to tort claims, SABS claims, or both, are promptly reported to any insurer who may have responsibility to deal with such claims, and to require an insurer so notified to expeditiously handle the claim. For example, section 258.1 (1) and (2) **Notice of Accident** requires an insured to provide a written report to his insurer within 7 days of any incident involving his insured automobile that would be required to be reported to the police.[37] In my opinion the purpose of the section is to make sure that incidents involving automobiles – particularly those resulting in bodily injury, are promptly reported to the relevant insurer so they can be properly dealt with.

Notwithstanding that there is a general statutory and common law basis to argue that claimants, insureds, and insurers must all be proactive in dealing with claims for bodily injury arising from motor vehicle accidents, the law on deflection of SABS claims is, at least so far, quite specific with respect to the fact situations to which it applies.

[37] Section 199 of the *Highway Traffic Act*, R.S.O. c. H.8, as amended requires that every person in charge of a motor vehicle who is directly or indirectly involved in an accident resulting in personal injuries to report the accident forthwith to the police.

A major difficulty I havein accepting the “constructive deflection” argument in this case is that the facts upon which it is founded are clearly distinguishable from the fact situations in the deflection case law. All of the deflection cases of which I am aware deal with situations where the claimant or the claimant’s representative has either submitted a SABS application to an insurer, or stated a clear intention to the insurer to do so. The insurer, being fully aware of the SABS application or the intention of the claimant to submit a SABS application, then declines to accept responsibility (contrary to its Regulation 283/95 obligations as the first insurer to receive the SABS application), and in some cases, suggests that the claimant submit the application to a different insurer.

In this case however, there were never any direct dealings between the claimant or his representative and Belair before the SABS claim was submitted to HMQ. In fact, no SABS application was ever submitted to Belair by the claimant. Belair did not know (albeit possibly because it did not comply with section 258 of the *Insurance Act*) that the claimant was advancing, or intended to advance a SABS claim before that claim was submitted to HMQ.

The evidence shows that at the time of the communications between Mr. Madirazza and Belair relied upon by HMQ, no SABS claim was in existence to be deflected. In this case, the claimant did not complete a SABS application until May 25, 2009, and it was not submitted to HMQ until June 2, 2009. There is no evidence to indicate that at any time before June 2, 2009 Belair knew, or had information in its possession to indicate that it ought to have known about the claimant’s SABS application, or any intention on the part of the claimant to make a SABS application.

HMQ's submission that had Belair accepted its insured's proposal to send Belair a copy of the May 15, 2009 notice letter, Belair would have communicated with the claimant's counsel before he sent his May 28, 2009 letter to HMQ, and claimant's counsel would then have dealt with Belair in respect of both the tort and SABS claims is nevertheless both plausible, and logical.

It does, however, involve some speculation about whether certain events would or would not have occurred, and perhaps more significantly,about whether those events, assuming they would have occurred, would have taken place within a certain timeframe.

On the timingissue, HMQ might say that the constructive deflection is not dependent on a finding that Belair would have identified itself to claimant's counsel in the 9 day period between Mr. Madirazza contacting Belair on May 19, 2009, and claimant's counsel sending the claimant's SABS application to HMQ on May 28, 2009, or whether it did so after that time. If Belair had complied with its section 258 *Insurance Act* obligations in a timely way as contemplated by the legislation Belair's existence as Mr. Madirazza's insurer would have come to the attention of all concerned long before the time limit expired for HMQ to serve Belair with an NDBI. Further, had Belair identified itself as Mr. Madirazza's insurer in a timely fashion, since Belair's only viable defence on the priority issue was the 90 day time limit in section 3 (1) it probably would not have been necessary for HMQ to serve an NDBIand pursue a priority dispute. In all probability Belair simply would have taken over the claim.

It is conceivable that Belair's failure to comply with its obligations under section 258 of the *Insurance Act* may have prevented it from acquiring the knowledge that the claimant intended to advance a SABS claim; however, in the absence of authority, and because the facts of this case are distinguishable from those in the current deflection case law combined with the fact that the "constructive deflection" argument involves some speculation about whether certain events would have happened and the possible timing of those events, in my opinion I do not have a sound enough legal basis to extend the law of deflection as advocated for by HMQ.

I do believe however, that the foundation of the "constructive deflection" argument – Belair's failure to comply with the requirements of section 258 of the *Insurance Act,* should have an impact on costs in this matter. I will deal with that issue in the Conclusion segment of the Award.

HMQ made one further argument in support of its position that Belair should be found to be the priority insurer. HMQ submits that Belair either waived its rights to rely upon the failure of HMQ to satisfy the provisions of subsection 3 (1), and (2) of Regulation 283/95, or that it is estopped from doing so.

The legal requirements to establish waiver are set out in *Saskatchewan River Bungalows v. Maritime Life Assurance Co.*[38]In that case the Supreme Court of Canada had to decide whether an insurer had waived its rights under a life insurance policy to lapse the policy by sending a letter indicating that it would accept the payment of a premium and continue coverage even though the policy had lapsed as of the date of the

[38][1994] 2 S.C.R. 490, (SCC) ("*Saskatchewan*.v.*Maritime Life*").

letter. The court decided that the insurer had waived its rights by sending the letter, but that it had retracted its waiver and properly lapsed the policy before the insured acted to make a premium payment during the period the waiver would have been in effect.

In discussing the case law on waiver the court made the following comments:

> Recent cases have indicated that waiver and promissory estoppel are closely related…The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so…
>
> …Waiver occurs where one party to a contract or to proceedings takes steps which amount to forgoing reliance on some known right or defect in the performance of the other party…
>
> …The elements of waiver were described in *Federal Business Development Bank* v. *Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.)…
>
> … The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.
>
> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them…[39]

By way of background support for this argument, HMQ submits that Belair's conduct from the outset brings its *bona fides* in respect of its dealings with the SABS claim into question. HMQ submits that Belair's efforts were directed at avoiding the

[39] *Saskatchewan* v. *Maritime Life*, paras.18, 19, 20.

claim from time Belair was notified of it *via* the September 9, 2009 NDBI sent by HMQ's agents.

HMQ submits that Belair should have realized at that time from documentation in its own files that this was the same incident and potential claim reported to it by its own insured back in May 2009, and done the "right thing" by accepting responsibility to deal with the claim.

Instead, Belair did not immediately respond to HMQ's NDBI, and in fact remained "incommunicado" for several months until finally taking a position on the NDBI in late January, 2010. HMQ characterized this inaction as Belair "*waiting and hiding*" so as to avoid the SABS claim. In support of this suggestion HMQ notes that the May, 2009 documentation about Mr. Madirazza's report of the incident to Belair did not come to light until arbitration proceedings were well underway, and only then after much persistence by HMQ's counsel to obtain its disclosure.

While Belair's claims handling procedures in this matter leave much to be desired, starting withBelair's failure to appreciate its responsibilities under section 258 of the *Insurance Act* when contacted about the accident by its insured in May, 2009, I am of the view that the evidence falls short of establishing that Belair deliberately attempted to avoid dealing with the claimant's SABS claim for improper reasons.

The evidence indicates that Belair did intend to respond to HMQ's NDBI, at least with a preliminary position, shortly after it was received. My conclusion is based on a September 16, 2009 memorandum[40] authored by Belair's witness in these proceedings,

[40]Exhibit 7, Tab 14.

John Buenavides. Almost immediately after receiving HMQ's NDBI Mr. Buenavides had a Belair adjuster, Jill Rivers, obtain a statement[41] from their insured, Mr. Madirazza. Mr. Madirazza repeated to Ms. Rivers what he had advised the police from the outset, that he believed the claimant was being fraudulent and that no accident had occurred, at least as far as Mr. Madirazza was concerned.At this point Belair had no information from the claimant or the claimant's representative, nor did it have a police report. Belair concluded that further investigation was required. On a preliminary basis, it appears Belair had concluded that an "accident" may not have occurred.

In the aforementioned memorandum Mr. Buenavides states:

> I will respond to claims pro, handling the file for MVAC,that we are currently conducting our investigation and will not formally respond to their *Notice of Dispute* until completed.
>
> Since we are going to take the position of "No Accident" it is most likely that we will require counsel sometime down the road.

Mr. Buenavides did not respond right away to HMQ as his memorandum suggests that he intended to do. He later testified that he could not remember whether he had responded or not, apart from his official rejection of the NDBI by way of a January 27, 2010 letter. He had no notes indicating that he had made a response, and based on the evidence before me it does not appear that any response was ever made except for the January 27, 2010 letter sent by Mr. Buenavides.

Mr. Buenavides' memorandum, an internal Belair document, makes it clear that he intended to contact HMQ to advise HMQ of Belair's intention to further investigate

[41]Exhibit 6, Tab 10.

before providing a formal response to the NDBI. The fact that he does not recall doing so, and he has no notes to explain why he did not do so, may indicateadeficient follow-up routine, but I am not prepared to infer from this evidence that it demonstrates a deliberate plan on Belair's part to try to avoid the SABS claim.

HMQ also made much of the fact that although Belair appeared to have suspicions from the outset about whether an accident had occurred, it did not raise this issue with HMQ as a defence to the NDBI until proceedings in this arbitration were well underway.

HMQ emphasizes that Belair took no position with HMQ in the matter until it finally issued a formal response to HMQ's NDBI January 27, 2010.[42]The only defence that Belair raisedat that time was the 90 day, section 3 (1) defence.

As indicated, HMQ wishes to characterize this conduct on the part of Belair as indicative of a planned effort on Belair's part to avoid dealing with the claimant's SABS claim when it had an obligation to do so.

I do not agree. It must be remembered that most of Belair's conduct which HMQ seeks to impugn took place after HMQ had already received (as the first insurer) the claimant's SABS application.Having received the SABS application, notwithstanding the merits of any priority claim it may have had with Belair, it was HMQ's obligation to deal with the SABS claim, and separately pursue its priority claim with Belair in compliance with the requirements of Regulation 283/95, section 3.

[42]Exhibit 7, Tab 21.

As of September 9, 2009, all Belair had received in connection with the SABS claim was HMQ's NDBI. There was no SABS claim which had been presented to Belair by the claimant for Belair to try to avoid.From Belair's perspective, this was a Regulation 283/95 priority dispute. There was no obligation on Belair to immediately provide a formal response to HMQ's NDBI. Belair was perfectly entitled to conduct an investigation into the matter, particularly on the issue of whether there had been an accident within the meaning of the SABS.

Earlier in these reasons I indicated my disagreement with HMQ's argument that Belair should have assumed responsibility for payment of SABS to the claimant from HMQ and then later, if so advised, challenged the claimant's entitlement to SABS by asserting no accident had occurred.Had Belair taken that course then in my view it would have estopped itself from denying responsibility for the payment of SABS to the claimant on the grounds that there had not been an accident. As I stated previously, determining whether an accident has occurred is a necessary precondition for the obligation to begin paying SABS. The fact that HMQ apparently decided to accept that there had been an accident (at least for purposes of wanting to transfer responsibility of the claim to Belair) was not a conclusion that was binding on Belair for the purposes of responding to the NDBI.

Belair's initial contact with its insured suggested that there may have been no accident at all, an issue that would of course impact upon the validity of any SABS claim, and hence Belair's position on HMQ's NDBI. In my view, it is not surprising that this was the issue of primary concern to Belair at that time, and worthy of further investigation. Here I would point out that HMQ argued vigorously throughout these

proceedings that it was entitled to “official” confirmation that an accident had occurred in the form of a police accident report or a record of the accident with the Ministry of Transportation before any statutory time periods should be found to run against it regarding service of an NDBI.

As far as any delay in raising the 90 day defence is concerned, it must be remembered that when Belair first received HMQ’s NDBI there was no information whatsoever in it as to when HMQ had received the claimant’s SABS application, so Belair would have no way of knowing whether this was an issue or not at that time. The most reliable evidence suggests that Belair did not find out when HMQ had received the claimant’s SABS application until Mr. Buenavides spoke with another adjuster employed by agents of HMQ, Nora Bedrossian, on January 27, 2010.[43]The evidence also indicates that Belair did not receive a copy of the claimant’s SABS application until long after the fact on May 3, 2011.[44]

It would have been better claims handling practice if Belair had immediately responded to HMQ’s NDBI when received on September 9, 2009, and to have ascertained then when HMQ had received the claimant’s SABS application. Had this occurred however, it would have been immediately apparent at that time that HMQ’s service of its NDBI was beyond the 90 day time limit in section 3 (1) of Regulation 283/95. Belair discoveringearlier that it had the 90 day time limit defence available to

[43]Exhibit 3, Q. 454 – 467. Subsequent questions and answers suggest that Mr. Buenavides thought he may have spoken with another HMQ agent adjuster before this date to obtain information as to when HMQ had received the claimant's SABS application but Mr. Buenavides could not recall when any such conversation took place, and did not document it. I should also point out that HMQ led no evidence of any earlier conversation than the one between Mr. Buenavides and Ms. Bedrossian.
[44]Exhibit, 3, Q. 578.

it,and telling HMQ that would not have enabled HMQ to change the fact that it had served its NDBI outside the required time limit.

I now come to the evidence which forms the central part of HMQ's argument on the waiver/estoppel issue. On November 3, 2009 a treatment plan (OCF 18) was faxed to Belair by a chiropractor, Dr. Nader Raffi, who was providing medical treatment to the claimant.[45] Although there is no direct evidence on how Dr. Raffi came to fax this treatment plan to Belair instead of HMQ, I think it is a reasonable inference from the documentary evidence that it follows claimant's counsel learning of the existence of Belair as the probable insurer of Mr. Madirazza, and then refocusing his efforts, and those of the claimant's medical providers in respect of the claimant's SABS claim, to Belair.

By this time, claimant's counsel had received a copy of HMQ's NDBI sent September 9, 2009. Claimant's counsel had also received a copy of the police report indicating Belair as Mr. Madirazza's insurer. He had written to HMQ October 5, 2009 enclosing a copy of the police report, and requesting that HMQ provide him with the name of the adjuster at Belair who had carriage of the matter.[46]

The first piece of evidence upon which HMQ's waiver/estoppel argument depends is a letter written by Belair to the claimant dated November 6, 2009 in response to the treatment plan received from Dr. Raffi.[47]Although there is no direct evidence on the point, the letter appears to me to be a standard form letter typically written in response to SABS treatment plans received by Belair. The variable parts of

[45]Exhibit 7, Tab 16.
[46]Exhibit 4,Tab 12.
[47]Exhibit 7, Tab 17.

the letter include the date, the name and address of the claimant, the claim number, the date of loss, the nature of the treatment and the amount of the treatment plan. There are severalother paragraphs in the document which appear to be boilerplate or precedent in nature.

HMQ emphasizes that the letter clearly states Belair is unequivocally approving the treatment plan as submitted, in other words confirming an obligation to pay SABS to the claimant. The relevant paragraph of the letter reads as follows:

> This is your notice that **we are approving the plan as presented** in accordance with Section 38 (8) of the Statutory Accident Benefits Schedule (SABS). We have no conflict of interest in regards to this Treatment Plan.

The letter indicates that it was signed by Belair's witness in these proceedings, John Buenavides. Mr. Buenavides was examined under oath and during the arbitration hearing at length on this issue by counsel for HMQ. In essence, Mr. Buenavides' explanation for this letter going out under his signature was that it was "*an oversight*" on his part. Belair had not made any decision at that stage to accept responsibility from HMQ for the claimant's SABS claim. Belair had not communicated to any of HMQ, claimant's counsel, Jeffrey Gray, or the claimant that it intended to assume responsibility for the claimant's SABS claim from HMQ. It was simply an error that the letter was sent.

Once again, although it would appear Belair's claims handling practices could have used some improvement, at least at that time, considering all of the evidence available to me I am not prepared to find that Belair's November 6, 2009 letter to the

claimant constitutes a legal waiver by Belair of its rights to dispute responsibility for the claimant's SABS claim.

One piece of evidence that I think is important in coming to this conclusion is the response Belair made directly to Dr. Raffi himself in respect of the treatment plan. On November 5, 2009, the day before Belair sent the above-mentioned letter to the claimant, Belair faxed back a copy of the treatment plan sent on November 3, 2009 by Dr. Raffi. On the document faxed to Dr. Raffi Belair stated the following:

- No payments will be considered until receipt of completed OCF 1
- Priority of payment may lie with another insurer.[48]

This document is consistent with Belair's position that it had not made a decision to accept responsibility for the payment of the claimant's SABS claim, and that priority of payment responsibility was still in issue. There is no evidence Belair had changed its mind between late afternoon on November 5, 2009 when it sent its fax reply to Dr. Raffi, and November 6, 2009 when it sent a form letter response to the claimant.

I accept the explanation that Belair sent the November 6, 2009 letter to the claimant in error, and without any intention of stating a formal position that it was prepared to assume responsibility for the claimant's SABS claim from HMQ. In my view, for Belair to be found to have evinced an unequivocal intention to waive any rights it had under Regulation 283/95 to dispute HMQ's NDBI and assume responsibility for the claim from HMQ there would need to be evidence clearly stating such an intention. There is no evidence of that in the November 6, 2009 letter. It was not directed or

[48]Exhibit 7, Tab 1.

copied to HMQ or its agents, and it did not in any way address the issue of the priority dispute between HMQ and Belair.

The second piece of evidence HMQ relies upon for the foundation of its waiver/estoppel argument is an email from Nora Bedrossian at ClaimsPro on behalf of HMQ, confirming a January 27, 2010 telephone conversation with John Buenavides at Belair.[49]

I will reproduce Ms. Bedrossian's entire email here:

> Hi John:
>
> Thanks for speaking with me today regarding the above claim. I confirmed that TD insurance was not valid on the date of loss, however, your policy was valid and that you plan to accept the claim provided that we send you a copy of the TD letter confirming same.
>
> Please send me a brief reply to indicate that you are accepting the claim and I will advise the solicitor, Jeffrey Gray of same as he would like to hear from you.
>
> Thanks,
>
> Nora Bedrossian, Senior Adjuster

If this was the only evidence available, if accepted on its face it might be interpreted as indicating an intention on the part of Belair to accept responsibility for the SABS claim from HMQ contingent only upon proof that TD General Insurance Company did not have a prior policy.[50]

[49] Exhibit 7, Tab 22.
[50] There is no issue in these proceedings involving TD Insurance. The parties accepted that TD's policy had been properly canceled before the date of loss.

Ms. Bedrossian's email is not however, the only evidence available. Mr. Buenavides, who was examined *viva voce* under oath, and who testified under oath at the arbitration hearing (Ms. Bedrossian did not testify in these proceedings), denied telling Ms. Bedrossian that Belair would accept responsibility for the claim if it was confirmed that TD Insurance did not have a valid policy. Mr. Buenavidesdid acknowledge the telephone discussion with Ms. Bedrossian on January 27, 2010. His recollection of the conversation was different however, than what Ms. Bedrossian recorded as her recollection of the conversation. The main thing Mr. Buenavides recalls ascertaining from Ms. Bedrossian in this conversation is the fact that HMQ had received the claimant's SABS application on a date that was more than 90 days prior to HMQ serving its NDBI on Belair. This gave rise to Mr. Buenavides taking the position with HMQ that its NDBI was out of time under section 3 (1) of Regulation 283/95.

It is significant to me that later that same day, Mr. Buenavides sent an email of his own to Ms. Bedrossian attaching a letter[51] which constituted Belair's formal response to HMQ's NDBI denying responsibility for the claim based on the 90 day defence.

I will not repeat the entirety of the letter here. Suffice it to say that it clearly sets out Belair's position that it was advised that HMQ had received the SABS application from the claimant on May 28, 2009[52]. Therefore, Belair would not accept priority for the

[51]Exhibit 7, Tab 21. It should be noted the parties agree the letter was mis-dated and read January 27, 2009 when it should have read January 27, 2010.
[52] As previously indicated, HMQ did not receive the SABS application until June 2, 2009. Nothing turns on this however because either date of receipt is more than 90 days prior to HMQ's September 9, 2009 NDBI to Belair.

claimant SABS claim from HMQ because the notice was issued beyond the 90 day period prescribed by section 3 of Regulation 283/95.

It seems very unlikely to me that in his January 27, 2010 telephone conversation withMs. Bedrossian, Mr. Buenavidesobtained confirmation from her that HMQ received the claimant's SABS application on a date that would put the service of HMQ's NDBI beyond the time limit in section 3 (1), but in the same conversationhe gave an unqualified assurance to Ms. Bedrossian that Belair waived any Regulation 283/95 rights it may have to resist the NDBI and agreed to take over the claim.

This conclusion seems even more unlikely when one considers that less than three hours after the telephone conversation Mr. Buenavides sent the letter setting out Belair's formal position denying responsibility for the claim. The letter makes no reference to any other discussion, nor does it suggest that Belair was revoking any earlier stated intention to take over the claim. I note that there is no evidence of any follow-up by Ms. Bedrossian following receipt of Belair's January 27, 2010 letter indicating surprise, or questioning a purported change of position by Belair.

Considering all of the evidence, especially the evidence which is conflicting, I am not satisfied that the contents of this email authored by a person who did not testify in these proceedings is sufficient for me to conclude that Belair demonstrated a clear and unequivocal intention to waive its rights to rely on the section 3 (1) 90 day defence, and agreed to accept responsibility from HMQ for the claimant's SABS claim. In my view the evidence is stronger to indicate that the only unequivocal position clearly stated by

Belair on January 27, 2010 was that it would not accept responsibility for the claimant's SABS claim because HMQ had failed to comply with section 3 (1) of Regulation 283/95.

Events which took place in the time between November, 5 and 6, 2009, and January 27, 2010 are also important to the point made in the preceding paragraph in respect of the waiver/estoppel issue. Claimant's counsel, Jeffrey Gray wrote to Belair on November 24, 2009[53]. In that letter Mr. Gray advised that he had left a telephone message for Mr. Buenavides on November 4, 2009 to which he had not received a reply. Mr. Gray goes on to indicate that if Belair did not immediately comply with various demands which would involve dealing with the claimant's SABS claim he would apply to FSCO for mediation of those claims.

Claimant's counsel wrote again to Belair on January 8, 2010[54]. He indicated that he had received no reply to his November 24, 2009 letter, and offered another opportunity to Belair to deal with his clients SABS claim.

In December, 2009, several Auto Insurance Standard Invoices (OCF 21) were sent by the claimant's treatment providers to Belair[55] seeking payment for treatment provided to the claimant.

Belair did not respond in any manner to either the letters from claimant's counsel, or the documents sent by the claimant's treatment providers. The first, and only official response to any of the overtures by HMQ, claimant's counsel, Jeffrey Gray, and the claimant's treatment providers seeking to have Belair assume responsibility for the

[53]Exhibit 7, Tab 18.
[54]Exhibit 7, Tab 20.
[55] Exhibit 7, Tabs 3 to 12.

claimant's SABS claim was Belair's January 27, 2010 letter denying responsibility for the claim.

Although the lack of timely response was not very courteous, and again speaks to deficiencies in Belair's claim handling procedures at the time, from the standpoint of the waiver/estoppel argument, apart from the November 6, 2009 form letter sent by Belair to the claimant, and the January 27, 2010 email written by Ms. Bedrossian, there is no evidence whatsoever to indicate that Belair demonstrated an unequivocal intention to waive its rights to rely upon the section 3 (1) 90 defence provided by Regulation 283/95.

I do not think the estoppel argument requires extensive discussion. The courts have said that waiver and estoppel are very closely related, with the main difference being that estoppel requires proof of detrimental reliance or alteration of position to the prejudice of the party asserting the estoppel.[56]

I come to the same conclusion on this issue as I have done on the issue of waiver. In my view, the evidence is insufficient to prove that Belair at any time gave an assurance to HMQ or its agents that it was not going to rely upon any of its rights under Regulation 283/93 to dispute priority, and that it was going to take over responsibility for the claimant SABS claim. Most significantly for the estoppel argument, even if some such assurance could be inferred from the evidence,there is no evidence to indicate that HMQ ever detrimentally relied upon such an assurance.

[56] See the June 24, 2009 unreported decision of Herman J., In*Motors Insurance Corporation* v. *Old Republic Insurance Company,* an appeal of the arbitration decision of Guy Jones, November, 2008.

HMQ clearly could not have refrained from serving its NDBI on Belair within 90 days based upon an assurance that Belair would not rely upon its rights under Regulation 283/95 becauseHMQ did not advert to the information it had about Belair being the insurer of Mr.Madirazzauntil September 8, 2009, the day before it served its NDBI.

Likewise, there is no evidence that HMQ altered its position or detrimentally relied upon any conduct by Belair after HMQ had served its September 9, 2009 NDBI. It had no communication at all with Belair between that time and January 27, 2010, the date Belair served its written response indicating that it intended to rely upon the 90 day time limit in section 3 (1). HMQ commenced this arbitration less than two weeks later, on February 10, 2010.[57]

I have already dealt with Ms. Bedrossian's January 27, 2010 email summarizing her recollection of her telephone discussion with Mr. Buenavides of Belair that day. Even if it could be construed as evidence that Belair gave an assurance it would not rely upon its Regulation 283/95 rights, HMQ would hardly have had time to alter its position to its prejudice, or detrimentally rely upon such an assurance when mere hours later Belair provided a written statement of its position that it was denying responsibility for the claimant's SABS claim based on the section 3 (1) 90 day time limit defence.

Considering all of the evidence, I conclude that Belair did not waive its rights to dispute priority under the terms of Regulation 283/95, nor is it estopped from doing so.

[57]Exhibit 6, Tab 13.

Conclusion

For the foregoing reasons I conclude that HMQ is the priority insurer, and is responsible for the payment of SABS to the claimant.

It remains for me to address the issue of costs. Ordinarily, in accordance with Regulation 283/95, and the *Arbitration Act*, costs are awarded to the successful party. In this case that would be Belair. The statutes and common law are clear however, that how, and whether costs are awarded are always in the discretion of the arbitrator.

I note that paragraph 6 of the arbitration agreement[58] confirms my discretion with respect to the awarding of costs, the amount which should be payable, if any, and by whom.

After careful consideration, I am of the opinion that this is an appropriate case for each party to bear its own costs of the arbitration, and share equally the fees and disbursements of the arbitrator.

I want to say the outset that counsel in this arbitration conducted themselves impeccably, presenting their cases skillfully, and with cogent, reasoned arguments over several hearing days. There is nothing about the conduct of counsel, or of the parties themselves in respect of these arbitration proceedings that has any bearing on my costs ruling.

I do not award costs to HMQ recoverable against Belair because it was not successful in seeking to transfer responsibility for the payment of SABS to the claimant

[58]Exhibit 8.

to Belair. It must take responsibility for its failure to satisfy the requirements of Regulation 283/95, section 3, as it existed at the time relevant to this arbitration.

I do not award costs to Belair recoverable against HMQ for a combination ofreasons. The most significant reason is that it is my view that Belair's failure to comply with very important provisions in section 258 of the *Insurance Act*in May, 2009 may well have impactedupon subsequent developments in respect of the claimant's SABS claim, and the interaction of the parties which ultimately led to HMQ bringing this arbitration.

As a matter of law, I was not satisfied that Belair's failure to follow the requirements of section 258 of the *Insurance Act* was sufficient on the facts of this case, and in the absence of any authority, to extend the law of deflection to find that Belair had deflected the claimant's SABS claim to HMQ. I am of the opinion however, that an appropriate sanction for Belair failing to follow the requirements of section 258 of the *Insurance* Act – which quite possibly influenced whether this arbitration would have been necessary, would be to not award it costsof these proceedings against HMQ.

I also consider that, but for HMQ's failure to serve its NDBI within the 90 day time limit prescribed by section 3 (1) of Regulation 283/95, there is no doubt that Belair would have been the priority insurer pursuant to section 268 of the *Insurance Act*, and liable to pay SABS to the claimant. Belair is not responsible for HMQ's lack of diligence.It is nevertheless the fortuitous beneficiary of a situation where HMQ is the priority insurer in a technical sense only, because HMQ is without a remedy to transfer to Belair responsibility for the payment of SABS to the claimant.

The courts have endorsed the principle that in determining costs the adjudicator should take into consideration what the unsuccessful party might reasonably expect to pay in the circumstances.[59] In this case one could see how awarding costs in favour of Belair might reasonably be viewed as unfair compensation in the sense that Belair's failure to comply with important provisions of the *Insurance Act* may have helped it avoid paying a claim for which it otherwise could have been responsible, and contributed to arbitration which may not have been necessary.

In my view, there is a high standard to be met for an adjudicator to be satisfied that the meritsof the evidence and the law in a case justify extending a legal principle. It requires compelling facts, and a solid indication that the law is trending in that direction. In deciding what is fair in terms of thecosts of litigating the merits of a case however,an adjudicator requires flexibility, and shouldfocus to a much greater extent on the equities of the matter. Taking everything into account I am of the opinion that awarding no costs to either party, and having them share equally the arbitrator's fees and disbursements is the correct result in this case.

Dated at Toronto, January 11, 2017

_____

Scott W. Densem, Arbitrator

[59] See *Ontario v. Rothmans*, O.J. No. 2367 (ONCA).