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:

UNIFUND ASSURANCE COMPANY

Applicant

and

TRAVELERS INSURANCE COMPANY OF CANADA/THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Respondent

AWARD

Heard: January 5, 2018

Counsel:

Derek Greenside, and Raman Pander for the Applicant

Sarah Scott for the Respondent

SCOTT W. DENSEM: ARBITRATOR

Introduction

This arbitration concerns an *Insurance Act* s. 268 priority dispute with respect to the payment of Statutory Accident Benefits ("SABS") to Annie Chen ("the claimant"). The claimant was born January 31, 2002. She was 14 years of age, and therefore a minor, when she was struck as a pedestrian by a vehicle insured by the applicant ("Unifund") on April 6, 2016. An application for SABS was submitted to Unifund and, in accordance with the priority dispute Regulation, 283/95 ("283/95"), Unifund commenced handling the claimant's SABS claim.

Unifund also commenced a priority investigation to determine whether there was any other insurer in higher priority to it which would be responsible for the payment of SABS to the claimant. As a result of its investigation, which will be discussed in detail in the Analysis section of this Award, Unifund determined that at the time of the accident the respondent ("Travelers") insured the claimant's mother, Xuelin (Shirley) Chen ("the claimant's mother") under a policy of motor vehicle liability insurance. Unifund served a Notice of Dispute between Insurers ("NDBI") on Travelers.

The parties agree that the claimant was a dependant of the claimant's mother at the time of the accident, and therefore an "insured person" under the Travelers policy issued to the claimant's mother.[1] The parties agree that the coverage under the Travelers policy would, subject to the determination of this preliminary issue, and whether in fact the Travelers policy did provide for SABS coverage at the material time,

[1] See *Insurance Act* Ont. Reg. 34/10 ("SABS Effective September 1, 2010), s. 3.

be higher priority SABS coverage than the coverage provided by the Unifund policy for the vehicle which struck the claimant.[2]

The parties agree, and the evidence confirms, that the SABS application submitted to Unifund was received by Unifund on May 10, 2016. By operation of subsection 3 (1) of 283/95, an insurer wishing to dispute its obligation to pay SABS must give written notice to another insurer who it claims is in higher priority within 90 days of the receipt of a completed SABS application. In this case, the parties agree, and the evidence confirms, that this 90 day period expired on August 8, 2016.

The parties agree, and the evidence confirms, that Unifund served its NDBI on Travelers on August 15, 2016, seven days beyond the 90 day time limit prescribed by subsection 3 (1) of 283/95.

The narrow preliminary issue to be decided at present is whether Unifund's NDBI served outside of the aforementioned 90 day time limit is valid. If Unifund's NDBI is valid, then Travelers may assume responsibility for the claim from Unifund, or, Travelers may elect to have the arbitration proceed on the issue of whether there was SABS coverage available under the Travelers policy at the time of the accident. If Unifund's NDBI is not valid, then subject to appeal, this will end the matter and Unifund will remain responsible for the payment of SABS to the claimant.

[2] SABS Coverage under *Insurance Act* subsection 268 (2) 2. i. takes priority over the coverage in subsection 268 (2) 2. ii.

The Issue

The main issue to be decided in the arbitration is which of Unifund and Travelers is the higher priority insurer responsible for the payment of SABS to the claimant?

Determining the priority issue in this case depends first on resolving the preliminary issue involving the potential application of the provisions in subsection 3 (2) of 283/95. This Award addresses that preliminary issue.

Subsection 3 (2) reads as follows:

> 3 (2) An insurer may give notice after the 90-day period if,
>
> > (a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and
> >
> > (b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

To validate its NDBI, Unifund has the onus of proving that both branches of the subsection 3 (2) test have been satisfied. In the context of this case then, Unifund must establish that 90 days was not sufficient to determine whether there was an insurer in higher priority to Unifund, and that between May 10, 2016, and August 8, 2016, Unifund made the reasonable investigations necessary to determine whether there was an insurer in higher priority to Unifund.

Evidence

The following documents were entered into evidence as exhibits at the arbitration hearing:

Exhibit 1: Brief of Documents (part of Unifund factum), tabs 1 – 12.

Exhibit 2: July 12, 2016 Letter from claimant's counsel to Unifund's counsel (part of Unifund's Reply).

Exhibit 3: August 2, 2016 Letter from Unifund's counsel to claimant's counsel.

Exhibit 4: Report on Examination under Oath of claimant Annie Chen (part of Travelers factum).

Exhibit 5: August 24, 2016 Letter from Travelers to Unifund (part of Travelers factum).

Maurice Baker testified on behalf of Unifund. Mr. Baker was the claims handler who was responsible for the claimant's SABS claim from the time that the OCF-1 was first submitted to Unifund, and throughout the 90 day priority investigation period.

Analysis

Unifund submits that its NDBI should be validated. Unifund argues that the evidence demonstrates that 90 days was not a sufficient time to determine Travelers was a priority insurer, and that Unifund conducted reasonable investigations necessary within the 90 day period to determine whether a priority insurer existed.

Unifund cites four factors which support its submission that 90 days was not a sufficient time to identify Travelers as a priority insurer.

The first factor relied upon by Unifund relates to the OCF-1 submitted on behalf of the claimant.[3] In part 4 of the OCF-1 the question is asked whether the claimant is covered under the automobile insurance policy of any person on whom the claimant is a dependent (e.g. a parent). The question may be answered by checking a box indicating “yes”, or by checking a box indicating “no”. In this case the box for “no” was checked. Unifund submits that this information was incorrect, and therefore misrepresented the insurance status of the claimant. The claimant, as it turned out, was potentially insured for SABS under the policy issued by Travelers to the claimant’s mother.

The second factor relied upon by Unifund is that the claimant’s counsel refused to allow a statement to be taken from the claimant.

The third factor relied upon by Unifund is the inaccuracy of the results of a Name Search for Driver’s License Number conducted by Unifund through the services of ISB Canada.[4] The results of this search returned to Unifund indicated “NO RECORD” of a driver’s license number for the claimant’s mother.

The fourth factor relied upon by Unifund is the delay or slow pace on the part of claimant’s counsel with respect to answering undertakings given on the examination under oath of the claimant.

All of these factors are advanced by Unifund in support of its submission that they combined to make the 90 days between May 10, 2016 and August 8, 2016 an insufficient amount of time to identify Travelers as the priority insurer, notwithstanding reasonable efforts on Unifund’s part during that time to investigate priority.

[3] Exhibit 1,Tab 1.
[4] Exhibit 1, Tab 5.

Travelers submits that the case law makes it clear that there is a high standard to be met by an insurer seeking subsection 3 (2) relief. Travelers emphasizes that the subsection 3 (2) case law has uniformly stated that insurers are “sophisticated litigants” who are very familiar with the time constraints involved in priority investigations, and with the kinds of impediments to those investigations which routinely occur – as they did here. Travelers submits that there was nothing exceptional about the difficulties encountered by Unifund in its priority investigation which would take it outside the ordinary course, and justify relief under subsection 3 (2).

Travelers submits that with a modicum of additional effort Unifund could have had the necessary information indicating that Travelers was a priority insurer sufficiently in advance of the expiry of the 90 day time limit to enable it to serve its NDBI within the 90 days.

The details concerning the priority investigation conducted by Unifund, and the reasons why the investigation was conducted as it was, are found partly in the evidence of Mr. Baker. I will review what I consider to be the essential aspects of Mr. Baker’s evidence now.

Mr. Baker was well trained in priority investigations. Specifically, he knew that upon receipt of an OCF-1, it was important to immediately start an investigation to determine whether there was an insurer standing in priority to Unifund. Although it was not clear that there was a specific company-wide diary system to record the beginning and the end of the 90 day time limit specified in section 3 (1), Mr. Baker’s evidence was clear that he was well aware of the 90 day time limit for priority investigations, would

"*put it in my calendar*", and governed himself accordingly through his handling of the matter. In cross examination he confirmed that he knew from the outset that the 90 day investigation time limit expired August 8, 2016.

Mr. Baker described his important initial priority considerations after receiving an OCF-1. One of the first steps to take is to determine whether the claimant is a named insured, or whether the obligation for Unifund to pay SABS arose on some other basis (e.g. a person struck by a Unifund insured vehicle, or perhaps as a passenger in a Unifund insured vehicle).

Mr. Baker would also determine whether the claimant was represented, and immediately try to arrange for a statement to be taken from the claimant.

Importantly for this case, in my view, Mr. Baker immediately noted two things from the OCF-1 submitted on behalf of the claimant. It indicated that the claimant had been struck by a Unifund insured vehicle, and that the claimant was 14 years old – therefore a minor. As he put it in his evidence, he was, "*automatically interested as to whether she had somebody caring for her*". By this he meant that he was cognizant of the issue as to whether the claimant was dependent for financial support or care on a parent or guardian who may have automobile insurance because he knew that such a policy would take priority over Unifund's coverage as the striking vehicle, pursuant to section 268 of the *Insurance Act*.

As Mr. Baker described, he knew he had to "*dig further*" on the question. He wanted to determine with whom the claimant resided, whether she was dependent upon her mother and/or father, and did the mother and/or father have automobile insurance?

Mr. Baker's first step was to seek a statement from the claimant. He knew from the SABS application that because the claimant was represented by the law firm, McLeish Orlando, he would require their permission and cooperation to obtain a statement from the claimant.

Mr. Baker testified that he instructed independent adjusters to contact claimant's counsel to seek permission to obtain a statement from the claimant. This evidence is confirmed in the Unifund Claims log notes for the interval May 19, 2016 and August 15, 2016.[5] Mr. Baker's evidence and the Unifund Claims log notes for May 19, 2016 indicate that his instructions to the independent adjusters were to obtain a statement specifically addressing the priority issue.

I note that the Unifund Claims log notes which are authored by Mr. Baker begin with the May 19, 2016 date and contain the reference, "*Rec'vd OCF-1*". This confirms that May 19, 2016 was the first date that Mr. Baker began handling this claim.

Mr. Baker's arbitration hearing testimony next dealt with the date of June 7, 2016. He testified that on that date he learned from the independent adjusters assigned to try to obtain a statement from the claimant that her counsel would not allow a statement. Consequently, he sought authority from his supervisor to assign counsel to conduct an examination under oath of the claimant. He stated that this authority was obtained on June 9, 2016. The Unifund file was copied and sent to be mailed to counsel with the instructions to arrange and conduct an examination under oath of the claimant.

[5] Exhibit 1, Tab 3 ("Unifund Claims log notes").

On June 20, 2016, Mr. Baker received word from counsel's office that the Unifund file had been received and efforts were underway to schedule an examination under oath of the claimant, as instructed.

Mr. Baker testified that on the same date he initiated a Name Search for Drivers License Number ("driver's license search") using the claimant's mother's name, and an address from OCF-6 documents which Unifund was using to remit payment for hospital expenses – 5000 Sheppard Avenue East. The driver's licence search itself was not available to made an exhibit. The Unifund Claims log notes for June 20, 2016 confirm that the search was made, and in any event I accept Mr. Baker's evidence that he commissioned the search. Mr. Baker testified that this driver's license search produced no result.

On June 29, 2016 Mr. Baker initiated a second driver's license search in the name of the claimant's mother using an address found in the police report – 201-5800 Sheppard Avenue East. The result of this search has been referred to earlier – Exhibit 1, Tab 5. It came back "no result" on June 30, 2016.

On June 29, 2016 Mr. Baker also learned that the examination under oath of the claimant by counsel was scheduled for July 6, 2016.

This essentially brought to a conclusion Mr. Baker's own priority investigation efforts. He testified that at this point he waited for the results of the examination under oath of the claimant which counsel was scheduled to conduct July 6, 2016.

Mr. Baker received counsel's report on the examination under oath of the claimant on July 14, 2016.[6] Mr. Baker testified that the information in counsel's report on the examination under oath confirmed to him that the claimant was principally dependent for support or care upon the claimant's mother. He was also aware that counsel had requested various undertakings of claimant's counsel with respect to automobile insurance available to the claimant's mother and was awaiting a response to those undertakings.

On August 12, 2016, Mr. Baker followed up with counsel to determine whether counsel had received information in response to the undertakings respecting potential automobile insurance for the claimant's mother. I will note here that by this time the 90 day priority investigation period had already expired (August 8, 2016).

On August 15, 2016, Mr. Baker received information from counsel confirming that the claimant's mother had a valid policy of automobile insurance with Travelers which was in effect on the date of the accident, and the policy number. On the same date Mr. Baker faxed Unifund's NDBI to Travelers.

Next I will briefly summarize the evidence of events after the matter was transferred to counsel by Mr. Baker. This relates to Unifund's fourth argument as to why 90 days was not a sufficient time within which to identify Travelers as the priority insurer – claimant's counsel's delay in answering undertakings.

The claimant's examination under oath took place on July 6, 2016. On July 8, 2016, Unifund's counsel faxed a letter to claimant's counsel detailing the undertakings

[6] Exhibit 4.

given on the claimant's examination under oath.[7] For the purposes of the issue to be resolved it is unnecessary for me to repeat here all of the undertakings requested. Suffice it to say that Unifund's counsel sought answers to the necessary questions which, when ultimately answered, disclosed the details of the Travelers policy.

The letter also stipulates that the undertaking requests were being made pursuant to section 33 (1) of the SABS. That is an important section so I will reproduce the relevant portions of it here in their entirety:

> 33 (1) A person applying for a benefit under the Regulation **shall within 10 business days after receiving a request from the insurer**[8] provide the following:
>
> 1. Any information reasonably required to assist the insurer in determining the person's entitlement to a benefit.
>
> 2. A statutory declaration as to the circumstances that gave rise to the application for a benefit…

On July 12, 2016, claimant's counsel faxed the responding letter[9] to Unifund's counsel stating in part as follows:

> I acknowledge your client's urgency in this matter. I can assure you that I am making best efforts to obtain the information and/or documents from our client and third parties and I will produce it to you as soon as I receive it.

No response having been received to the undertakings, Unifund's counsel wrote again to claimant's counsel on August 2, 2016.[10] This was a reminder letter that the undertakings had not yet been satisfied and time was of the essence.

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[7] Exhibit 1, Tab 6.
[8] Arbitrator's emphasis.
[9] Exhibit 2.

On August 4, 2016 claimant's counsel emailed[11] the automobile insurance broker for the claimant's mother asking for information and documents concerning the claimant's mother's automobile insurance at the time of the accident. The request showed a "RE" line which included what other evidence confirms is the Travelers policy number for the claimant's mother's policy. This fact, and the phrasing of the email leads me to draw the inference that by this point claimant's counsel had spoken with the claimant's mother about her automobile insurance probably with a view to satisfying the undertakings given on the claimant's examination under oath.

It would appear from claimant's counsel's August 4, 2016 email that claimant's counsel had been advised by the claimant's mother about the Traveler's policy and had been given the policy number. Claimant's counsel was following up with the broker because he may have been told that the claimant's mother believed that she had either cancelled or reduced her automobile coverage in February 2016, just before leaving for China to undertake employment, and that the coverage was reinstated in some manner when the claimant's mother returned from China following the claimant's accident.

The claimant's mother's broker responded the same day by email[12] attaching policy endorsements indicating coverage was "cancelled" effective February 29, 2016, and "reinstated" April 12, 2016.

Claimant's counsel faxed a letter[13] dated August 5, 2016 to Unifund's counsel answering the undertakings from the claimant's examination under oath. The facsimile

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[10] Exhibit 3.
[11] Exhibit 1, Tab 7.
[12] Exhibit 1, Tab 7.
[13] Exhibit 1, Tab 9.

stamp on the exhibit indicates that this letter was not received by Unifund's counsel until August 8, 2016 at 3:01 p.m. This of course was the last day in the 90 day priority investigation period and less than an hour from what under the Rules of Civil Procedure at least is considered to be the end of the business day for serving documents.[14]

In answer to undertakings concerning the existence of insurance coverage for the claimant's mother at the time of the accident claimant's counsel indicated that the claimant's mother had advised that she did not have insurance coverage at the time of the accident. Claimant's counsel nevertheless enclosed documents received from Travelers addressing the coverage changes to the claimant's mother's automobile policy.

On August 11, 2016 Unifund's counsel emailed a letter[15] to Mr. Baker at Unifund attaching the August 5, 2016 letter from claimant's counsel and the enclosures from Travelers. Unifund's counsel astutely recognized that based on recent legal authority at that time, notwithstanding the lack of coverage implied by claimant's counsel, Travelers policy may well have had SABS coverage available to the claimant on the date of the accident.

Unifund's counsel recommended to Mr. Baker that he immediately serve an NDBI on Travelers. On August 15, 2016, Mr. Baker served Unifund's NDBI on Travelers.[16]

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[14] Rule 3.01 (d) stipulates that documents served after 4:00 p.m. are deemed served the next business day.
[15] Exhibit 1,Tab 10.
[16] Exhibit 1, Tabs 11 and 12.

I will pause here to emphasize that I am not addressing in this Award the issue of whether the Travelers policy actually did provide SABS coverage to the claimant. That may or may not be an issue for another day in this arbitration.

There is no clear evidence that the apparent conclusion by claimant's counsel that the Travelers policy did not provide SABS coverage to the claimant at the time of the accident is responsible for some or all of the delay in giving a formal response to the undertakings requested by Unifund's counsel from the examination under oath of the claimant. In my view, trying to determine with any certainty in the absence of better evidence what claimant's counsel or the claimant herself may have believed about the status of her insurance coverage at the time of the accident is not only speculative, but of limited relevance to the subsection 3 (2) analysis.

The main focus of my analysis for the preliminary issue to be decided must be on action taken (or not taken) by Unifund, or on its behalf, in pursuing its priority investigation within the 90 day period. What other parties may or may not have done is but one factor to be considered, and only in the context as to how this may have affected Unifund's priority investigation. Unifund's main concern had to be first to identify any other automobile insurance policy which may have offered priority SABS coverage to the claimant, and then to place that insurer on notice of a priority dispute with an NDBI. Whether Unifund would ultimately be found to be correct in their priority argument was, as the case law has borne out, a secondary concern.

As will be seen, looking at what was done or not done in the time frame following the examination under oath and the undertakings given by claimant's counsel is not the

area where I have the greatest concern for Unifund's position. In my opinion, to a great extent the ability of Unifund's counsel to obtain a faster response than was made to undertakings given on the examination under oath of the claimant has significant practical limitations. I will return to this issue in my analysis of whether Unifund's priority investigation within the 90 day period was reasonable, and whether 90 days was a sufficient time to identify Travelers as a priority insurer.

It is appropriate here to review the law on what is required of an insurer in conducting a reasonable investigation within the 90 day period, and whether 90 days was a sufficient time within which to conduct that investigation.

It is trite but accurate to say that a decision whether a particular priority investigation is reasonable must be made in the context of the specific facts of each case. The case law has however, enunciated some general principles as guidelines for the interpretation of subsection 3 (2).

One of the earliest cases dealing with the subsection is *Kingsway General Insurance Company v. West Wawanosh Insurance Company*[17]

As I have indicated, because the factual context of the subsection 3 (2) decisions is important, I will try to briefly recite the relevant facts as found by the court for each case to which I refer.

In this case, the claimant was operating a transport truck insured by Kingsway when involved in an accident giving rise to his SABS claim. The claimant was insured by West Wawanosh for his own vehicle. The claim was presented to West Wawanosh

[17] [2001] O.J. No. 1115, (ONSC) ("*Kingsway v. West Wawanosh*").

who, after receiving legal advice that it should pay the claim, began doing so. West Wawanosh's legal advisers subsequently discovered some conflicting decisions suggesting that Kingsway had priority. West Wawanosh served Kingsway with an NDBI.

The arbitrator validated West Wawanosh's NDBI which was served outside the 90 day investigation time limit. The basis for his decision was that the law was unclear during this time as to which insurer ought to have priority so he found that 90 days was not a sufficient period of time for West Wawanosh to make a determination that Kingsway was a prior insurer.

The court overturned the arbitrator's decision finding that 90 days was insufficient time for West Wawanosh to make a priority decision in part because it had clearly done so within 90 days. The court found that the arbitrator had incorrectly read in to subsection 3 (2) the requirement that West Wawanosh be able to make the "correct" decision as to priority. It further held that if these types of decisions were always going to be reviewable on the basis that the law was unclear there may never be a time when such decisions were unreviewable.

The Superior Court appeal in the *Kingsway v. West Wawanosh* case was heard concurrently with an appeal of another arbitration decision. The court had this to say about the general approach which should be taken to the application of subsection 3 (2):

> I do not see any reason why the parties here should not be held to strict compliance with the requirements of the Regulation. In both of these appeals, we are dealing with three large insurance companies and a branch of the Provincial Government.

> It goes without saying that these parties are sophisticated and experienced participants in the insurance industry. They have available to them all of the advisors of the highest quality that they could need in order to determine their rights and obligations under the prevailing statutory regime. There is, therefore, no unfairness visited upon them by insisting on strict compliance with the notice requirements… Further, in cases involving disputes between insurers, strict compliance promotes certainty for the parties in terms of their handling of claims.[18]

The decision was appealed to the Court of Appeal and the trial decision was upheld.[19] The Court of Appeal specifically approved of the trial judge's approach and made these often quoted comments:

> The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.[20]

The *Kingsway v. West Wawanosh* decision is frequently cited in priority dispute and loss transfer cases, generally by the party asserting that strict compliance with a

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[18] At paragraph 22.
[19] 58 O.R. (3d) 251.
[20] At page 255.

particular part of the priority dispute regulation, or the *Insurance Act*, should be enforced.

Not surprisingly, other decision makers dealing with cases involving different fact scenarios have made use of the "*little room…for carving out judicial exceptions*" permitted by the Court of Appeal, and this has resulted in what might be seen as a softening of the rather absolute sounding pronouncement in *Kingsway v. West Wawanosh*.

In *Primmum Insurance Company v. Aviva Insurance Company of Canada*[21] the Ontario Superior Court dealt with the application of subsection 3 (1) and (2). In this case, the 17-year-old applicant was injured while an occupant of a stolen vehicle insured by Aviva. An application for SABS was submitted to Primmum on her behalf by her mother and her mother's common law spouse (stepfather) – Primmum's insured. Primmum was told that at the time of the accident the claimant resided with the claimant's mother and her common-law spouse. Primmum was aware that priority would be decided on the dependency issue. Primmum appointed an investigator to look into the dependency issue.

Within the 90 day investigation period, Primmum twice interviewed the claimant's mother and her common-law spouse, its insured, and asked questions relevant to the dependency issue. The claimant was also made available to be interviewed but was asked no questions by Primmum's investigator. The claimant's mother and Primmum's insured willingly cooperated and provided answers to the questions asked. Primmum

[21] 2005 CarswellOnt 7710 (ONSC).

accepted the information received as indicating that the claimant was dependent upon her mother, and the mother's common law spouse – Primmum's insured. Quite some time after the expiry of the 90 day investigation time limit, Primmum obtained further information calling into question the accuracy some of the information it had previously been given and upon which it had relied for its dependency conclusion. They also discovered that the questioning (or lack thereof) by their independent investigators of the claimant's mother, her common-law spouse, and the claimant on the dependency issue was less than adequate. Primmum changed its mind about accepting dependency and served Aviva with an NDBI.

In dealing with the section 3 (2) (a) adequacy of 90 days to investigate issue, the court agreed with Primmum's argument that in an appropriate case, a deliberate misrepresentation/withholding of information, or even an innocent misrepresentation/withholding of information by the insured vis-à-vis the insurer may show that the 90 day priority investigation time limit was insufficient in the circumstances; however, the court qualified the extent to which this circumstance should affect the analysis:

> …the principal issue is not whether the nondisclosure or misinformation provided to (the insurer) was the result of dishonesty or some other more innocent reason. Rather the only issue under s. 3 (2) is whether the receipt of the inaccurate information renders the 90-day period insufficient for the investigation of the particular case. It is for the insurer who seeks to rely on s. 3 (2) to demonstrate why, in the particular case, the

> nondisclosure or misrepresentation made the 90-day period inadequate.[22]

Although the court stated that in the appropriate case, an insurer which has been provided with inaccurate information by its insured may be able to establish that 90 days was not a sufficient time to make a determination that another insurer may be in priority, the court held that Primmum came far short of meeting the standard of proof on the facts of this case. On this point the court stated:

> The testimony of (Primmum's adjuster investigating priority) demonstrates that he conducted only a superficial investigation into the issue of dependency. He accepted the statements of the unsophisticated insureds because the living situation they described was "common" and "he had no reason to disbelieve them". The issue under section 3 (2) (a) is not whether the investigation was done properly within the 90 days. The issue is whether the investigation could be done properly within the 90 days. In this case, the 90 day period was more than enough time to conduct an investigation. (Primmum's) problem is that they did not do so.[23]

Given the court's decision on subsection 3 (2) (a), it was technically not necessary for the court to consider the 3 (2) (b) issue – did Primmum conduct the reasonable investigations necessary within the 90 day time limit? Nevertheless, the court did so and commented as follows:

> The determination of reasonableness in the context of section 3 (2) (b) is very much a fact driven process and must be determined on a case-by-case basis…In considering the adequacy of the investigation it is important to stress that section

[22] At paragraph 27.
[23] At paragraph 27.

> 3 (2) (b) requires that the investigation be "reasonable", not that it be perfect. This could not be otherwise since, when viewed through the often omniscient lens of hindsight, it would be the rare investigation that could not be improved upon. In making this assessment of reasonableness, it is appropriate to consider both what was done to investigate the claim as well as what was not done.[24]

The court went on to uphold the arbitrator's conclusion that Primmum's priority investigation was not reasonable. The Court agreed with the arbitrator's summary of the details relevant to the dependency issue which ought to have been asked of the claimant (who was not asked questions), as well as the claimant's mother, and her common-law spouse – Primmum's insured. Essentially, the Court concluded that Primmum's priority investigator failed to ask the claimant and her parents the appropriate questions to reasonably investigate the dependency issue.

In my opinion, the court's concluding comments are helpful in considering how to balance what I will term the strictness mandated by *Kingsway v. West Wawanosh* for the general approach to these cases, with the requirement to look at the specific facts of the case in determining how to fairly apply the provisions of section 3 (1), and (2):

> While the duty of utmost good faith means that the 90-day period in section 3 (2) (a) may not be sufficient for an investigation where an insurer has been misled as to material facts, it does not preclude a searching assessment of the investigation conducted by the insurer. To hold otherwise would render section 3 (2) (b) meaningless. This would substantially reduce the incentives for the (insurer) to conduct a thorough investigation and be contrary to the purpose of section 3 of the Regulation, i.e. to place "the

[24] At paragraph 30, and 31.

> burden on the insurer who intends to dispute its liability to take a more proactive approach to these issues." (Citation omitted) A thorough investigation is required precisely to detect non-disclosure or misrepresentation no matter what its cause…[25]

The last case to which I will refer – *Liberty Mutual Insurance Company v. Zürich Insurance Company*,[26] is a decision of Justice Perell of the Ontario Superior Court, on appeal from an arbitration decision of Arbitrator Guy Jones.

Both Arbitrator Jones's decision and the court's decision upholding it, provide a good summary of the principles to be followed in dealing with subsection 3 (1), and (2) cases.

The following facts of *Liberty v. Zürich* are also strikingly similar to the facts of the case before me. The SABS claimant was a 13-year-old boy who was struck by a vehicle insured by Liberty. The SABS application on behalf of the claimant indicated that he lived at 126 Northoldt Crescent (which was actually not the case at the time of the accident). Also incorrect was the assertion that there was no other insurance policy of any person on whom he was a dependent. The application indicated that the claimant could be contacted through the law firm representing him.

At first instance, arbitrator Jones outlined 19 different efforts made by Liberty after it received the SABS application to investigate priority, and that those efforts met the test of reasonableness under subsection 3 (2) (b). He found however, that Liberty had not proven that 90 days was an insufficient time to identify Zürich as a priority insurer. On appeal, it was agreed that Liberty had made reasonable efforts to

[25] At paragraph 33.
[26] (2007) CanLII 54080 (ONSC) ("*Liberty v. Zürich*").

investigate priority within the 90 day investigation time limit. The issue to be decided was the subsection 3 (2) (a) question as to whether 90 days was a sufficient period of time for Liberty to make the determination that Zürich was a priority insurer.

The court reviewed the principles established in the case law for section 3 (2) cases. Justice Perell made the following comments with respect to the application of section 3 (2):[27]

> …Section 3 (2) is to operate strictly, because an insurer is entitled to know at an early stage that it will be managing and be responsible for the payment of benefits…
>
> …Section 3 (2) is designed to immediately engage in the provision of benefits for the insured and to encourage the insurer who is providing the benefits to properly exercise due diligence to make a determination whether another insurer should be responsible to pay…
>
> …It is…desirable to interpret s. 3 (2) in such a way as to discourage insurers from issuing notices indiscriminately in the off chance that a priority insurer will be identified…
>
> …The insurer is required to make a reasonable investigation, but perfection is not required and there should be recognition that adjusters are extremely busy handling more than one complex matter at the same time…
>
> …The onus is on the party relying on the late notice provisions of s. 3 (2) to show that 90 days was not a sufficient time for the determination…

[27] At paragraphs 14, 15, 16, 17, 18, and 19.

> …The circumstances of each case must be examined to determine whether 90 days was not a sufficient time for the determination…

Specifically on the issue of how it is to be determined whether the insurer has satisfied the onus of proving that 90 days was not a sufficient time to identify another priority insurer, the court stated the following:[28]

> A review of the case law reveals…that something less than proving that a determination was impossible within 90 days will suffice to satisfy the onus…an insurer seeking to deliver a notice after 90 days must show both that it exercised due diligence and also that there was something in all of the circumstances that would justify requiring more than 90 days to make a determination about whether to issue a notice to a particular insurer…
>
> …what the insurer knew and did not know, what the insured did and did not do, and what the insurer could and could not do in the particular circumstances are all relevant factors to the determination of whether the insurer had sufficient time to make a determination that another insurer is obliged to pay the benefits...without intending to be exhaustive, Arbitrator Jones identified the completeness and accuracy of the application form, the cooperation provided by the interested parties, the number of potential insurers, and the press of other demands on the adjuster's time as relevant factors…
>
> …the identification with hindsight of an overlooked or unused possibility of finding the information within 90 days does not categorically preclude a longer period being justified…However, that said, it seems obvious that an insurer may have greater difficulty meeting the onus of justifying an extension when it did not employ obvious or readily available

[28] At paragraphs 23, 28, 32, and 33.

> means that had a reasonable likelihood of finding the information it needed, even when the insurer satisfies the onus of showing that it made reasonable inquiries.

The court then went on to apply these principles to the facts in *Liberty v. Zurich*.

Liberty received the claimant's SABS application July 25, 2001. The court noted that as part of its priority investigation, Liberty's efforts involved many communications or attempted communications with the claimant and his mother and with the lawyers who were representing them. Faced with a lack of cooperation, Liberty undertook surveillance of the address given for the claimant in the SABS application. They identified a vehicle parked at the address which was owned by a person believed to be the spouse or common-law spouse of the claimant's mother. Liberty performed a search to confirm the ownership and insurance of this vehicle, and served an NDBI on its insurer (Lloyds) based on the possibility that the claimant could have coverage under that policy. This turned out not to be the case however, because the owner of the vehicle was the father of the person living with the claimant's mother.

With respect to the dealings between Liberty, the claimant, the claimant's mother, and the claimant's lawyers, he noted that Arbitrator Jones was satisfied that not only were they not cooperating, but that the claimant's mother intentionally misled Liberty on matters relating to the claimant's living arrangements. While pointing out that the case law has indicated the real question is not whether there was innocent or deliberate misrepresentation – but rather the extent of the impact of inaccurate information on the insurer's ability to identify a priority insurer within the 90 day investigative time limit,

Justice Perell clearly accepts Arbitrator Jones's findings with respect to non-cooperation. He states:

> During the time that Liberty was focusing its investigations on 126 Northolt, Steven's mother and Steven's lawyers were non-cooperative or not making themselves available to provide the information that Liberty was seeking about other possible insurers.[29]

After the relevant time period had passed it became known that the claimant had been living with his father at the time of the accident at 81 Baylawn Drive. It was further determined that when the accident occurred the claimant's father was away on a trip to China. It appears that the father's sister, the claimant's aunt, lived at the same address and was taking care of the claimant while his father was away. It was also determined that while Liberty was focusing its investigative efforts on the 126 Northolt address, the claimant's father returned from China and resumed living at the 81 Baylawn Drive address where he regularly parked his vehicle.

Although this detailed information was not known to Liberty during its investigation, Arbitrator Jones' decision hinged on the fact that on August 22, 2001, approximately two months before the expiry of the 90 day investigation time limit, Liberty received a copy of the police accident report which showed what turned out to be the father's address of 81 Baylawn Drive as being the claimant's address. Liberty asked the claimant's lawyers for an explanation of this different address on the police report from what was on the SABS application. No reply was received from the claimant's lawyers.

[29] At paragraph 42.

It was not until early October, 2001, that Liberty retained an investigator to interview the police officer who investigated the accident about how he came to use the 81 Baylawn Drive address for the claimant on his accident report. Through this means they were able to connect this address with the claimant's father. On November 1, 2001 – which would have been shortly past the expiry of the 90 day investigative time limit, the investigator attended at 81 Baylawn Drive, and recorded the license plate number of a vehicle parked there. An ownership and insurance search revealed that the vehicle was owned by the claimant's father, and insured by Zürich. Unfortunately for Liberty, this information was not confirmed, and their NDBI served on Zurich, until approximately two weeks after the expiry of the 90 day investigation time limit.

The court quoted extensively from the reasons of Arbitrator Jones in upholding his decision. I will not recite all of those reasons here, but I think it is important for this case to note some of Arbitrator Jones' comments, as well as the court's assessment of those comments:

> …we are met with the situation where there were extenuating circumstances. The question is, whether they were such that the saving provisions should apply. There is no doubt that with the benefit of hindsight, the information should have been obtained within the 90 days by the use of fairly basic investigative techniques. The police accident report was in Liberty's possession by late August 2001 and it gave an address which if followed up on would have provided the necessary information. Having said that, Liberty, as noted above, made numerous other efforts to attempt to determine where the father was and, what other insurance was available, etc. there was a great deal of documentation pointing to another address and Liberty was undoubtedly somewhat misled, intentionally or otherwise, by the

> claimant's mother. In addition it received, at best, minimal cooperation from the claimant's solicitor.
>
> This was not a situation where Liberty sat back and did nothing…Despite all their efforts, Liberty should have, in my view, have at least followed up with the police officer as to why the Baylawn address was on the report. Had they done so, it would have led them to the father and ultimately to Zürich. This could have been done within 90 days of reviewing the completed Application for Accident Benefits…

With respect to this analysis of Arbitrator Jones, the court stated:

> … Arbitrator Jones made no error in this analysis…he did give effect to the extenuating circumstances identified by Liberty, but he concluded, correctly in my view, that notwithstanding the circumstances and notwithstanding that the investigations that Liberty undertook were reasonable it had not shown that 90 days was not sufficient.
>
> Liberty was asking the right questions and was pursuing information about who might have a blood or dependency relationship with (the claimant). It was not impossible for Liberty to find out about (the claimant's) natural father within 90 days…Arbitrator Jones was correct in concluding that Liberty did not show that in all the circumstances, including the difficulties that Liberty was confronting because of the confusing names, multiple addresses, this information and competing demands of work that 90 days was insufficient to make a determination.

Keeping in mind these principles which I have outlined from the case law, I will now apply the law to the facts of this case.

For the reasons which follow, I conclude that Unifund has not satisfied their onus of proving either that it conducted a reasonable investigation within the 90 day

investigative time limit, or that 90 days was not a sufficient time within which to identify Travelers as a priority insurer.

The evidence indicates that Unifund received the claimant's SABS application on May 10, 2016. There was a delay of approximately nine days which is unexplained in the evidence before Mr. Baker notes that he had received the OCF 1 and began handling the SABS claim. The Unifund Claims log notes authored by Mr. Baker do not begin until May 19, 2016.

The evidence also makes clear that from the moment Mr. Baker reviewed the claimant's SABS application he was alive to the dependency issue, and the need to immediately commence an investigation to determine whether the minor claimant had priority SABS coverage through an automobile policy issued to a parent or guardian. I heard no testimony from Mr. Baker, nor is there any indication in the documentary exhibits, which would support an argument that Unifund was misled into not investigating priority, or delayed its investigation because it relied upon the assertion in the SABS application that the claimant had no other insurance available to her. To the contrary, as an experienced claims handler Mr. Baker testified that he knew immediately that the priority issue required investigation given that a dependency situation was evident from the SABS application itself.

The SABS application itself provided some important information for the investigation which was not proactively acted upon by Unifund for priority investigative purposes.

The SABS application disclosed that the claimant was a minor. It provided the claimant's address – "*4112 – 33 Bay Street*". It provided the identity of the claimant's Substitute Decision-Maker – "*Xuelin Chen (Shirley)*", who, as it turns out, was the claimant's mother. It provided the identity and contact information for the claimant's representative – Dale Orlando. If it had been necessary, a simple Internet search, or telephone call would have revealed that the claimant was represented by the law firm McLeish Orlando.

The Unifund Claims log notes[30] confirm that Unifund was also in possession of the police report on May 19, 2016. In one of his entries for that date Mr. Baker mentions that the address given for the claimant on the police report is 5800 Sheppard Avenue East in Scarborough.

When the SABS application was first considered on May 19, 2016, Unifund opted to undertake the one investigative step for which there is no specific authorization in the SABS – it sought to obtain a statement from the claimant. Unifund did not contact the claimant's representative directly, instead it retained an independent adjuster with instructions to contact the claimant's representative seeking permission to obtain a statement from the claimant.

While lack of direct contact for this specific purpose is not crucial, it certainly delayed the investigation and, as will be seen, it is my opinion that the lack of any attempt by Unifund to make direct contact with the claimant's representative from the outset to address priority issues is fatal to Unifund's position in this priority dispute.

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[30] Exhibit 1, Tab 3.

As the evidence indicates, a statement from the claimant was ultimately refused by the claimant's representative – a position perfectly within the rights of the claimant's representative to take pursuant to the SABS.

The next step which could be described as a priority investigation by Unifund was to assign counsel for the purposes of requesting an examination under oath of the claimant. This is permitted by Regulation 283/95, section 6. 2. The file and the instructions to conduct the examination were not in the hands of counsel until approximately June 20, 2016.

Although this is a reasonable, and generally effective step in priority investigation, it was not taken until close to six weeks after the SABS application had been received by Unifund, and without any other priority investigation having been done to that point other than a statement request which was appropriately refused.

In my opinion, Unifund failed to make timely and appropriate use of what is perhaps its most important tool for priority investigation purposes – the rights it has under section 33 of the SABS to obtain from the claimant or the claimant's representatives, "*any information reasonably required to assist the insurer in determining the person's entitlement to a benefit*". The section uses mandatory language requiring the claimant to provide this information within 10 days of the insurer's request.

I would note as well that Regulation 283/95, section 6 requires the insured person to provide the insurers with "*all relevant information needed to determine who is required to pay benefits under section 268 of (the Insurance Act).*

With the authority of these sections in the SABS and the priority dispute regulation, Unifund could have, and should have immediately – as early as May 19, 2016, made a written request to the claimant's legal representative to provide information sufficiently similar to the undertaking requests ultimately made by counsel on the July 6, 2016 examination under oath. Technically, this could even have been done verbally, in a telephone call for example – although it is certainly better practice to pursue these matters in writing.

In addition, as a "back up" to specific questions concerning the availability of insurance, Unifund could have asked for information which would have facilitated its own searches to verify whether the claimant's Substitute Decision-Maker had a policy of insurance. Some examples of questions which should have been asked include confirmation of the identity of the claimant's guardian, her address, her driver's license number – if any, details of vehicles owned by her or her spouse – if any, the licence plate(s) and/or vehicle identification number(s), and her date of birth. Those particulars alone would have readily facilitated a proper driver's license search and revealed the existence of the Travelers policy.

In this connection I note that one of the pieces of information obtained on the subsequent examination under oath of the claimant was that her mother owned a Mercedes automobile at the time of the accident. This is the kind of information that could have been pursued much more vigorously at an early stage.

For a case such as this when dependency on a parent or guardian is clearly in issue – or even for any case where priority issues may be indicated, I expect that it

would be possible for a major insurer like Unifund to develop a standard form letter setting out appropriate priority questions, and reciting the applicable sections of the Regulations confirming it is mandatory the information be provided within 10 days (in the case of section 33 of the SABS), which could be sent to the claimant/claimant's representative immediately upon receipt of the SABS application. This would certainly ease the burden on the front-line claims handlers who, as I and other adjudicators have recognized, are the people who have to deal with the impact of our hindsight analysis on their priority investigations.

Unifund should also have attempted to clarify, at the earliest opportunity, the significance of the 4112 – 33 Bay Street address on the SABS application, given the different Sheppard Avenue addresses it was aware of from the police report and the OCF-6 documents. This is especially important when considering the driver's licence searches as a tool for priority investigation. I will return to this matter shortly.

The point is, Unifund did not have to request a statement to properly seek this information, or defer any further investigation by sending the matter to counsel to request and conduct an examination under oath. While the tool of an examination under oath by counsel is certainly a reasonable, and reliable investigative procedure, it should not become a substitute for proactive priority investigation by the insurer itself. In my view, the examination under oath should be viewed more as one alternative to consider in a situation where the insurer is faced with a claimant or claimant's representative who refuses or declines to comply with its regulatory obligations to provide information the insurer has already properly requested.

In this case, the priority investigation questions I have outlined above could have quite properly been asked of the claimant's representative by direct contact. In my view, the evidence of the manner of dealings Unifund and its counsel had with the claimant's representative in this case make it reasonably likely that the questions would have been sufficiently answered much earlier so that Travelers would have been identified as the priority insurer.

The other priority investigation tool that was overlooked by Unifund, and which may well have resulted in Unifund obtaining the necessary information to identify Travelers as a priority insurer, is the Statutory Declaration. Subsection 33. 2. of the SABS regulation requires a person applying for a benefit to, if requested by the insurer, provide a Statutory Declaration, "*as to the circumstances that gave rise to the application for a benefit".* This is mandatory within 10 days of the request.

I will comment on this in conjunction with addressing another of Unifund's arguments – the alleged lack of cooperation on the part of the claimant's representative with respect to the priority investigation. Mr. Baker, in his evidence, described the situation by saying that it was his impression the claimant's representative would get back to him, "*when they felt like it*", or in a "*leisurely*" way. I do not accept that the evidence establishes that the claimant's representative was uncooperative, and that lack of cooperation made 90 days an insufficient amount of time for Unifund to identify Travelers as a priority insurer.

No request of the claimant's representative for specific information relevant to the priority issue was made by Unifund until the request by Unifund's investigators that the

claimant provide a statement. Further, there is no evidence that it was indicated to the claimant's representative that the statement requested was for the purposes of obtaining information relevant to the priority issue. My impression from the evidence is that there was a request that the minor claimant be produced for an in person meeting with the investigator at which meeting a statement would be taken by the investigator.

The response given by the claimant's representative to the request for a statement is, in my opinion, very important. Contrary to the suggestion that the refusal to provide a statement evidenced unwillingness to cooperate, the claimant's representative stated that they would not consent to an in-person statement, but voluntarily offered to provide what the SABS entitled the insurer to obtain – a Statutory Declaration.

Mr. Baker did not mention this in his testimony (I say this not suggest to Mr. Baker was not forthright in his evidence, he was not asked about it), but his note of June 7, 2016 concerning his conversation with the independent adjuster assigned to take the claimant's statement and the subsequent report from the independent adjuster[31] clearly indicate that the claimant's representative advised he would willingly have "*their client*" complete a Statutory Declaration instead of giving an in-person statement. Unlike *Liberty v. Zurich*, where the claimant's representatives and counsel either deliberately misled or did not respond to requests for information, my impression from the evidence in this case is that the claimant's representative was always responsive, and quite prepared to cooperate and provide information within the requirements of the SABS –

[31] Exhibit 1,Tab 4.

even volunteering to provide the information in an approved SABS form without having been specifically asked to do so.

I should like to pause in my analysis here and emphasize that it is not my intention to be unnecessarily critical of Mr. Baker's personal handling of the matter. As a general assessment, I found Mr. Baker to be professional, and knowledgeable, as well as a credible witness. I echo the comments which have been made by judges and arbitrators in other cases recognizing the pressures and difficulties faced by insurance claims handlers dealing with many claims at once. Just handling the SABS claim itself can be complicated enough, let alone when the time constraints of priority investigation are added to the mix, although I have to say that no evidence was led about such problems having a specific affect on Unifund's priority investigation in this case.

Having said that, I have to be mindful that our Court of Appeal has emphasized that in the context of applying 3 (2), insurers must be treated as "sophisticated litigants", with the best advisors available to them to supplement their own, special expertise. As arbitrator it is incumbent upon me to conduct, as Justice Ducharme put it in *Primmum v. Aviva*, "*a searching assessment*" of what was done and what was not done by the insurer to properly apply the provisions of section 3 (2).

A searching assessment of the evidence in this case simply does not support Mr. Baker's impression of lack of cooperation on the part of the claimant's representative. The claimant's representative was not asked for any information on the priority issue directly by Mr. Baker so there was nothing for them to be uncooperative about. I have already pointed out that the request for a statement was something that the claimant's

representative was perfectly within his rights to refuse based on the SABS, and even then, he voluntarily offered to provide what the SABS do require, if requested – a Statutory Declaration. This offer appears to have been overlooked or ignored.

The early entries in the Unifund Claims log notes indicate to me that Mr. Baker did have some telephone contact with the claimant's representatives. A fair reading of those entries indicate that the claimant's representatives were willingly providing responses and information to the kinds of questions they were being asked by Mr. Baker. They do not appear to have been asked any specific questions which would have clarified the insurance priority situation.

Later, when asked by counsel to schedule an examination under oath, there is no evidence to suggest there was any undue delay by the claimant's representative in complying with the request.

There was some delay in claimant's counsel satisfying the undertakings given on the July 6, 2016 examination under oath. They were not answered within 10 days. I do not view this to be evidence of non-cooperation. The tone of the dealings between Unifund's counsel and claimant's counsel was courteous, and professional throughout. After receiving the July 8, 2016 letter confirming the undertakings from Unifund's counsel, claimant's counsel's July 12, 2016 reply (see *infra,* p. 12) confirmed that claimant's counsel was aware of the need to provide answers as quickly as possible and confirmed that he was trying to do so.

Perhaps relying on this assurance, Unifund's counsel did not follow up on the undertakings until very close to the expiry of the 90 day investigation time limit. I do not

say this in a critical way because again, there was no indication in the manner of claimant's counsel's dealings which would have suggested there should be concern about the degree to which Unifund would receive cooperation with the inquiries.

To address a point I alluded to earlier, even if claimant's counsel had refused to give the necessary undertakings or was plainly obstructionist or indifferent about attempting to satisfy them, the only option open to Unifund's counsel would have been to bring a motion and seek a court order compelling answers or the satisfaction of undertakings. From experience, being familiar with the over-burdened operation of the courts, the chances of such a motion even being scheduled for a date within the remaining period of the 90 days investigation time limit would have been virtually zero.

It may be that in the appropriate case this is the kind of step that would be necessary so that even if a motion could not be heard within the remainder of the 90 days, an insurer in the position of Unifund would be able to demonstrate that lack of cooperation on the part of a claimant's representative made it impossible to obtain the priority information within 90 days.

That is not the situation in this case so the resolution of this theoretical scenario will have to be decided another day. Here, the problem with Unifund's priority investigation occurred well before the matter was even referred to counsel. I do not see anything happening after the arrangement and completion of the examination under oath as really having any significant bearing on the 3 (2) issues.

In my view, not immediately accepting the offer by the claimant's representative to provide a Statutory Declaration (or not making the request itself) from either the

claimant or the claimant's mother was another missed opportunity by Unifund to try to obtain useful priority information at an early stage. As has been discussed it was obvious from the outset that the claimant was a minor. The SABS application was signed on the minor's behalf by her Substitute Decision-Maker. Clearly the claimant's representative would have been taking instructions from an adult, in all likelihood the Substitute Decision-Maker, and may well have agreed to provide a Statutory Declaration from her.

The Unifund Claims log notes for a few days earlier on June 2, 2016 confirm that on that date Mr. Baker spoke with someone (possibly a law clerk) in the employ of the claimant's representative. He was following up on expenses which had been submitted identifying "Mona" as the person the claimant lived with. He wanted to know who Mona was. He was advised by the claimant's representative that the claimant lived with Mona who was taking care of her. Most significantly however, his note discloses that he was told the following, "***Her mother Shirley Chen lives in China and flew in to take care of her daughter*** *however they still ask for visitors expense for Mona as well as the mother does not speak English and Mona travels with her to see (the claimant)."*

Therefore, by the time Unifund was advised that the claimant's representative would willingly provide a statutory declaration from "his client", but not a statement, Unifund already knew that the claimant's Substitute Decision-Maker was the claimant's mother. In my opinion, It would have been reasonable, and certainly proactive priority investigation, for Unifund to request that the claimant's mother and Substitute Decision-Maker provide the Statutory Declaration offered by the claimant's representative.

At the arbitration hearing the question of whether Unifund was entitled as a matter of law under 283/95 to request that the claimant's mother be examined under oath was addressed in submissions. Unifund's counsel argued that section 6 of 283/95 provides only for an examination of the "insured person". He submitted that this would restrict the right of the insurer to examine only the claimant, even though she was a minor, in a case like this. Neither counsel nor I were aware of any authorities on point.

The language of section 33 of the SABS is arguably broader in that it permits the insurer to obtain information from, or request a Statutory Declaration from "*a person applying for a benefit*". Certainly a Substitute Decision-Maker is effectively applying for benefits, albeit on behalf of the nominal claimant. I am not aware of any decisions interpreting this wording to allow an insurer to obtain information from, or request a Statutory Declaration from a Substitute Decision-Maker, nor am I aware of any decisions which have disallowed such requests based on the section 33 wording.

In my view, it definitely makes both legal and practical sense to permit an insurer to request information, or a Statutory Declaration from, and even examine under oath the Substitute Decision-Maker. The Substitute Decision-Maker assumes that role to act in the best interests of a minor or a person under disability. The Substitute Decision-maker signs and submits the SABS application on behalf of the minor or person under disability.

It seems reasonable from a statutory interpretation point of view because it would give effect to the purpose of the relevant parts of the regulation – to facilitate the insurer

effectively obtaining information relevant to the claimant's SABS claim which would include priority information.

It would also make sense from a practical standpoint. The Substitute Decision-Maker has assumed that role to provide effective assistance to a minor or person under disability in pursuing a SABS claim. Logically, the Substitute Decision-Maker would be the most appropriate person from whom relevant information in connection with the claim should be sought. The obvious common sense of interpreting the Regulations this way is demonstrated by the situation where the claimant is a minor so young, or a person under a disability so disabled, that they were incapable of providing information, a Statutory Declaration, or being examined under oath.

Although not binding on SABS matters, I note that the Rules of Civil Procedure governing court actions provide for the examination of litigation guardians in place of minors or parties under disability where an action is brought by or against such persons[32]

To return to the point regarding Unifund's priority investigation, the SABS do not require the claimant to give a statement. Therefore, in my view, the refusal to do so cannot amount to "non-cooperation" sufficient to render 90 days an insufficient time to identify another, priority insurer. In any event, the evidence indicates that the claimant's representatives cooperated throughout with Unifund and its counsel in this case. When the request was made for an examination under oath – the only proper SABS investigative step for which the claimant's representative's cooperation was requested,

[32] See, for example, Rule 31.03 (5).

they readily complied. The problem is that too many reasonable investigative steps had already not been pursued, and it was becoming late in the day when the step was taken to seek an examination under oath through counsel – especially without any other effective priority investigation having been undertaken.

To summarize on this point, considering the issue from the perspective of whether Unifund pursued a thorough and timely priority investigation, I consider it to be a fatal flaw in the investigation that Unifund itself did not even make a request to have the claimant's mother provide information either directly in the form of a Statutory Declaration, or indirectly, based on questions asked through the claimant's representative under the authority of SABS section 33, or 283/95 section 6. As the ultimate results of the claimant's mother's examination under oath demonstrate, had these other investigative tools been pursued much earlier it is reasonably likely that Travelers would have been identified as a priority insurer within the 90 day time limit.

In addition to this primary criticism of Unifund's priority investigation outlined above, I believe there were other means to investigate priority which although Unifund did undertake them, it did so ineffectively, and not in a timely way. By this I am referring to the driver's license searches.

Unifund advances the argument that one of the reasons why 90 days was not a sufficient time to identify Travelers as a priority insurer is that the driver's license searches it conducted returned no result. In my opinion, this argument does not advance Unifund's position. The driver's license searches conducted were submitted without adequate information to make it likely that a positive result would be obtained.

Although Mr. Baker testified that such a search can be done with a simple name and address, he conceded that it is obviously better to do such a search with additional information such as a date of birth and/or driver's license number. Unifund could not have included this information when they submitted their searches because they did not have it. They did not have it because they had not taken any proper steps to try to obtain the information. They also did not conduct a driver's license search using the one address they had from the outset which may well have been more likely to produce a positive result.

The SABS application provided the 4112 – 33 Bay Street address for the claimant. It was not until June 20, 2016, approximately one month after Mr. Baker commenced his handling of the file, and about five weeks after the SABS application had been received by Unifund that the first driver's licence was attempted to try to determine driver's license information for the claimant's mother. Unifund had known since June 2, 2016 that Xuelin (Shirley) Chen, the claimant's Substitute Decision-Maker identified in the SABS application was the claimant's mother. Despite have the above-noted information, the address used for the first search was taken from an OCF-6 expense submission.

The second driver's license search conducted close to six weeks after the SABS application was first received used the police report address. I also note from this search which is Exhibit 1, Tab 5 that the description "East" was not included with reference to Sheppard Avenue. Residents of Toronto will know that Sheppard Avenue addresses are designated as "East", or "West", from the dividing point being Yonge Street. The evidence does not disclose whether including "East" in the address would

have made any difference. I cannot help but observe however, that it is unlikely to have increased the chances of a successful result.

There does not appear to have been any attempt to conduct a driver's license search using the address given as the claimant's residence in the SABS application. In my opinion it would have been part of a reasonable investigation to conduct a driver's license search on Xuelin (Shirley) Chen using the address given for the claimant in the SABS application which was signed by her as the Substitute Decision-Maker, who was known to be the claimant's mother as early as June 2, 2016. It would have been a reasonable inference – at least for the purposes of undertaking a search, that the claimant resided with her Substitute Decision-Maker. More importantly, there was a reasonable likelihood that the address in the SABS application may have been the same address used by Xuelin (Shirley) Chen for licensing and insurance purposes.

I do not have any evidence before me upon which I could definitively find that had a driver's license search of the claimant's mother been conducted using the 4112 – 33 Bay Street address which was in the SABS application it would have confirmed Travelers as the claimant's mother's insurer, or at least led to sufficient information being obtained that this could have been confirmed by a further search for insurance particulars.

The test to be considered for the purposes of considering 3 (2) issues however, is not certainty. Just like an insurer seeking to prove that 90 days was not a sufficient time to identify another priority insurer does not have to establish to the level of impossibility that it could not have done so within 90 days, the reverse is true. The

evidence does not have to establish with certainty that had particular priority investigation efforts been undertaken a priority insurer would without doubt have been discovered with 90 days. It only has to be “reasonably likely” that had the investigation efforts been undertaken the priority insurer would have been discovered within 90 days.

As a basis for my conclusion that a reasonable investigation of priority ought to have included a driver’s licence search for the claimant’s mother’s name using at the very least the 4112 - Bay Street address, and that it had a reasonable likelihood of success, I note that the Travelers insurance documents found at Exhibit 1, Tab 9 confirm the address of their insured – Xuelin Chen (the claimant’s mother) as 4112 – 33 Bay Street, the same address given for the claimant on the SABS application. It is a reasonable inference from this that the 4112 – 33 Bay Street address was the address used by the claimant’s mother for licencing and insurance purposes, and that a search using that address would have confirmed same.

Unifund should have pursued these avenues of investigation to conduct a reasonable priority investigation. Had it done so, in my opinion, it is reasonably likely that 90 days would have been a sufficient amount of time for Unifund to identify Travelers as a priority insurer.

The examination under oath of the claimant was conducted on July 6, 2016. The necessary information was requested at that time which resulted in Unifund’s counsel having in its possession on August 8, 2016, at a time narrowly within the 90 day investigation time limit, the details it needed to identify Travelers as the priority insurer.

I stress that my findings on the section 3 (2) issues are not founded on Unifund's counsel having received this information approximately one hour before the expiry of the 90 day investigation time limit, and a conclusion that they could or should have arranged for the issuance of an NDBI before the expiry of the 90 day investigation time limit.

It would have been purely fortuitous, rather than a reasonable expectation, that Unifund's counsel would have been able to instantly act upon the receipt of this information and arrange for the issuance of an NDBI in less than an hour on August 8, 2016.

Where these timing facts do become relevant however is in determining the reasonable likelihood that had the inquiries I have outlined been commenced as they should have been, approximately concurrently with the receipt by Unifund of the SABS application, Travelers would likely have been identified as the priority insurer.

The evidence indicates that the identification of Travelers as the priority insurer was accomplished within approximately one month after the examination under oath - the first, effective priority investigation step taken. This did not take place until almost 2 months after the SABS application was first received. In my opinion, considering all of the evidence, it is a reasonable conclusion to draw that had the necessary priority inquiries commenced when Unifund received the claimant's SABS application on May 10, 2016, it is reasonably likely that 90 days, or approximately three months, would have provided more than sufficient time to identify Travelers as the priority insurer.

Conclusion

To summarize, I would characterize this case as one where, in the words of Justice Perell in *Liberty v. Zurich*, in investigating priority Unifund "…*did not employ obvious or readily available means that had a reasonable likelihood of finding the information it needed*…", and therefore it has been unable to meet its onus of proving that the requirements of section 3 (2) (a) and (b) have been met to validate its NBDI against Travelers.

This is not a situation like Arbitrator Samis referenced in *State Farm Insurance v. ACE-INA*[33] where what I have found Unifund should have done amounts to, "*hypothesiz(ing) some theoretical line of investigation or inquiry that, if made at the right time and to the right person, would have revealed the necessary information for the priority dispute.*"[34]

The means available to Unifund to investigate priority were "*fairly basic investigative techniques*"[35]. They required nothing more than written (or even verbal) requests exercising rights enshrined in the SABS and priority dispute Regulations, or searches with proper information which are recognized as standard throughout the insurance industry.

For the purpose of emphasizing the exceptional standard of proof required to satisfy the section 3 (2) tests, I would point out that Unifund's priority investigation in this case did not come close to approaching what Liberty conducted as described in *Liberty*

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[33] Arbitration Award August 22, 2011.
[34] At page 8.
[35] Arbitrator Jones in *Liberty v. Zurich*, as quoted at paragraph 51, *supra*, footnote 25.

v. Zurich. Unifund was also not met with anything like the resistance Liberty confronted in that case from the claimant's representatives. Indeed, in this case, I have found that the claimant's representative was cooperative when asked, and even volunteered assistance. Notwithstanding extensive priority investigative efforts, Liberty was still unable to satisfy the requirements in 3 (2) (a), even though it had satisfied the reasonable investigation requirements of 3 (2) (b).

On the preliminary issue, I find that the NDBI served by Unifund on Travelers is not valid because it was not served within 90 days as required by subsection 3 (1), and Unifund has not met its onus of proof to validate the NDBI pursuant to subsections 3 (2) (a) and (b).

I invite the parties to contact me to discuss whether further arbitration proceedings will be necessary, and if so, the timing for such proceedings.

As the successful party, Travelers is entitled to its costs with respect to the arbitration to date, and specifically with regard to the preliminary issue.

I would hope that the parties could agree on costs, but should they require my involvement in dealing with any costs issues, please contact my Coordinator to arrange a telephone conference to discuss them.

Dated at Toronto, March 29, 2018

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Scott W. Densem, Arbitrator