

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:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

and

ROYAL & SUNALLIANCE INSURANCE COMPANY

Respondent

AWARD

Heard: January 30, 2013

Counsel:

Daniel Strigberger for the Applicant, Economical Mutual Insurance Company

Derek Greenside for the Respondent, Royal & SunAlliance Insurance Company

SCOTT W. DENSEM: ARBITRATOR

Introduction

The parties retained me to arbitrate a priority dispute concerning which of the applicant or the respondent has the highest priority to pay Statutory Accident Benefits ("SABS") to Tina Bigas, the spouse of David Bigas. Tina Bigas was injured in an accident occurring on January 7, 2009. At the time of his wife's accident, David Bigas was the named insured on automobile insurance policy number 3257276 ("the policy") issued by Economical Mutual Insurance Company ("Economical"). Tina Bigas was a specified driver on the policy.

Application for SABS was made to Economical. Economical has paid SABS to Tina Bigas and seeks reimbursement from The Royal & SunAlliance Insurance Company ("Royal").

Economical disputes its liability to pay SABS on the basis that it canceled the policy effective December 14, 2008, prior to the accident giving rise to the SABS claim. The parties agree that if Economical properly canceled the policy then Royal is responsible for the payment of SABS. If the Economical policy was not properly canceled then Economical will remain responsible for the payment of SABS.

It is agreed between the parties that there are no issues concerning the timeliness of service of The Notice of Dispute Between Insurers. The arbitration proceeded pursuant to the terms of the *Arbitration Act*, an arbitration agreement between the parties, and a letter from Densem ADR Solutions Inc. dated September 11, 2009.

The parties have agreed that an appeal may be taken from this Award on a question of law or a question of mixed fact and law.

Factual Background to the Issues¹

David and Tina Bigas were first insured with Economical on March 10, 2003. The policy which is the subject of the termination dispute in this arbitration was issued to them on that date. Economical also insured David and Tina Bigas under Personal Insurance Policy number 3259250 D issued to David and Tina Bigas in March, 2003.

Economical is not a direct writer of insurance policies. They deal through brokers who place policies with Economical on behalf of clients. During the time relevant to the issues in this arbitration David and Tina Bigas placed their insurance with Economical through F. R. Appleton Insurance Brokers ("Appleton") located in Oshawa, Ontario.²

Economical's records concerning the policy go back only as far as 2006. They have been purged before that. As of March 1, 2006 Economical insured a 2002 Dodge Grand Caravan, and a 2004 Dodge SX 2.0 under the policy.

Beginning in 2007 David Bigas had some problems keeping the premium payments current for the policy. On three occasions that he fell into arrears Economical sent him a registered letter indicating that his policy would be terminated if outstanding premium amounts were not paid by a certain date. The effective termination date was stipulated to be 30 days from the date of the registered letter.

¹ These facts are taken from the parties' *facta*, the exhibits, and the *viva voce* evidence. Many facts are either agreed upon, not in dispute, or they have been established by the evidence. I have noted specifically where there is a dispute about the facts.

² When David and Tina Bigas first began dealing with what is now Appleton the brokerage was called McDougall Insurance Brokers Ltd. It changed to Appleton later on and at all times material to this arbitration it was Appleton.

Economical first sent a termination letter dated May 11, 2007, with an effective termination date of June 12, 2007. The second termination letter sent was dated November 2, 2007 with an effective termination date of December 4, 2007. The third termination letter sent was dated March 13, 2008 with an effective termination date of April 13, 2007.³

On each occasion Mr. Bigas paid up the arrears and put the policy back into good standing. It was never terminated as a result of these three termination letters.

After the first termination letter and before the second termination letter Mr. Bigas asked Appleton to change the address Economical had for him with respect to the policy. A Policy Change Form was generated by Appleton dated May 14, 2007⁴. Following receipt of this Policy Change Form Economical changed the Bigas address with respect to the policy to 67 Townline Road North, Courtice, Ontario. Thereafter, all communications (before the January 7, 2009 accident) from Economical to Mr. Bigas with respect to the policy were addressed to 67 Townline Road North, Courtice, Ontario.

Economical did have another address for David and Tina Bigas, 2 Cloverfield Street, Courtice, Ontario. It appears that this is an address to which it sent communications to David and Tina Bigas with respect to their Personal Insurance Policy. There is also some evidence that this address was used at least once following

³ A fourth termination letter sent dated November 13, 2008 relates to the termination in issue in this arbitration and will be dealt with in detail later in the Award

⁴ Exhibit 1, Tab 3

the January 7, 2009 accident to communicate with Mr. Bigas regarding potential claims under the policy.⁵

The Certificate of Insurance in force for the policy commencing March 1, 2008 for a one-year period to March 1, 2009 confirmed coverage for the previously mentioned 2002 Dodge Grand Caravan, and 2004 Dodge SX 2.0. The annual premium charge for the 2002 van was \$884. The annual premium charge for the 2004 SX was \$946. The total annual premium was \$1,830. The agreement in place between Mr. Bigas and Appleton/Economical required that the premiums be paid monthly in installments of \$152.50 plus a service charge of \$4.58, for a total of \$157.08 monthly.

By the end of June, 2008, the full premium for the March 1, 2008 to March 1, 2009 policy year had been paid in full. This included any arrears that had given rise to the March 13, 2008 termination letter. At that point the policy was in good standing.

On July 2, July 3, and July 9, 2008 three transactions with respect to the policy were completed following communications between David Bigas and Appleton. There is no dispute with respect to the first two transactions about what was asked for by Mr. Bigas and what was done by Appleton. The third transaction however, is disputed. Specifically, the parties disagree on what Mr. Bigas asked of Appleton on July 9, 2008. I will discuss details of these transactions in my analysis of the documentary and *viva voce* evidence.

As a result of the three, July 2008 transactions, an outstanding premium balance was generated. Since the parties disagree on the details of the third transaction, they do

⁵ See Exhibit 3, January 13, 2009 letter to David Bigas from Economical.

not agree on the amount of premium that was outstanding following these transactions. They do agree however, that the premium amount outstanding was either \$576 (Economical's position), or \$170 (Royal's position).

No amount of the outstanding premium was paid to Appleton by Mr. Bigas so Economical sent a fourth letter of termination to Mr. Bigas dated November 13, 2008. Prior to this letter an account statement dated September 23, 2008 had been sent to Mr. Bigas. Both of these documents indicated that there was a total outstanding premium of \$576.

No payment of any kind having been made Economical terminated the policy effective December 14, 2008. The accident involving Tina Bigas occurred January 7, 2009.

The Issues

The issue for decision is whether Economical effected a valid termination of the policy in accordance with the Statutory Conditions of Ontario Regulation 777/93 under the *Insurance Act*.

To decide this issue two questions must be answered:

- 1) Did the November 13, 2008 termination letter satisfy the requirements of Statutory Condition 11 (1.3)?
- 2) Did the November 13, 2008 termination letter satisfy the requirements of Statutory Condition 12?

Exhibits and Evidence

Three documentary exhibits were entered into evidence and *viva voce* evidence was received from two witnesses. The particulars are listed below:

- Exhibit 1: Economical's Document Brief (23 Tabs)
- Exhibit 2: Royal's Document Brief (12 Tabs)
- Exhibit 3: January 13, 2009 letter from Economical to David Bigas
- Witness: Rosie Monaco, Economical Underwriter
- Witness: David Bigas, Economical Insured

Analysis

Rosie Monaco has been employed as an underwriter with Economical for 13 years. She is now a senior personal lines underwriter. She was not the underwriter who dealt with the relevant coverage changes on the policy. She did not have personal knowledge of the matters in issue. She testified from the Economical underwriting file. By saying this I am in no way calling into question the veracity or weight of her evidence, I am simply noting that her knowledge of the matters in issue was based on documents rather than personal involvement.

Ms. Monaco did confirm that Economical had an agency relationship with Appleton. Appleton was authorized to bind risks on Economical's behalf. She confirmed that the policy was originally issued on March 1, 2003. Economical's records have been purged however, and there is limited data available prior to March 1, 2006.

Ms. Monaco's evidence confirmed much of what I have set out in the "Factual Background to the Issues" heading so I will not repeat those details here.

She did confirm Economical's receipt of the Policy Change Form requesting a change of address on the policy for David and Tina Bigas to the 67 Townline Road North, Courtice, Ontario address. This form was received from the broker and the change was processed with respect to the policy by Economical on May 31, 2007.

She also confirmed that the Personal Insurance Policy issued to David and Tina Bigas had a different address. It had the 2 Cloverfield Street, Courtice, Ontario address. She explained that it was not uncommon for insureds to have different addresses for different policies. Economical would rely on its broker to provide the insured's desired address for any particular policy. In this case, Economical would not cross reference address information with respect to the policy and the Personal Insurance Policy because there was no need to do so. They had been given instructions as to the proper address for the policy, and they had different instructions with respect to the Personal Insurance Policy. They would rely on the broker to ensure that the insured's address information was up-to-date and correct.

With respect to the three July, 2008 transactions on the policy Economical had no direct knowledge of the instructions given by David Bigas. As indicated, Economical does not deal directly with its insureds. The insureds deal with the broker who then communicates with Economical.

With respect to the first July, 2008 transaction Ms. Monaco confirmed that this is evidenced by two documents. The first document is a Policy Change Form from

Appleton to Economical.⁶ This document instructed Economical to add to the policy a 2008 Dodge Grand Caravan. The effective date for the change was July 2, 2008. The Policy Change Form was received by Economical on July 4, 2008.⁷ The Policy Change Form states that the additional premium for this vehicle was \$899. In the “Remarks” section of the Policy Change Form it states: *“Effec[tive] July 2/08 Substituting ‘04 Dodge Caravan and add 43 – Bill of sale attached. Also adding Chrysler Financial as a lien holder.”* The Policy Change Form notes “Susan Coles” submitting the Form as the authorized representative of Appleton.

I pause here to note that the vehicle that is to be removed from the policy is actually described incorrectly in the Remarks section. It will be recalled that the Dodge Grand Caravan vehicle that was insured up to that point on the policy was a 2002 model, not a 2004 model. This could have been confusing since there was a 2004 Dodge vehicle also insured on the policy, but it was a sedan not a van. It nevertheless appears that Economical either sorted this out with Appleton or it was clear to Economical that Appleton was referring to the 2002 Dodge Grand Caravan as the vehicle to be removed because that is what was done. I would add that the rest of the evidence, including the *viva voce* evidence from Mr. Bigas, confirms that these were the correct instructions for the first policy change.

The second document that confirms the details of this first policy change is the Certificate of Insurance Issued by Economical, prepared July 30, 2008.⁸ It states that the effective date of the change is July 2, 2008. There is an entry in Economical’s

⁶ Exhibit 1, Tab 18

⁷ Evidence from Appleton (see Exhibit 1, Tab 14, January 20, 2009 letter from Appleton to Economical) confirms that Appleton received instructions from Mr. Bigas for this change on July 2, 2008.

⁸ Exhibit 1, Tab 15

underwriting notes July 30, 2008 confirming the addition to the policy of the 2008 Dodge Grand Caravan, and the removal of the 2002 Dodge Grand Caravan.⁹ This Certificate confirms that there was a premium increase of \$98 for adding the 2008 Dodge Grand Caravan and removing the 2002 Dodge Grand Caravan. The 2004 Dodge SX 2.0 remained on the policy.

Economical's evidence concerning the second July, 2008 policy transaction again consists of a Policy Change Form and a Certificate of Insurance. The Policy Change Form instructs Economical to restore the 2002 Dodge Grand Caravan to the policy, but with Comprehensive coverage only. The effective date for the change is noted to be July 2, 2008. The Policy Change Form was received by Economical on July 7, 2008.¹⁰

The Policy Change Form does not specifically note any change to the premium for restoring the 2002 Dodge Grand Caravan to the policy with only Comprehensive coverage. In the "Remarks" section it states, "*adding back '02 Dodge Caravan – comp. cov'g only*". Once again Susan Coles is noted to be the authorized representative of Appleton submitting the Form.

Another Certificate of Insurance was issued by Economical following this second July, 2008 policy change. The Certificate was prepared July 31, 2008. It states that the effective date of the change is July 2, 2008. There is an entry in Economical's underwriting notes July 31, 2008 confirming that the 2002 Dodge Grand Caravan was

⁹ Exhibit 1, Tab 19

¹⁰ Evidence from Appleton (Exhibit 1, Tab 14) confirms that Appleton received instructions from Mr. Bigas for this change on July 3, 2008.

restored to the policy with comprehensive coverage only.¹¹ The Certificate confirms that the 2002 Dodge Grand Caravan has been restored to the policy with Comprehensive coverage only. It shows an additional premium of \$72 for restoring the vehicle with the Comprehensive coverage.¹²

Economical's information with respect to the third, July 2008 policy change is more limited. Economical does not have a Policy Change Request Form to confirm Appleton's instructions regarding any requested change to the policy.¹³ The only Economical document reasonably contemporaneous to July, 2008 that has been introduced into evidence confirming a policy change is a Certificate of Insurance prepared August 1, 2008 with an effective date of July 9, 2008.¹⁴ This Certificate shows that the 2002 Dodge Grand Caravan has full road coverage and indicates a premium of \$406. The evidence of Ms. Monaco at the arbitration hearing confirmed that the \$406 amount was in addition to the previous charge of \$72 for the addition of Comprehensive coverage on the vehicle. In other words, there was no "double charge" for coverage that was being added to the vehicle.

There is an entry in Economical's underwriting notes with respect to this last policy change from July 9, 2008. The note however, does not appear until October 1, 2008, 2 months after the Certificate of Insurance confirming the change was issued. It is not clear why this note was not made until two months after the Certificate of Insurance was issued, when the entries in the underwriting notes for the other two July, 2008

¹¹ Exhibit 1, Tab 19

¹² Exhibit 1, Tab 16

¹³ Evidence from Appleton (Exhibit 1, Tab 14) confirms that David Bigas contacted Appleton on July 9, 2008 and it was this communication that resulted in the change to the policy adding full road coverage to the 2002 Dodge Grand Caravan.

¹⁴ Exhibit 1, Tab 17

policy changes were made contemporaneous with the issuance of the Certificates of Insurance confirming the changes.

David Bigas testified that he has been married for 20 years to Tina Bigas. He graduated high school and then completed one year in a business administration course at each of Mohawk College and McMaster University. He did not receive a diploma or degree with respect to the business administration courses.

For about the last 20 years Mr. Bigas has operated a store in downtown Oshawa. The store sells collectible items, books, magazines and toys.

Economical has been his (and his wife's) insurer since 2003. When they first were insured with Economical they resided at 1541 Fieldgate in Oshawa. In 2005 they moved to 2 Cloverfield Street, Courtice. They have lived at the 2 Cloverfield address from that time until the present.

On his examination in chief Mr. Bigas testified that he had a long standing relationship with Appleton as his insurance broker. Appleton's place of business was about 1 ½ blocks from his store. Over the years he would see the principal of Appleton, Fred Appleton, on an average of 1 to 2 times per week. Sometimes Fred Appleton would simply drop in as a courtesy call, and on other occasions he would come by on insurance policy business, usually to collect payments.

When collecting payments, as Mr. Bigas described it, Fred Appleton would stop in and ask whether, "*I had any money*" for the payment of insurance premiums. Sometimes when Mr. Bigas gave Fred Appleton money for insurance premiums on these visits Fred Appleton would write a receipt for Mr. Bigas' payment on the back of a

business card. Mr. Bigas had automobile, homeowners, and commercial business insurance with Appleton. When Fred Appleton stopped by to collect premiums he was not sure what policy the payments were being applied to but whatever he was told by Mr. Appleton he owed, he paid. Mr. Bigas trusted Appleton and apart from the circumstance giving rise to the dispute in this arbitration he never had any problem with Appleton's work on his behalf as his insurance broker.

This was the nature of the relationship from its inception up until the January 7, 2009 accident involving Tina Bigas.

With respect to the policy changes in July 2008 Mr. Bigas testified that he "probably" told Appleton possibly as early as June 30, 2008 or on July 1, or 2, 2008, about his purchase of the 2008 Dodge Grand Caravan. He did not speak directly to Fred Appleton in this communication. He spoke to one of the women in the office with whom he was familiar, but he could not recall whether it was Rosemary or Sue. He believes that he attended at Appleton's office on this occasion.

Initially his intention was to trade in the 2002 Dodge Grand Caravan but he changed his mind because the dealer was not offering enough of a trade-in allowance to make it worth his while to trade in the vehicle. In his initial communication Mr. Bigas told Appleton that he was going to be trading in the 2002 Dodge Grand Caravan. He attended at Appleton's office a second time advising Appleton of his decision to keep the 2002 Dodge Grand Caravan. He told them that it was his intention at that time to "park" the vehicle and not use it. He did not speak directly to Fred Appleton during this visit, and once again he cannot recall whether it was Rosemary or Sue that he spoke to.

He recalls that after this second visit to Appleton's office he received a telephone call from Fred Appleton. He testified that Fred Appleton recommended to him that he take out Comprehensive coverage on the 2002 Dodge Grand Caravan so that it would have some protection even though it was not going to be used on the road. Mr. Bigas stated that he accepted Mr. Appleton's advice and asked him to go ahead with the placement of Comprehensive coverage on the 2002 Dodge Grand Caravan.

With respect to the last and crucial contact with Appleton that led to the addition of full coverage on the 2002 Dodge Grand Caravan, Mr. Bigas testified that "sometime in July 2008" he inquired of Appleton what the cost would be to use the 2002 Dodge Grand Caravan in his business. This contact with Appleton was by telephone. He did not speak to Fred Appleton. He spoke with one of the women in the office but he cannot recall which one. Based on the information he was given about the premium cost he decided it was not worthwhile to proceed with a business use of the 2002 Dodge Grand Caravan.

Mr. Bigas was clear in his arbitration evidence that he did not instruct Appleton to put full coverage back on the 2002 Dodge Grand Caravan.

It was his evidence that he did not receive any of the Certificate of Insurance showing the premium increase of \$406 for the addition of full coverage to the 2002 Dodge Grand Caravan¹⁵, the Account Statement showing an outstanding premium amount of \$576¹⁶, or the November 13, 2008 registered letter of termination indicating

¹⁵ Exhibit 1, Tab 17

¹⁶ Exhibit 1, Tab 20

that the total amount due was \$576¹⁷. The Canada Post documentation indicates that the registered letter was signed for by a "V. Perry". Mr. Bigas testified that this is not his mother who was residing at 67 Townline Road North, Courtice. He does not know who V. Perry is.

Mr. Bigas testified on his examination in chief that had he seen any of these documents he would have contacted Appleton to ask "*why do I owe you \$576*". In fact, he did not recall anything being said to him during his dealings with Appleton about additional premium being required for the addition of the 2008 Dodge Grand Caravan to the policy or for adding back the 2002 Dodge Grand Caravan to the policy with Comprehensive coverage.

On cross-examination the March 13, 2008 letter of termination¹⁸ was put to Mr. Bigas. It has the same 67 Townline Road North, Courtice, Ontario address that Exhibit 1, tabs 17, 20 and 21 have. Mr. Bigas admitted that he had signed for this registered letter, and that he contacted Appleton right away to deal with the amount due to avoid termination of the policy.

Mr. Bigas was asked to explain why, if he was living at 2 Cloverfield Street, Courtice, were there so many documents bearing the 67 Townline Road North, Courtice address? For example, the June 30, 2008 Vehicle Purchase Agreement for the 2008 Dodge Grand Caravan bears the 67 Townline Road North address. Mr. Bigas explained that with respect to documents involving the purchase of vehicles they would all show his mother's address, 67 Townline Road North, Courtice. The reason for this is that his

¹⁷ Exhibit 1, Tab 21

¹⁸ Exhibit 1, Tab 10

mother had been employed with Chrysler Canada and she was entitled to an employee discount for the purchase of vehicles. It was necessary that any purchase documents show her address for the discount to apply.

In general however, he admitted that he used his mother's address of 67 Townline Road North, Courtice because *"from time to time I was looking for a stable mailing address"*. He did not elaborate on this. He acknowledged however, that that even though he had no recollection of doing so it is possible that he instructed Appleton to submit the Policy Change Request Form to Economical officially changing his address for the policy to 67 Townline Road North, Courtice.¹⁹ He conceded that at no time did he instruct Appleton that the 67 Townline Road North, Courtice address was incorrect or should be changed.

As it turns out, his mother's address may not have been very stable. He testified that Canada Post services his mother's 67 Townline Road, Courtice, address with a "super mailbox". This is located in a rural area. Canada Post employed subcontractors to deliver the mail to the box. Mr. Bigas stated that in 2008 there were many problems with mail intended for his mother's address being placed in the wrong mailbox, or mail intended for others being placed in his mother's mailbox. Mail was also lost.

With respect to the Certificates of Insurance issued for the annual policy renewal in March, 2008²⁰, the addition of the 2008 Dodge Grand Caravan and the removal of the 2002 Dodge Grand Caravan resulting in a \$98 premium increase²¹, and the restoration of the 2002 Dodge Grand Caravan to the policy with Comprehensive coverage resulting

¹⁹ Exhibit 1, Tab 3

²⁰ Exhibit 1, Tab 13

²¹ Exhibit 1, Tab 15

in a \$72 premium increase, Mr. Bigas had no recollection of seeing them, but he admitted that they reflected exactly what he had asked Appleton to do. Shortly thereafter he admitted having seen the Certificate of Insurance for the \$98 increase, but he was still unsure about having seen the Certificate of Insurance for the \$72 increase. He reiterated that he most definitely did not see the Certificate of Insurance for the \$406 increase.²²

He went on to explain that Fred Appleton would often stop by his store and drop off policy documents in person. For this reason his address "*was not important*" since Mr. Appleton always knew where to find him.

As far as the \$98 and \$72 premium increase amounts are concerned, he said that even if he had known about both of them he probably would not have said anything unless Fred Appleton pointed them out. The nature of their relationship was such that he expected Fred Appleton to bring anything to his attention that he needed to deal with.

He admitted that in the past the policy premiums had fallen into arrears to the point where letters of termination had been sent to him, but he always paid up in accordance with what Appleton told him he owed. Normally Fred would discuss all details concerning the policy with him including amounts owing, and policy changes. He said, "*I relied on Fred 100%. That is why I use a broker*". It was his evidence that unfortunately Fred did not bring to his attention any details about outstanding premium between the July, 2008 policy changes and the January 7, 2009 accident, even though

²² Exhibit 1, Tab 17

he would have seen Fred over that period. Mr. Bigas first learned about the cancellation of the policy when he contacted Appleton after his wife's accident.

The last piece of evidence to consider concerning these July, 2008 changes to the policy is the January 20, 2009 letter from Appleton to Economical.²³ Fred Appleton did not testify at the arbitration hearing. Any evidence that he could have given concerning the contacts between his brokerage and Mr. Bigas in July, 2008 would likely have been of questionable value. Apart from the one telephone call which Mr. Bigas says that Fred Appleton made to him to recommend that he place Comprehensive coverage on the 2002 Dodge Grand Caravan, Fred Appleton did not deal directly with Mr. Bigas with respect to the policy changes. Most significantly, Fred Appleton did not communicate with Mr. Bigas with respect to Mr. Bigas' inquiry concerning the possible commercial use of the 2002 Dodge Grand Caravan. As his January 20, 2009 letter indicates, a "CSR" in his office had been working with Mr. Bigas on the July, 2008 policy changes. It appears that the person at Appleton who may have dealt with Mr. Bigas no longer works for Appleton.²⁴

Production of the relevant portions of the Appleton file was made to the parties. Apart from the January 20, 2009 letter, no documents or notes from that file were introduced into evidence that would in any way clarify from Appleton's perspective the issue of what happened in the third communication between Mr. Bigas and Appleton in July, 2008.

²³ Exhibit 1, Tab 14

²⁴ Examination of Lisa Garnet, Economical underwriter, Exhibit 2, page 39, lines 15 and 16.

Some caution needs to be exercised in interpreting the January 20, 2009 letter written by Mr. Appleton to Economical. The letter was written after the January 7, 2009 accident, when the problems arising out of the policy cancellation surfaced. In my view the purpose of the letter was clearly an entreaty by Mr. Appleton to Economical on behalf of a long-standing client to retroactively reinstate coverage on the policy in exchange for payment of the \$170 premium increase created by the addition to the policy of the 2008 Dodge Grand Caravan and the restoration to the policy of the 2002 Dodge Grand Caravan with Comprehensive coverage.

In the last paragraph of the letter Mr. Appleton states:

... I propose your company consider reinstating coverage on the subject policy (after collecting small balance of outstanding premium related to first and second endorsement added) and thereby honour the automobile claim of January 7, 2009 as presented.

Nevertheless, there is no evidence before me to justify a conclusion that in his letter Mr. Appleton deliberately distorted the nature of the dealings between his brokerage and Mr. Bigas in July, 2008. In fact, to the contrary, my sense of Mr. Appleton's January 20, 2009 letter is that he was trying to set out as fairly as he could that a regrettable misunderstanding had led to the termination of Mr. Bigas' policy by Economical.

If he had been motivated solely by self-interest for the reputation of his brokerage I expect that the letter would have read much differently. Instead, my interpretation of the letter is that Mr. Appleton is describing a misunderstanding on the part of one of his employees in misinterpreting Mr. Bigas' inquiry concerning the possibility of insuring the

2002 Dodge Grand Caravan for commercial use as instructions to place full coverage back on the vehicle.

Mr. Appleton does not describe what happened as an error by his employee in so many words, but neither does he dispute that, as Mr. Bigas testified at the arbitration hearing, Mr. Bigas only inquired about the cost to insure the 2002 Dodge Caravan for commercial use, he did not specifically instruct Appleton to place the coverage. The letter states:

... Mr. Bigas called our office again to collect information on using the 2002 Dodge Caravan for limited commercial use. Once the premium was quoted he decided the commercial use was not a practical idea. Here is where our problem begins: – the CSR in our office who had been working with Mr. Bigas on all of these changes understood that full road coverage...was to be put on 2002 Dodge Caravan...Mr. Bigas now advises he had no intention to use the 2002 Dodge at this time nor to have it insured for other than the Comprehensive he had previously instructed.

Economical's position is that I should find on the evidence Mr. Bigas did instruct Appleton to place full coverage on the 2002 Dodge Grand Caravan when he telephoned Appleton on July 9, 2008. Economical submits that Mr. Bigas is not a credible witness, and that his evidence about his communication with Appleton on July 9, 2008 being only an inquiry about premium cost and nothing more, should not be believed.

Economical submitted that Mr. Bigas' manner of giving evidence had a "used car salesman" feel to it so that in general Economical urged me to be very cautious about relying on much of it. Economical submitted that Mr. Bigas' presentation was such that it appeared he was prepared to say whatever was necessary to maximize the chance his insurance coverage would be found to be valid at the time of his wife's accident.

In in further support of this position Economical emphasizes that Mr. Bigas' evidence is of questionable veracity with respect to which insurance documents that he received and which he did not receive. Economical stresses that it seems Mr. Bigas conveniently did not receive what could be the most important documents for the issue in this case – the Certificate of Insurance indicating a premium increase of \$406, the September 23, 2008 account statement reminding about the unpaid premium of \$576, and the November 13, 2008 registered letter of termination. On the other hand, Mr. Bigas admits receiving other insurance documents sent to the same address. For example, he received the March 13, 2008 letter of termination (the Canada Post documentation indicates that he signed for it so it would be difficult to deny receipt), and he admits that he received the Certificate of Insurance prepared July 30, 2008 adding the 2008 Dodge Grand Caravan to the policy, indicating a premium increase of \$98. He was uncertain about whether he received the Certificate of Insurance prepared July 31, 2008 adding the 2002 Dodge Grand Caravan back onto the policy with Comprehensive coverage, but he did not deny receiving it.

Economical's position is that even though a finding Mr. Bigas was not being truthful about whether he received certain insurance documents does not prove that he instructed Appleton on July 9, 2008 to add full coverage back onto the 2002 Dodge Grand Caravan, an inference should be drawn that if he was prepared to lie about the first issue then it is likely he was also lying about the second one.

Royal, of course, disagrees with this characterization of Mr. Bigas' testimony. Royal submits that I should find Mr. Bigas was a straightforward and truthful witness.

Royal emphasizes that Mr. Bigas gave a reasonable explanation as to why he might have received some mail at 67 Townline Road North, Courtice, while not receiving all of the mail directed to that address. He testified about inconsistent and unreliable mail delivery to the super mailbox that was used to service his mother's address, and there is no reason to disbelieve his evidence on that point.

Royal also stressed that from Mr. Bigas' point of view, his address was not especially important because Mr. Appleton would frequently deliver insurance documents to Mr. Bigas' business address. Further, Mr. Bigas testified that he relied upon Appleton to bring to his attention any important matters about his insurance policies. If Appleton told him that he owed something then he would pay.

My impression of the reliability of Mr. Bigas' evidence is that it falls somewhere in between the positions advocated by Economical and Royal. I would agree with Economical that there were times during Mr. Bigas' testimony when I felt he was going out of his way to come up with answers to questions for the general theme of his testimony that would support a conclusion the policy was valid at the time of his wife's accident. His evidence about his weekly encounters with Mr. Appleton involving the regular discussion of insurance matters, and the problems with his mother's super mailbox, was I found, very self-serving and rather convenient. I surmise that he was aware there was really no way of challenging it.

He also tended to have a garrulous streak that I felt betrayed some nervousness about what he was saying. Sometimes this can be attributed to the atmosphere created by a formal proceeding such as trial or arbitration. I did not however, get the impression

that Mr. Bigas was overly intimidated by the circumstances so I do not think this would be the explanation for this mannerism.

On the other hand however, his evidence must be considered in the context of all of the evidence, especially the uncertainty of the Economical evidence, and the inferences to be drawn from the Appleton evidence about what occurred during the July 9, 2008 contact between Mr. Bigas and Appleton.

I find it problematic that there is no direct evidence to contrast with Mr. Bigas' evidence that would indicate Appleton was clearly instructed by Mr. Bigas to add full coverage back onto the 2002 Dodge Grand Caravan. In fact, the available evidence from Economical on this point creates uncertainty, and the Appleton letter is supportive of the position advocated by Royal that Economical's policy termination proceedings resulted from Appleton's error in misinterpreting Mr. Bigas' inquiry about the cost of insuring the 2002 Dodge Grand Caravan for business use.

There is no Policy Change Form from Appleton confirming any July 9, 2008 instructions to it to restore full coverage to the 2002 Dodge Grand Caravan. There are Policy Change Forms confirming instructions on July 2, and 3, 2008, first for the addition of the 2008 Dodge Grand Caravan to the policy (removing the 2002 Dodge Grand Caravan), and subsequently restoring the 2002 Dodge Grand Caravan to the policy with Comprehensive coverage only. There are entries in Economical's underwriting notes contemporaneous with the issuance of the Certificates of Insurance confirming Appleton's instructions regarding the July 2, in July 3, 2008 changes to the policy. The underwriting note for the July 9, 2008 policy change for some reason does not appear

until October 1, 2008, two months after the Certificate of Insurance putting full coverage on the 2002 Dodge Grand Caravan was issued.

Mr. Bigas agreed that he gave the instructions embodied in the two Policy Change Forms and the first two Certificates. These changes also gave rise to premium increases, even though they were smaller than the increase that resulted from adding full coverage back to the 2002 Dodge Grand Caravan. I suppose it should be pointed out that Mr. Bigas did not try to deny responsibility with respect to owing premium for these changes (although he did not recall a discussion with Appleton of any increased premium for these changes), he did so only with respect to the \$406 premium increase.

As I have indicated, I felt that portions of Mr. Bigas' testimony were designed to support the conclusion that the policy was still valid at the time of his wife's accident. When his testimony is considered as a whole, and in the context of all the evidence however, I am unable to conclude that Mr. Bigas lied about his July 9, 2009 discussion with Appleton.

There is a Certificate of Insurance issued August 1, 2008 that adds full coverage back onto the 2002 Dodge Grand Caravan. It would seem reasonable to conclude that Economical was asked by Appleton to do this otherwise there would no explanation for the creation of the Certificate. The fact that the Certificate was issued as a result of Appleton requesting it does not prove however, that Appleton correctly interpreted its July 9, 2008 communication with Mr. Bigas. Appleton may well have believed that Mr. Bigas asked for full coverage to be restored to the 2002 Dodge Grand Caravan, but if it was mistaken in that belief then it would have erred in asking Economical to restore full

coverage to the 2002 Dodge Grand Caravan. As a result, Economical, relying on its agent Appleton, would have mistakenly increased Mr. Bigas' premium on the policy by \$406. In my opinion, the preponderance of the evidence indicates that this is what occurred.

Having made the above findings of fact, I will turn now to address the questions posed in the two issues before me – whether the November 13, 2008 letter complies with the Statutory Conditions for policy termination. I will deal with the second issue concerning Statutory Condition 12 first because in my opinion the answer is fairly straightforward.

Royal takes the position that the November 13, 2008 termination letter is invalid because it was not addressed and mailed to Mr. Bigas' latest post office address as notified to Economical. Royal submits that Economical should have addressed and mailed the termination letter to 2 Cloverfield Street, Courtice, and not 67 Townline Road North, Courtice. Royal submits that Economical ought to have cross-referenced the information it had readily available to it in its computer records indicating that the most recent address for the Bigas family was 2 Cloverfield Street, based on where it was sending communications with respect to the Personal Insurance Policy. Royal points to the fact that Economical sent a letter to Mr. Bigas on January 13, 2009 at the 2 Cloverfield Street address regarding the January 7, 2009 accident and possible claims under the policy as evidence that Economical knew or ought to have known that this was the correct address for David and Tina Bigas.

I do not accept this argument. Statutory Condition 12 requires that written notice...“to the insured named in this contract²⁵ is to be delivered or sent by registered mail to the insured's latest post office address “as notified to the insurer”. In my opinion, the meaning of this wording is quite clear. It is referring to the address notified to the insurer with respect to the contract about which the communication is being sent, on the date that the communication is being sent. It does not require an insurer to conduct a search of its database to determine every address it might have on file for an insured with respect to any policy it might have for that insured, and then make further inquiries as to whether the address it has for the policy in question is the correct one.

Where, as here, an insured has instructed his broker to give official notice to the insurer of his address to which communications with respect to an insurance policy should be directed, and the broker has sent the insurer a Policy Change Form confirming those instructions, the insurer is entitled to rely upon those instructions and communicate with the insured at the address notified. The insurer is not required to go behind these instructions, and search or cross-reference information in its records for other possible addresses the insured may have given for different insurance policies.

As was pointed out by Rosie Monaco, Economical's underwriter, in her evidence, it is not uncommon for insureds having several policies with an insurer for the insured to request communications with respect to those policies be directed to different addresses. For example, an insured may wish to have communications with respect to a commercial insurance policy directed to his office, while having communications with respect to a personal insurance policy directed to his home.

²⁵ arbitrator's emphasis.

I find that Economical's November 13, 2008 termination letter complied with the requirements of Statutory Condition 12. It was addressed and mailed to the latest post office address as notified to Economical by Mr. Bigas. Mr. Bigas admitted that he never requested a further change of address with respect to the policy once Economical was notified to use the 67 Townline Road address. Therefore, the November 13, 2008 letter of termination is not invalid as argued by Royal on the grounds that it was addressed and mailed to an incorrect address.

The first issue concerning Statutory Condition 11 (1.3) must be analyzed in two stages. The first stage involves determining whether the November 13, 2008 letter of termination correctly stated the outstanding premium amount due Economical from Mr. Bigas. Economical's submission is that the letter did correctly state the premium due as being \$576. Simply put, acceptance of this submission would require me to conclude that on July 9, 2008 Mr. Bigas instructed Appleton to add full coverage under the policy to the 2002 Dodge Grand Caravan. This would have resulted in a \$406 premium increase. Together with the previous two policy changes on July 2, and July 3, 2008 resulting in \$98 and \$72 premium increases, respectively, the total outstanding premium would have been \$576.

As I have indicated earlier in these reasons, I cannot find on the evidence before me that on July 9, 2008 David Bigas instructed Appleton to add full coverage under the policy to the 2002 Dodge Grand Caravan. I have found that Appleton misinterpreted or misunderstood Mr. Bigas' inquiry about the potential premium cost to cover the 2002 Dodge Grand Caravan for commercial use as instructions to add full coverage to the vehicle. Therefore, I conclude that Economical's November 13, 2008 letter of

termination incorrectly stated the premium due from Mr. Bigas to Economical as \$576. To have correctly stated the premium due at that time the letter should have said \$170, being the total of the two premium increases generated by the policy changes of July 2, in July 3, 2008.

That is not the end of the argument. This takes us to the second stage of the analysis. Economical's further submission is that even if the \$576 amount stated in the November 13, 2008 letter of termination was incorrect, and the letter should have stated the premium due as \$170, the letter was nevertheless valid because there was an amount of premium due that remained unpaid up to and beyond the termination date set out in the letter. The fact that the letter may have misstated the amount of the premium due is no more than a technical defect, similar to a typographical error, not a substantive defect that invalidated the termination letter.

Economical stresses that the evidence is clear and indeed the parties agree that the two changes to the policy requested by Mr. Bigas on July 2, in July 3, 2008 resulted in a \$170 premium increase that remained unpaid after the termination date specified in the November 13, 2008 letter.

Royal's position is that the misstatement of the premium amount owing in the November 13, 2008 termination letter is a fatal defect that invalidates the letter. It is not the equivalent of a technical typographical error. It is an error that goes to the heart of the basis for the termination of the policy – the amount of money owed by the insured for the policy premium that remained unpaid.

I agree with Royal's position.

Once again I turn to the plain meaning of the language in Statutory Condition 11 (1.3). The opening words of the Condition state that the notice of termination shall,

“(a) state the amount due under the contract as at the date of the notice...”

In my opinion the Condition requires that the amount specified in an insurer's letter terminating an insured's policy accurately state the amount of premium that is actually owed by the insured at the date of the letter. The failure to have paid the premium claimed to be owing is the basis for the termination. In my view then, correctly stating the amount of premium owed is a fundamental requirement of a valid termination letter.

There was some discussion during counsels' submissions at the hearing as to what the result should be in a situation where there was a typographical error in a termination letter concerning the amount claimed to be due to the insurer. For example, say the letter misstated the amount owing because a decimal was misplaced. My first observation would be that this is not the situation before me. The amount inserted into the letter of termination by Economical was not misstated by typographical error. It was calculated as a result of erroneous instructions received from Economical's agent, Appleton. Having found that Mr. Bigas was not at fault for Appleton misinterpreting his request for information, would it make sense that he should bear the consequences of an inaccurately composed termination letter simply because there was some premium amount owing? I think not. In my opinion he is entitled to receive accurate information from his insurer where the insurer is telling him that his policy will be terminated if a certain amount is not paid by a certain date.

Even if this were a case of pure typographical error concerning the amount of premium due however, in my opinion the result should be the same. The onus is on the insurer, who wishes to terminate the policy, to make sure that the statutory requirements are strictly complied with. In other words, the insurer needs to “get it right”, otherwise it risks the consequences of having its termination letter found to be invalid.

I find support for my view in the case law dealing with the termination of insurance policies. I have been referred to the decision of private Arbitrator Bialkowski in *Gore Mutual Insurance Company v. Lombard General Insurance Company, and Motor Vehicle Accident Claims Fund*²⁶. The decision reviews the law regarding the cancellation of insurance policies by insurers, including the decision of the Supreme Court of Canada in *Lumberman's Mutual Casualty Co. v. Stone*.²⁷

Arbitrator Bialkowski concludes as follows:

On my review of the case law before me, I am satisfied that for a letter of termination to be effective, there must be strict compliance to the extent that the “essential elements” of the legislative requirements are contained in the notice letter... In my view, the “essential elements” as required by Statutory Condition 11 are as follows:

1. the amount due, together with any administration fee being sought;
2. the date on which the termination is to take place; and
3. that the insured has a right to avoid termination by paying the amount outstanding and the specified administration fee by noon on the day before the date on which the termination is to take place.

²⁶ Award June 21, 2010

²⁷ [1955], S.C.R. 627,

I agree with Arbitrator Bialkowski's statement of the law as it applies to the facts of the case before me. The Statutory Conditions require that one of the essential elements of a valid termination letter is an accurate statement of the amount due.

In addition to the statutory interpretation and case law principles that support my conclusion, in my view there are very good policy reasons for following this approach. Automobile insurance is compulsory in Ontario. Since the law requires all owners of vehicles to have insurance, the termination of insurance coverage is a serious matter. The legislature has mandated certain specific requirements be met before an insurer can properly terminate an insured's policy. As a matter of consumer protection I note that over the years the requirements for termination by an insurer of an insured's policy have become more onerous.²⁸

Conclusion

For the foregoing reasons I conclude as follows:

1. Economical's November 13, 2008 letter of termination of the policy complied with Statutory Condition 12, but it did not comply with Statutory Condition 11 (1.3). As a result, the letter of termination was a nullity and Economical did not validly terminate the policy.
2. Economical is the priority insurer and remains responsible for the payment of SABS to Tina Bigas.

²⁸ Consider, for example, the Statutory Conditions that increased the minimum notice of termination from 15 days to 30 days, and the requirement that termination letters contain provisions advising the insured of the right to avoid termination by paying an outstanding amount by a certain date.

3. Regulation 283/95, Section 9, states that unless otherwise ordered by the arbitrator, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful parties to the arbitration. Should the parties wish to make submissions concerning costs I invite them to contact my Coordinator to schedule a post-arbitration conference to discuss arrangements for costs submissions.

February 14, 2013

A handwritten signature in black ink, appearing to read "Scott W. Densem", written over a horizontal line.

Scott W. Densem, Arbitrator