IN THE MATTER OF the *Insurance Act* R.S.O 1990, c1..8, Section 268
AND IN THE MATTER OF the *Arbitration Act, S.O.1991, c.17,* as amended
AND IN THE MATTER OF an Arbitration

BETWEEN:

THE COMMONWELL MUTUAL INSURANCE GROUP

Applicant

-and-

CERTAS DIRECT INSURANCE COMPANY and BELAIR DIRECT INSURANCE COMPANY and ROYAL AND SUN ALLIANCE INSURANCE and OPTIMUM GENERAL INSURANCE COMPANY

Respondents

And

B E T W E E N:

OPTIMUM INSURANCE COMPANY INC.

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY, CERTAS DIRECT INSURANCE COMPANY and BELAIR DIRECT INSURANCE COMPANY and ROYAL AND SUN ALLIANCE INSURANCE

Respondents

DECISION

COUNSEL APPEARING

Jason R. Frost for the Applicant, The Commonwell Mutual Insurance Company (hereinafter called "Commonwell").

Amanda Lennox for the Applicant, Optimum Insurance Company Inc. (hereinafter called "Optimum").

Daniel Strigberger for the Respondent, Economical Mutual Insurance Company (hereinafter called "Economical").

Jeffrey Booth for the Respondent, Belair Direct Insurance Company (hereinafter called "Belair).

Katherine E. Kolnhofer/George Poirier for the Respondent, Unifund/RSA (hereinafter called "Unifund").

BACKGROUND INFORMATION

This matter comes before me both pursuant to s. 268 of the *Insurance Act*, Regulation 283/95 and the *Arbitration Act*. This is a priority dispute between a number of insurers. It arises out of an accident that took place on May 22, 2019.

At that time, Rebecca Davis and her children Sophia Seberras and Taya Carter were passengers in a VW Jetta bearing Ontario licence plate no. L9S2E4. The vehicle was being operated by Brandon Seberras. the Jetta was owned by James Hamilton.

Brandon Seberras is the father of Sophia and the previous partner of Rebecca. Rebecca and Sophia applied to Optimum for statutory accident benefits. Optimum insured Gary Davis. Gary is Rebecca's father and Sophia's grandfather.

Brandon's father Charles Seberras was insured by a Unifund policy of insurance, PR82AD33T4 which was in force at the time of the accident and Brandon was a described operator on that policy as an excluded driver pursuant to the OPCF-28A.

Unifund also insured Brandon under policy PR87ADE8K9. Brandon was a named insured under that policy but Unifund takes the position that the policy was cancelled prior to the date of loss. Whether or not Brandon's Unifund policy was properly cancelled is in dispute in this arbitration.

Belair also insured Brandon. He was the named insured under their policy but Belair alleges that their policy was cancelled effective February 20, 2015 for non-payment. Whether this policy was cancelled is also in dispute in this arbitration.

Commonwell is involved in this claim as Taya Carter applied to Commonwell for statutory accident benefits. Commonwell insures Taya's father, Dustin Carter. There is no question that the Optimum and Commonwell policies were in full force and effect on the date of loss. There are issues relating to these policies in terms of dependency, but that issue will be dealt with at a later date depending on the outcome of the cancellation issues that are presently up front and centre.

Certas was initially involved in this claim as James Hamilton (the owner of the Volkswagen) was insured with Certas. They were let out of the arbitration.

Economical insures John Fenchak, which was another vehicle involved in the accident. If all policies are properly cancelled and there are no dependencies found, then Economical would be the insurer of last resort.

Both Taya and Sophia are under 16 years of age. All the claimants have relatively significant injuries and their accident benefit claims remain open.

Issue

The issue that has been identified for me to determine is set out below:

1. Was the Unifund policy of insurance PR87ADE8K9 issued to Brandon Seberras properly

terminated prior to the accident?

2. Was the Belair policy of insurance 6681277 issued to Brandon Seberras properly terminated prior to the accident?

Proceedings

This matter proceeded by way of a written hearing. Each of the parties produced submissions. There was a Book of Documents filed by the Applicant Optimum, a Book of Documents by the Respondent Unifund and further documents were submitted with Economical's submissions. The parties also provided comprehensive Books of Authorities.

I will deal with each of the policies separately.

Issue 1: Was the Unifund policy properly terminated prior to the accident?

Facts

It is not in dispute that Unifund issued a policy to Brandon and that the policy term ran from June 12, 2015 to June 12, 2016.

While insured under the Unifund policy, Brandon had coverage for three vehicles in which he was described as the principal operator: a 2002 Volkswagen Jetta added June 12, 2015 but removed September 30, 2015, a 1995 Dodge Ram added July 27, 2015 removed August 12, 2015, and a 1986 Ford Mustang added August 12, 2015 removed September 30, 2015.

Unifund claims that the policy was cancelled pursuant to a registered notice of termination letter dated November 8, 2015. There does not appear to be any dispute that a copy of that letter has been unable to be produced.

What has been produced is the following.

There was a letter of July 14, 2015 directed to Mr. Seberras at 709 Kelly Street in Innisfil. The letter referenced the policy noted above. This letter advises Mr. Seberras that a July 5, 2015 pre-authorized payment was returned to Unifund noted as insufficient funds. The letter advises that as a result, the premium deductions for the remainder of the policy had been recalculated to include the missed payment along with a service charge of $25. Therefore, his preauthorized payment had been changed from $419.36 to $463.80 effective August 5, 2015. He is advised that although his deductions have been recalculated, his coverage has not been changed.

There is then a further and similar letter sent to Mr. Seberras at the same address dated September 13, 2015. This time his September 5, 2015 preauthorized payment has been returned marked as insufficient funds. He is now advised that his policy term has been recalculated to include that missed payment and a further service charge of $25 which changes his deduction "from $518.24 per month to $586.15 per month effective October 5, 2015". He is again advised that his coverage has not changed. However, this letter also includes the following:

> "We must advise however, that because you have had two insufficient funds in this policy term a third insufficient funds for reasons within your control will result in the cancellation of your policy and you will be notified by a registered letter."

On October 23, 2015 Unifund sends a registered notice of termination to Mr. Sebberas. The auto policy is provided as well as a note that it is the 2002 Volkswagen Jetta that is covered.

This letter advises that Unifund is giving the claimant 15 days' notice of the termination of his policy for non-payment of premium in accordance with the statutory conditions which are attached. The letter advises that at the end of the notice period Unifund will no longer insure Mr. Sebberas or his automobile. If there are any questions, he is told to contact his service specialist, and there is an address provided.

Of note is the fact that this letter does not provide a date that the policy will terminate, what the amount is that is owing, how he can make the payment (cash, certified cheque, etcetera), and where the payment can be made. Unifund acknowledges that there are deficiencies in this letter.

We now move to November 18, 2015 when Unifund sends another letter to Mr. Sebbaras. This time, the letter states:

> "Please be advised that the above-noted Unifund auto policy, which was cancelled as per the registered notice of termination letter dated November 8, 2015 has an outstanding balance of $1,556.20. This represents premium earned and not collected for the time the policy was in effect.
>
> We would appreciate that this premium be remitted to us immediately. Payment can be made by cheque, money order or by sending your credit card information to the above-noted address.
>
> If you have any questions concerning payment of this premium please contact the deductions department or if you would like to discuss your policy coverage or term, please contact your assigned service supervisor. Contact information for both the deductions department and your service supervisor is shown below."

There is then contact information for the customer service accounts and billing at Unifund with a telephone number and an email. There is also information attached to allow him to make a payment should he wish via credit card.

Mr. Sebberas did not contact Unifund. He did not repay the monies owing on his policy and this letter appears to be the last contact between Unifund and Mr. Brandon Sebberas.

It is acknowledged that all the letters outlined above were sent to Mr. Sebberas's correct address.

Unifund also points to some post-termination activities relating to the Sebberas family that Unifund feels are relevant.

Brandon's father Charles Sebberas obtained insurance coverage from Unifund under policy no.

PR82AD340H with a policy term of June 16, 2016 to June 18, 2017. Brandon was identified as an additional driver on this policy. Over the time period that this policy was in effect, Unifund says that Brandon received coverage for eight vehicles on which he was designated as the principal operator:

1. 2000 GMC Sierra added June 18, 2016
2. 2000 Ford F150 added July 11, 2016
3. 1999 Audi A4 added July 11, 2016
4. 1999 GMC Sierra added October 29, 2016
5. 2005 Chrysler 300C added December 2, 2016
6. 2002 Cadillac Escalade added January 9, 2017
7. 2003 Audi A4 added March 1, 2017
8. 1998 Dodge Ram added March 1, 2017

Charles also obtained a policy from Unifund, PR95AF08UR with a term of March 30, 2017 to March 30, 2018. Brandon was identified as an additional driver on this policy and once again he received coverage for an additional seven vehicles for which he was designated as the principal operator:

1. 1999 GMC K/V 2500 added March 30, 2017
2. 2000 Jeep Grand Cherokee added April 29, 2017
3. 2002 Volkswagen Jetta added May 6, 2017
4. 2002 Volkswagen Jetta added June 9, 2017
5. 2000 Volkswagen Jetta added June 16, 2017
6. 2002 GMC Sierra added July 31, 2017
7. 2006 Volkswagen Jetta added September 28, 2017

Charles also had a policy with Unifund bearing no. PR82AD33T4 which came into effect on March 19, 2015 and remained in effect up until the date of loss (May 22, 2019). Brandon did not list any vehicles on this policy and was specifically excluded from operating the vehicles on the policy by way of an excluded driver endorsement which Brandon signed on March 16, 2016 and December 6, 2017.

Mr. Sebberas's Ontario driving record was also included in the Unifund materials which showed that after the alleged policy termination, on three occasions Brandon was convicted of failing to have his insurance card with him while operating a motor vehicle. This was April 9, 2017, May 5, 2017 and February 14, 2019.

Position of the Parties

<u>Optimum/Commonwell</u>

Optimum and Commonwell both have similar positions with respect to the Unifund policy. They take the position that the policy was not properly cancelled and, despite the fact that the alleged cancellation took place almost four years prior to the date of loss, the policy would be in full force and effect on the date of loss due to the failure to properly cancel.

The Applicants submit that as Unifund is not able to produce the notice of termination dated November 8, 2015, there is therefore no evidence that the Unifund policy was properly cancelled. Even if one accepts that the November 8, 2015 reference date in the November 8 letter is inaccurate (and should have referred to an October date), the Applicants submit that the notices of termination are still ineffective as they do not comply with the statutory conditions set out in Ontario Regulation 777/93. In addition, in order for an automobile policy to be terminated, the Applicants submit that Unifund should have complied with s. 236 and 238 of the *Insurance Act*. The relevant section of the regulation noted above is 11(1.2) and 11(1.3). These are reproduced below.

> 2. Section 11(1) and (2) of *Statutory Conditions - Automobile Insurance*, O. Reg. 777/93:
>
> Termination
>
> 11. (1) Subject to section 12 of the Compulsoiy Automobile Insurance Act and sections 237 and 238 of the Insurance Act, the insurer may give to the insured a notice of termination of the contract by,
>
> (a) registered mail;
>
> (b) personal delivery;
>
> (c) prepaid courier if there is a record by the person who has delivered it that the notice has been sent; or

The Applicants submit that Unifund failed to comply with s. 11 due to the following deficiencies in the letters that have been produced:

1. The letter does not provide a date of cancellation.

2. The letter does not advise Brandon that he could pay his premiums in cash.

3. The letter refers to a November 8 registered letter as the basis for the cancellation. As Unifund cannot produce that letter, there is no evidence that that cancellation letter was compliant with s. 11 of the regulation.

Therefore, pursuant to s. 236(5) of the *Insurance Act*, the Applicants suggest the policy was not effectively cancelled and therefore it was in effect at the time of the accident.

Economical, although technically not an Applicant, also submits that the Unifund policy was not properly cancelled. In addition to relying on the failure to comply with s. 11 of the Ontario Regulation 777/93, Economical submits that there has been no evidence presented by Unifund that Brandon's account was delinquent with respect to his premium in the amounts that they allege he owes Unifund as set out in their termination letter. Economical submits that if an insurer terminates a policy for overdue premiums and it is later determined that those premiums were not in fact overdue, then the policy will be deemed to be in force. (*Ontario (Finance) v. Progressive Casualty Insurance Company of Canada*, 2007 CanLII 15475 Ontario Superior Court.) Therefore, as Unifund has failed to lead any evidence to support the amounts that they say

Brandon had not paid in terms of his premium, there is therefore no evidence that the payments were overdue and accordingly no right to terminate the policy for non-payment and therefore it should be deemed to be enforced.

The Applicants provide some case law to support their position. I summarize that below:

1. Ontario Regulation 777/93 requires that the insured be advised that the premium can be "payable in cash or by money order or certified cheque payable to the order of the insurer or as the notice otherwise directs". Where a letter does not provide an option that the insured can pay the outstanding amount in cash, the notice will be deficient. (*Dominion Canada v. Belair Direct* (September 2019) Arbitrator Novick and *Doran v. RBC General Insurance*, [2016] Carswell Ont. 9653 FSCO Arbitrator Matheson.)

2. Policy cancellation notices require strict compliance with the regulation. The termination provisions must be strictly interpreted and if an insurer has failed to comply with a term of the statutory condition, then the policy is not effectively terminated. (*London and Lancashire Fire Company v. Veltre* (1918) 56 SCR 588, *Gore Mutual Insurance Company v. Lombard General Insurance Company* v. *Motor Vehicle Accident Claims Fund* Arbitrator Bialkowski 2010 and *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830 Davies).

Unifund acknowledges that it has been unable to locate the letter dated November 8, 2015 and suggests that that is a typographical error, and instead it should have referred to the termination letter dated October 22, 2015. Unifund submits that this constitutes the termination notice letter. There is evidence that it was delivered by registered mail on October 22, 2015.

Unifund acknowledges that the letter of October 22, 2015 is not in perfect compliance with the regulation. However, Unifund takes the position that a standard of perfection is not required in the notice of termination. Unifund relies on the decision of Justice Davies in Allstate and Her Majesty the Queen (*supra*).

However, the main thrust of Unifund's submissions is that even if there were deficiencies in their notice of termination, that does not mean that the policy would remain in effect from November 2015 to May 22, 2019. Unifund suggests that if that were the case, the policy would remain in effect indefinitely until the end of time.

Unifund submits that it is clear that a policy can be terminated based on the expectations of the insured and also where there appears to be a mutual agreement between the parties that the policy be terminated.

Unifund submits that, before Unifund terminated the policy in the fall of 2015, Brandon was already behaving as if he no longer required the insurance from Unifund and in fact was in agreement with its termination.

Unifund points to the fact that on September 30, 2015 he removed both vehicles that had been listed on the policy from the coverage and no new vehicles were added between then and October 22, 2015 when the notice of termination letter was sent, nor were any vehicles added

between October 22, 2015 and the 15-day deadline that was set out in that letter.

Unifund submits that although that letter may have imperfectly complied with the regulation, there was ample information in there, together when paired with the earlier warning letters, and Brandon's own personal knowledge of the state of his premium payments, that Brandon would have understood the significance of the letter and what he needed to do to rectify the situation, and what might be the consequences of his failure to respond.

Unifund also submits that Brendan's own behaviour after October 2015 is clear that he understood that he no longer had access to coverage under the Unifund policy. They suggest that the most significant evidence of this is the fact that he was added as an additional driver to the two different policies held by his father. Further, he was identified as the principal operator of 15 different vehicles listed on those policies between June 2016 and September 2017.

Unifund suggests that if Brandon had not been aware that his policy with Unifund had been cancelled, then it would have made little sense for him to be listed on his father's policy or to add the vehicles on his father's policy. Unifund submits that every time Brandon added or removed a vehicle from his father's policy, he in essence affirmed his understanding and acquiescence that he did not have an insurance policy with Unifund.

Unifund also submits that there was no communication between Unifund and Brandon in 2016, 2017 or 2018. Unifund also submits that the three convictions that Brandon had for failing to have proof of insurance is a further indication that he must have known that he was not insured under the Unifund policy.

Lastly, Unifund submits that the evidence shows that the last time Brandon made a premium payment to the Unifund policy was in August 2015. The premium owing for September and October was unpaid. At no time between November 15, 2015 and May 2019 was a premium payment taken out of Brandon's bank account with respect to the 2015 Unifund policy.

Unifund therefore submits that even if the strict procedural compliance with the statutory regime was not done with respect to their termination letter, for the facts outlined above the 2015 policy would no longer be in effect on May 22, 2019 considering that the last premium payment had been some three-and-a-half years earlier.

With respect to these submissions, Unifund relies on the Court of Appeal decision in *Ontario (Finance) v. The Elite Insurance Company*, 2018 ONCA 809.

Unifund submits that this case stands for the proposition that s. 236(5) of the *Insurance Act* is not exhaustive and does not prevent a policy being terminated if the parties had a mutual intention to bring it to an end. The court suggested it was necessary to consider what else might have transpired between insured and insurer where there is a defective notice of non-renewal. The court suggests one can look at what other circumstances there are that may have arisen and brought the policy to an end.

Unifund points to the fact that the Court of Appeal in that case looked at the insured's behaviour and noted that he obtained coverage with another insurer which would have taken effect when

the Elite policy expired and therefore there was a mutual intention for the Elite policy not to continue.

Unifund suggests that to find that their policy remains in effect due to a defective notice indefinitely would give rise to absurd results.

Decision and Analysis

For reasons that will be outlined below, I conclude that the Unifund policy was not properly cancelled in November of 2015 and that it did remain in full force and effect on May 22, 2019.

I have already outlined the relevant regulation: s. 11 of Regulation 777/93. In addition, there are relevant provisions under the *Insurance Act* that I have reviewed. These are set out below:

1. 236(1): If an insurer does not intend to renew a contract or if an insurer proposes to renew a contract on varied terms, the insurer shall:
   (a) give the named insured not less than 30 days notice in writing of the insurer's intention or proposal;

2. 236(3): Notices under subsections (1) and (2) shall set out the reasons for the insurer's intention or proposal.

3. 236(5); A contract of insurance is in force until there is compliance with subsections (1), (2) and (3).

1. <u>Was Unifund's notice of termination defective?</u>

I agree with the Applicant's submissions on this point. First of all, there is no letter of November 8 in evidence which purportedly is the notice of cancellation letter. Therefore, there is no evidence before me as to whether that letter met the requirements of s. 11 of the regulation.

Even if I accept Unifund's submission that the October 22, 2015 letter was in fact the correct notice of termination, that letter itself is deficient. Unifund even acknowledges this but suggests that the deficiencies are minimal and in any event does not rely on this letter as the termination letter of the policy on a standalone basis.

Unifund relies on the letter of November 18, 2015. I find it is also defective and does not comply with the regulation.

The letter fails to set out that the claimant can pay the outstanding by cash. There is no date of cancellation. In my view, neither of these are minor deficiencies, but they have been found by other arbitrators to be non-compliant with the regulation to the extent that the policy has not been properly terminated.

I have reviewed Arbitrator Novick's decision from September 16, 2019 in the case of *Dominion v. Belair* (*supra*). In that case, Arbitrator Novick noted that rigorous standards must be imposed on insurers that attempt to cancel policies for non-payment. An insurer must make it clear to an

insured whose policy may be cancelled that it can be avoided by making the appropriate payments. Arbitrator Novick noted that s. 11(1.3)(b) explicitly requires that the notice provide that the amounts owing can be paid in cash or by money order. In the case before her, the notice did not do so and she found that a failure to do so results in any notice being sent out as being non-compliant.

I agree with Arbitrator Novick's analysis and adopt it here.

I also reviewed this issue in my decision, Co-*operators General Insurance Company v. Aviva Insurance Company of Canada* (December 14, 2021). At pages 10 through 12 I provided an analysis of the standard for imperfection permitted in a notice of termination. I relied particularly on the decision of Justice Davies in *Allstate Insurance Company v. HMQ* 2020 (*supra*). I adopt those comments and conclusions in this decision and I again find that, as Arbitrator Novick did, the notice of termination must include the essential elements that are set out in the legislative requirements under Statutory Condition 11. Unifund's letter simply did not meet those provisions. Therefore, on that basis, I find that the Unifund policy was not properly terminated.

However, my analysis cannot end there as Unifund raises an argument that irrespective of whether the notice was defective, I should find that the policy was cancelled by mutual agreement of the parties and by the subsequent behaviour of Mr. Seberras.

I have carefully reviewed the decision of the Court of Appeal in *Ontario (Finance) v. Elite Insurance* (*supra*). I find that that case is not helpful to Unifund as the policy that was being reviewed by the Court of Appeal and the circumstances of its termination or non-renewal are quite different than the facts before me.

In that case, Elite issued an automobile insurance policy for a six-month term. The policy was to be renewed for a second six-month term which would end on September 20, 2010. However, Elite could refuse to renew the policy if the claimant had not registered via the internet that he had received a data transmitting device for his vehicle within the two previous terms.

This policy is described as a "autograph" policy. It requires policyholders to install a device in their car that records their driving behaviour. If they install such a device, then they get a discount on the policy premium. Depending on the information that is collected, further discounts could be awarded to an insured. However, in order to get the discounts and in fact to qualify for the autograph policy, the insured had to register online to receive the autograph device. In this case, the claimant did not register online and never received or never installed the device.

The insured was advised that if he did not register for the device and secure it, Elite would cancel his policy. As the claimant did not register for the device, Elite sent him a letter by registered mail which he received on August 18, 2010 indicating that the policy would be cancelled effective September 20, 2010 based on his failure to register the device.

After that letter was received, the claimant called Elite on September 21 and told them again that he had not received the device. He was told that he had not registered online and that is why he had not received the device and his policy was now cancelled effective September 20. He was

directed to his broker to obtain alternate insurance.

The claimant did not pursue any further coverage with Elite and in fact on September 23, 2010 he obtained an automobile insurance policy from AXA for the same car that had been insured under the Elite policy.

He was involved in a motor vehicle accident on December 29, 2011.

This was a priority dispute in which the Fund was involved and claimed that the Elite cancellation was invalid as it did not comply with s. 236 and s. 238 of the *Insurance Act*, and therefore the policy had not been properly terminated and was in effect when the accident occurred.

The court said that at the heart of the dispute was the scope of the application of s. 236(5) and whether the parties could bring an end to their automobile insurance policy through their conduct after an invalid notice of renewal was given. The arbitrator concluded that question in the affirmative while the appeal judge held that s. 236(5) was determinative for all purposes as to what would occur if a defective notice of non-renewal was given.

The Court held (see paragraph 58) that s. 236(5) does not "renew" a policy. It simply extends its coverage potentially indefinitely until the insurer complies with the notice provisions for non-renewal. However, the court did hold that that does not preclude the consideration of other circumstances that may have arisen and brought the policy to an end. In the very specific circumstances of the Elite case, the court held that the arbitrator was right in finding that the parties shared a mutual intention that the Elite policy would not continue to cover the claimant. They acted so as to terminate their policy and conduct themselves in reliance on that.

With respect to this case, I am mindful of the court's statement at paragraph 78:

> "Interpreting s. 236(5) as requiring that a contract of insurance remain in force until there is compliance with the notice requirements is consistent with the objective of providing some certainty as to when a policy is enforced. It is also consistent with that objective to make the insurer responsible for compliance with the statutory conditions for non-renewal or its termination of a policy, as an insurer has control over the steps taken to initiate and complete that process."

I do not find in the circumstances of this case that the parties had a mutual agreement to end the contract and that the policy was therefore terminated even though there was non-compliance with s. 11.

Firstly, this would fly in the face of many other decisions on this issue. Further, if that were what the legislation intended, then the effect would be that each insurer who sent out a defective termination letter could simply rely on the fact that the insured went and secured a new policy or found himself some form of coverage elsewhere or as in this case had multiple convictions for driving uninsured to suggest that he agreed with and accepted the termination. This would in effect means that no insurer needs ever to comply with s. 11 as there is always an argument that can be made to suggest that the insured, by some actions thereafter as noted above, has accepted the termination and therefore by mutual agreement the contract has ended. I do not

believe that that was what the Court of Appeal intended in the Elite decision and it would change the landscape of how s. 11 of the Regulation would apply. It would make a mockery of the arbitrator's and court's conclusions that the notice of termination must come close to a standard of perfection in order to ensure that people whose policies are being cancelled for non-payment are done so properly. Automobile insurance is mandatory in Ontario (*Compulsory Automobile Insurance Act*) the strict requirements for the insurer to cancel a policy properly go hand in hand with that legislation.

I therefore conclude that the Unifund policy was not properly cancelled and despite the interesting and innovative submissions of counsel for Unifund on the Elite decision, I conclude that the policy was still in full force and effect on May 22, 2019.

Issue 2: Was the Belair policy properly terminated prior to the accident?

Facts

There is no dispute that Belair issued a policy of insurance to Brandon Seberras where Brandon was a named insured and the policy coverage was November 13, 2014 to November 13, 2015. The Belair policy was underwritten by the Nordic Insurance Company of Canada and bore policy no. 668-1277.

There is also no dispute that the Certificate of Automobile Insurance shows only one automobile attached to the Belair policy. It was a 1999 Dodge Ram. The Volkswagen Jetta that was involved in this accident was not specifically insured under the policy but in accordance with s. 2.2.3 0AP-1 the policy extends coverage to automobiles operated by Brandon even if not specifically insured under the Belair policy.

A VIN search of the Dodge Ram shows that Brandon Seberras removed the licence plates of the Dodge Ram on February 15, 2015. According to an Autoplus report, Brandon ceased and/or transferred ownership of the Dodge Ram on around February 17, 2015.

On February 20, 2015 Belair/Nordic sent a registered letter to Mr. Seberras at his 709 Kelly Street address in Innisfil. The wording of this letter is set out below.

> "We regret to inform you that we are unable to continue your present policy with Nordic Insurance Company of Canada due to non-payment of premium.
>
> **All coverage will terminate at 12:01 am on March 28, 2015.** To reinstate the insurance policy, a payment of $331.57 including a $70 fee for declined payment and a $25 reinstatement fee must be made by **noon on March 27, 2014 either by debit card, Western Union, money order, certified cheque or credit card.**
>
> If you decide not to reinstate your policy with Nordic Insurance Company of Canada, an outstanding balance of $130.77 is due and we would appreciate remittance within 15 (fifteen) days in order to clear your account. Payment of this amount is for the earned premium only and does not reinstate the policy.

> For further information, please call us at 1.888.228.2616. Our licenced insurance agents are here to assist you Monday to Friday, 7:00 am to 7:00 pm and Saturdays 8:00 am to 5:00 pm."

It is agreed that no further premium payments were made by Brandon to Belair after January 31, 2015. We also know that on June 12, 2015 Brandon obtained a policy of insurance with Unifund which was to run until June 12, 2016.

Efforts were made to examine Brandon Seberras in the context of this arbitration hearing and despite being served with a Summons, he failed to attend.

Position of the Parties

Belair

Belair, in it submissions, does not really address the sufficiency of the cancellation letter under s. 11(1.3)(b) of Ontario Regulation 777/93. Rather, Belair's submissions, like Unifund's revolves around an argument that Belair and Brandon, by their actions, mutually agreed to terminate the Belair policy. Belair also relies on the Court of Appeal decision in *Elite* (*supra*).

Belair submits that this is not a situation where it was a unilateral termination by an insurer. Rather, both the insured and an insurer clearly demonstrated a mutual intention to bring the policy to an end. The Belair intention was evidenced by their termination letter. Brandon's intention was indicated by going out and obtaining a new policy with Unifund which confirmed his intention to bring the Belair policy to an end. Effectively, Belair argues that Brandon's purchase of the Unifund policy amounts to a request to cancel his Belair policy, even though that request was not given directly to Belair.

Belair also submits that even if I find that their policy was not properly cancelled, that at most the Belair policy could only continue to be enforced until June 12, 2015, when Brandon's Unifund policy came into force.

Belair submits that with their policy terminating on March 28, 2015, that it would be an absurd result if their policy continued to remain in effect for four years (to the date of the accident).

Belair argues that s. 236(5) of the *Insurance Act* was not intended to create continuous contracts of insurance. They suggest that would be impractical as there would be a never-ending insurance contract where one party or the other is unaware of its existence.

Belair lists the following facts to support their position that there was a mutual termination of their policy.

1. Belair's letter February 20, 2015 clearly intended to cancel the policy.

2. Brandon transferred the Dodge Ram (the only vehicle on the policy) in February of 2015 before the cancellation date of March 28, 2015.

3. Brandon did not add any further vehicles to the Belair policy so there was no insurable interest in any car.

4. Brandon did not make any further payments to Belair.

5. Brandon purchased an auto policy with Unifund commencing June 12, 2015.

6. Brandon was later added to a Unifund policy with his father.

7. Brandon did not own a vehicle on May 22, 2019.

The Applicants

With respect to the cancellation letter itself, both Commonwell and Optimum point to the fact that the letter does not include the right of the insured to rectify the non-payment by paying in cash. Therefore, the letter does not meet the requirements of the regulation and it cannot be considered a proper termination.

In addition, Optimum points to the fact that the letter provides the incorrect date by which Brandon is required to pay the full amount to reinstate his policy. The letter is dated February 20, 2015 and it is noted that Brandon is required to pay the full amount by March 27. This is not in fact the business day before the day specified for the termination and again Regulation 777/93 has not been satisfied.

Commonwell points to the same deficiencies but also notes that the letter did not provide the address in Ontario for the delivery of the overdue amount. Therefore, there are three deficiencies in the letter. As I noted above, Belair does not appear to strenuously argue that their letter was not deficient.

On the issue of the mutual termination, Commonwell submits that the mere fact that an insured arranges a new insurance contract cannot be considered sufficient to "request" that another insurer cancel a prior policy. How can the mere fact of obtaining new insurance constitute a request under the *Insurance Act* to cancel a prior policy? The action of an insured in seeking new insurance would be behaviour that would be unknown to the insurer who had initially sought to terminate the policy for non-payment. Commonwell submits that such a finding would render s. 236 of the *Insurance Act* and s. 11 of the Statutory Conditions to be effectively "meaningless or moot".

Optimum makes similar submissions. Optimum also submits that there is no evidence that there was mutual agreement or understanding between Brandon and Belair with respect to his policy cancellation. Optimum submits that strict compliance is required as this was a unilateral termination of an insurance contract and not a mutual termination with the exchange of information nor is there evidence that Brandon "requested" Belair to cancel the policy.

Both Optimum and Commonwell argue that the *Elite* decision from the Court of Appeal referred to by Belair is not applicable to the facts of this case. They submit that in the *Elite* case, it was

not unreasonable for the arbitrator (as supported by the Court of Appeal) to determine that, on the specific facts of that case, there was a mutual intention to terminate the policy. The insured knew he had not registered for the autograph device as required by the policy and the insurer knew that the insured had not registered for the autograph device. Both understood that that would mean that the policy would be terminated. The insured in that case was specifically requested by the insurance broker (the insurer's agent) to get new insurance from a different insurer, and did so.

Commonwell points out that Belair did not lead any evidence to suggest that Brandon had requested specifically for his policies to be terminated. There was no evidence of any communication between Brandon and Belair once the deficient termination letters had been sent out. This, it is submitted, distinguishes the decision from *Elite*.

Both Commonwell and Optimum submit that the statutory provisions as set out in s. 236 of the *Insurance Act*, together with s. 11 of the Statutory Conditions, set out three possible avenues for an automobile insurance policy to be cancelled:

1. A compliant notice of termination;
2. A compliant notice of non-renewal; or
3. A request from the insured to terminate the policy.

The Applicants submit that there was no compliant notice of termination. This was not a situation of non-renewal. There was no request from the insured to terminate the policy. One cannot assume from the mere fact that an insured was delinquent on their premium and later entered into another automobile insurance policy, that that would constitute a "request" to terminate a policy.

Optimum also points to the decision of the Court of Appeal in *Merino v. ING Insurance Company of Canada*, 2019 ONCA 326. In that case, Optimum submits that the Court of Appeal confirmed that the decision in *Elite* was not about a unilateral termination. Optimum points to the comment of the Court of Appeal in *Merino* that automobile insurance is compulsory in Ontario. The termination and renewal provisions of the *Insurance Act* and its regulations provide notice periods to allow an insured time and an opportunity to seek alternate coverage once they have received notice that their insurance is going to be terminated. This is so that an individual who drives a car will always know whether they are or are not insured and can take the necessary steps to correct any gaps in coverage.

The court states at paragraph 43:

> "The scheme of the Act and its regulations prescribes the rights and obligations of the insured and the insurer under the automobile provisions, requires strict compliance, and provides an orderly and predictable set of consequences for compliance and non-compliance. For example, if a notice of termination does not comply with s. 11 of the Regulation, then the insurance contract remains in force: *Ontario (Finance) v. Traders General Insurance (Aviva Traders)*, 2018 ONCA 565, p. 142"

Optimum also points to the *Traders* decision referenced in the above quote by the Court of Appeal in *Merino*. In that case, the Court of Appeal again confirmed that if a notice of termination does not comply with s. 11 of the regulation, then the insurance contract remain in force.

Finally, Optimum also references the decision of *Echelon General Insurance Company v. Ontario (Minister of Finance)*, 2016 ONSC 5019. This was a decision of Justice Matheson. In this priority dispute, the insurer argued that they should not bear the consequences of failing to give proper notice of termination because the policy had expired on its terms by the time the accident occurred. The insurer in that case argued that the notice provisions under s. 11 of the regulation would only apply during the term of the policy. In other words, even if deficient notice is given when the policy itself expired based on the terms of the contract, at that point the policy would no longer be in existence.

Justice Matheson held that interpretation to be contrary to the plain words of the section. He suggested that under that type of interpretation all an insurance company need do is wait until the term of the policy has expired and then it can entirely avoid the obligations of s. 236 to give proper notice of either non-renewal or termination.

Optimum submits that the *Echelon* case, together with the wording of s. 236(5) of the *Insurance Act*, is clear and that a contract of insurance, irrespective of policy terms, remains in force until there is proper compliance with s. 11. The policy will not lapse upon the expiration of its term.

Therefore, the Applicants submit that the Belair policy remained in full force and effect as of the date of the accident of May 22, 2019 for the following reasons:

1. The termination notice was defective under s. 11.

2. The insured did not request his policy be terminated in accordance with the *Insurance Act* and the regulation.

3. The Belair policy did not simply lapse when Brandon secured new coverage with Unifund.

Therefore the Applicants submit that pursuant to s. 2.2.3 of the OAP-1, that as the Belair policy had not been properly terminated, coverage was extended to the occupants of the vehicle that Mr. Seberras was operating on the date of loss.

Decision Analysis

On the issue of whether or not the Belair policy was properly cancelled in accordance with s. 11 of the regulation, I find in favour of the Applicants. Belair did not lead any evidence or really put forward any argument to suggest that their cancellation letter met the strict requirements of s. 11. It did not tell the insured he could make payments in cash if he wished to reinstate his policy. It did not have an address as to where that payment could be made, and the timing as pointed out by Optimum as to the date of cancellation was incorrect.

Therefore, I conclude that the Belair policy was not properly cancelled in accordance with s. 11 of Regulation 777/93.

However, that was really not Belair's main argument. Their argument is that it does not matter that their notice was not compliant with s. 11 because there was a mutual agreement to terminate the policy based on the actions of Belair in providing the cancellation notice for non-payment and Mr. Seberras in not paying the policy and securing another policy with Unifund.

I have carefully reviewed all the facts and I have carefully reviewed the submissions. For the reasons that I have outlined in part in my decision with respect to the Unifund policy, I agree with the submissions of the Applicants. This was a case of a unilateral termination of a policy for non-payment. The facts do not, in my view, support that this was a mutual termination of the policy nor do the facts support that Brandon "requested" his policy could be cancelled as is his right under the *Insurance Act*.

I find that it would be inconsistent with s. 236(5) of the *Insurance Act*, Regulation 777/93 and the case law to conclude that where there is no actual communication between an insured and an insurer other than a termination letter based on non-payment, that there can be said a mutual agreement to terminate a policy. It would, in my view, result in an absurdity. It would allow insurers to simply ignore Regulation 777/93, and in particular s. 11, when terminating policies as they could simply take the position that the insurer did not make the payments and/or found a policy elsewhere that it was a mutual agreement and they did not have to meet the strict requirements. I simply cannot accept that that is what was intended by the legislature. As the Court of Appeal pointed out in the *Merino* decision, the scheme of this Act and its regulations requires that the insurer strictly comply with s. 11 of the regulation. There is to be an orderly and predictable set of consequences for compliance and non-compliance. To find, as submitted by Belair, that Brandon's actions constitute either an actual intention to cancel the policy or a request to cancel the policy, would not provide for an orderly and predictable set of consequences. For similar reasons as I have outlined above, I also do not accept Belair's argument that their policy would be effectively terminated on the date that Brandon entered into his new policy with Unifund. I do not find that approach consistent with the Court of Appeal in either *Merino*, *Elite* or the *Traders* decision (all *supra*).

Time and again arbitrators and the courts have confirmed that where there is a unilateral termination of a policy of automobile insurance for non-payment by an insurer, that that termination must strictly comply with s. 11 of Regulation 777/93. Despite able submissions of counsel, I find that neither the facts of this case nor the law support Belair's and Unifund's position that despite the defective termination letters, that their policies were no longer in effect on the date of loss.

I therefore conclude that the Belair policy was also in full force and effect on the date of loss.

AWARD

I therefore find that the policy of Unifund was not properly cancelled and was in full force and effect on May 22, 2019. I also find that the Belair policy was not properly cancelled and was in full force and effect on May 22, 2019.

I make no finding as to who the priority insurer in this case is. This award only deals with whether or not the Unifund and Belair policies had been properly cancelled.

COSTS

As this decision does not decide the priority issue, I have not made any order as yet with respect to the legal costs of this preliminary issue hearing.

If counsel are not able to agree on the legal costs that flow from this decision, then they can let me know and we will arrange at our next pre-hearing to discuss setting up a costs hearing.

As to the costs of the arbitration itself, as Belair and Unifund were not successful then the arbitration costs will be split 50/50 as between Belair and Unifund.

DATED THIS 12th day of December, 2023 at Toronto.

Arbitrator Philippa G. Samworth
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