

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lloyd's Underwriters v. The Dominion of Canada General Insurance Company

BEFORE: Strathy, J.

COUNSEL: Graeme Mew for the Appellant

D'Arcy McGoey for the Respondent

DATE HEARD: February 29, 2008

ENDORSEMENT

[1] This is an appeal, pursuant to section 45 of the *Arbitration Act*, S.O. 1991, c. 17, from an award of Arbitrator Bruce R. Robinson (the "Arbitrator"), dated May 16, 2007. The Respondent, The Dominion of Canada General Insurance Company, is a first party insurer that seeks loss transfer indemnity from the Appellant third party insurer, Lloyd's. The issue is whether the Arbitrator erred in concluding that the limitation period applicable to the Respondent's loss transfer indemnity claim under section 275 of the *Insurance Act*, R.S.O. 1990, c. I. 8, as amended, was six years pursuant to section 45(1)(g) of the *Limitations Act*, R.S.O. 1990, c. L.15 rather than two years pursuant to section 206(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H. 8.

[2] The issue arises because the payments in question were made by the Respondent insurer to its insured prior to the enactment of the *Limitations Act, 2002*, S.O. 2002, c. 24, which came into force on January 1, 2004. The question of which statute applies would be irrelevant after that date as the two year limitation period under the new *Limitations Act, 2002* is congruent with the *Highway Traffic Act* limitation.

[3] Counsel agree that the appeal is on an issue of law and that the standard of review is correctness.

[4] The Respondent's insured sustained a serious closed head injury on August 31, 1994. He submitted an application for Accident Benefits to the Respondent, which paid them. The Respondent requested loss transfer indemnity from the Appellant, the insurer of the heavy commercial vehicle involved in the accident. The Appellant accepted responsibility for

payment under the Fault Determination Rules and reimbursed the Respondent for some, but not all, of the Accident Benefit payments. The Arbitrator found that arbitration had been initiated by letter dated April 23, 2002 from the Respondent to the Appellant. If the claim is subject to a two year limitation, the Appellant's liability is only \$9,795.22 as opposed to \$194,203.61, if the six year limitation applies, as found by the Arbitrator.

[5] The right to indemnification arises by virtue of section 275 of the *Insurance Act*, which provides, in part, as follows:

Indemnification in certain cases

275. (1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations *is entitled*, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, *to indemnification* in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose. [emphasis added]

[6] Counsel advise that they have found no judicial authority directly on point, although there has been some judicial and arbitral consideration of the issue.

[7] The issue was directly addressed in a private arbitration before R.E. Holland, Q.C. in *Wellington Insurance Company v. Boreal Insurance Inc.* (September 20, 1994). He held, without detailed reasons, that the claim was for indemnity and was not a claim for “damages occasioned by a motor vehicle” under the *Highway Traffic Act*. While the decision is not of course binding on me, it was a decision of an arbitrator with great experience as counsel and as a judge in matters of insurance law and is deserving of respect.

[8] There is additional arbitral authority that the limitation period in a loss transfer dispute is six years. In *Canadian General Insurance Company v. Transit Insurance Company* (September 4, 1996, Private Arbitrator Webb), it was argued that the applicable limitation period was two years due to subsection 45(1)(h) of the *Limitations Act*, which provided a two year limitation to an “action for a penalty”. The arbitrator held that the action was not a penal action and the six year limitation period was applied. Again, the issue of the *Highway Traffic Act* limitation does not appear to have been argued.

[9] In *York Fire and Casualty Insurance Co. v. Co-operators* (1999), 17 C.C.L.I. (3d) 16 (Ont. S.C.J.), Justice Somers upheld another decision of Arbitrator R.E. Holland, stipulating that the six year limitation period under the *Limitations Act* applied to a loss transfer indemnity payment claim. The accident took place in 1990, the last accident benefit payment was made in June, 1997 and the request for indemnity was sent to the third party insurer in December of 1997. The claim was resisted on the basis that it was out of time. The first party insurer argued that the *Insurance Act* arbitration provisions are a self-contained code and that there was no applicable limitation period. Arbitrator R.E. Holland had held that the six year limitation period of the *Limitations Act* applied. Justice Somers agreed, holding that the claim for indemnity was an

“action upon the case” and that the applicable limitation was six years. In so doing, he relied upon the judgment of Austin, J., in *Superior Propane Inc. v. Tebby Energy Systems* (1992), 9 O.R. (3d) 769 (Ont. Gen. Div.) in which it was held that an action for contribution or indemnity under the *Negligence Act*, R.S.O. 1990, c. N. 1, was an “action on the case”. The possible application of the *Highway Traffic Act* limitation does not appear to have been raised before Justice Somers.

[10] In the recent decision of the Court of Appeal in *State Farm Mutual Automobile Insurance Co. v. Dominion of Canada General Insurance* (2005), 79 O.R. (3d) 78 (C.A.), it was held that a “rolling limitation” applies to loss transfer claims and that a new limitation period arises with each payment made by the first party insurer. The Court of Appeal stated, at para. 4 that “it is common ground that the arbitration must be commenced within six years after the cause of action arose as required by the *Limitations Act...*” It does not appear that the *Highway Traffic Act* limitation was put at issue by the parties or considered by the Court. The Court of Appeal expressly noted that its decision conformed with that of Arbitrator Holland, whom it described as, “someone with vast experience in automobile insurance law.”

[11] Section 206 of the *Highway Traffic Act* provides:

206(1) Subject to subsections (2) and (3), no proceeding shall be brought against a person *for the recovery of damages occasioned by a motor vehicle* after the expiration of two years from the time when the damages were sustained. [emphasis added]

[12] On a plain reading of this section, the first party insurer’s claim is not a claim “for the recovery of *damages occasioned by a motor vehicle*”. It is a claim for indemnity based on a purely statutory obligation. The insurer’s right to indemnity arises not by virtue of any principle of common law or insurance law, but by virtue of the statutory right of indemnity. A claim for indemnity is not a claim for damages: *Ukrainian (Fort William) Credit Union Ltd. v. Nesbit Burns Ltd. et al.* (1997), 152 D.L.R. (4th) 640 (Ont. C.A.).

[13] This conclusion is reinforced by the principle that statutes creating limitations should be strictly construed: *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Ukrainian (Fort William) Credit Union, supra*. To describe the first party insurer’s claim as a claim “for the recovery of damages occasioned by a motor vehicle” would stretch the language beyond the breaking point. Moreover, reading the statute in a “broad and purposive manner”, as Mr. Mew urges, I cannot see that the purpose of the two year limitation is promoted by holding that it applies to the adjustment of losses as between insurers.

[14] This conclusion is consistent with the judicial and arbitral authorities referred to above. Moreover, I would have thought that if the issue of the *Highway Traffic Act* limitation was alive after the 1994 decision of Arbitrator Holland in *Wellington Insurance, supra*, it would have been raised in one of the subsequent cases. I suspect that the insurance industry has assumed that the six year limitation applies and has structured its practices accordingly.

[15] I should mention that although the Respondent raised in its factum the potential impact of the twenty year limitation period in section 45(1)(b) of the *Limitations Act* applicable to an “action on a specialty”, the issue was not pressed by Mr. McGoey, who candidly acknowledged that there would be little enthusiasm in the insurance industry for a twenty year period for the assertion of loss transfer claims. It seems to me that the mere fact that a cause of action is conferred by statute does not make the claim “an action on a specialty”: *Kenmont Management Inc. v. St. John Port Authority* (2002), 210 D.L.R. (4th) 676 (N.B.C.A.), leave to appeal to the S.C.C. dismissed, [2002] S.C.C.A. No. 143; *872899 Ontario Inc. v. Iacovoni et al.* (1998), 40 O.R. (3d) 715 (C.A.), leave to appeal to the S.C.C. dismissed, [1998] S.C.C.A. No. 476.

[16] For the foregoing reasons, the appeal is dismissed with costs in the amount of \$3,000.00, inclusive of G.S.T., as agreed by the parties.

Strathy, J.

DATE: March 7, 2008