

IN THE MATTER OF SECTION 268 OF THE *INSURANCE ACT*,
R.S.O. 1990, C.I.8, AND O. REG. 283/95

AND IN THE MATTER OF THE *ARBITRATION ACT, 1991*,
S.O. 1991, C.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ING INSURANCE COMPANY OF CANADA

Applicant

-and-

PRIMUM INSURANCE COMPANY

Respondent

DECISION ON PRELIMINARY ISSUE

Counsel: Douglas A. Wallace
McCALL DAWSON OSTENBERG WALLACE LLP

Solicitor for the Applicant

Marc D. Isaacs
STRATHY & ISAACS

Solicitor for the Respondent

ISSUE:

The preliminary issue to be determined is:

“Does an Arbitrator appointed pursuant to Ontario Regulation 283/95 and The Arbitration Act, 1991 have the jurisdiction to determine whether or not Ms. Otten is deemed to be a “named insured” under the automobile policy issued by Primum?”

ORDER:

An Arbitrator appointed pursuant to Ontario Regulation 283/95 and The Arbitration Act 1991 does have the jurisdiction to determine whether or not Ms. Otten is deemed to be a “named insured” under the automobile policy issued by Primmum.

FACTS:

This matter proceeded by way of a teleconference preliminary hearing on August 23, 2006. An Arbitration Book of Documents was filed and marked as Exhibit 1 which included an Agreed Statement of Facts, the Certificate of Automobile Insurance of Primmum Insurance Company and the Certificate of Automobile Insurance of ING. The former shows Rudy Van Diren as the named insured and the latter Cindy Otten as the named insured.

The essential facts of this case are not in dispute insofar as the preliminary issue is concerned. The facts can be summarized as follows:

On June 24, 2005 Cindy Otten was driving a 2004 Yamaha V-Star 650 motorcycle on Highway #7 near Guelph. She lost control, entered a ditch and sustained various injuries.

At the time of the accident Cindy Otten was the registered owner of the motorcycle. Rudy Van Diren was Cindy Otten’s fiancée. It is acknowledged that they were not spouses or dependants as defined under The Insurance Act or the Statutory Accident Benefits Schedule.

Rudy Van Diren was also the registered owner of two vehicles that were insured with Primmum Insurance Company under policy 75977033. The Certificate of Insurance found at Exhibit 1 at Tab 2 shows the named insured under that policy is Rudy Van Diren.

Cindy Otten, as well as being the registered owner of a motorcycle, was also the registered owner of a 2002 Chevrolet Monte Carlo. This was insured under the ING policy number 7 Z9512681. Cindy Otten was shown as the named insured on the Certificate of Insurance relating to the ING policy (see Exhibit 1 Tab 3).

On May 1, 2004 Cindy Otten’s 2004 Yamaha was added to the Primmum policy issued to Rudy Van Diren. In reviewing the Certificate of Insurance this motorcycle is shown as described automobile. Under rating information Rudy Van Diren is shown as the driver and principal operator of vehicle 1. Cindy Otten is shown as the driver and principal operator of vehicle 2: the motorcycle.

After the accident of June 24, 2005 Cindy Otten applied to ING for statutory accident benefits as a result of her injuries. ING being the first insurer to receive the completed Application for Statutory Accident Benefits commenced payment. ING has commenced this Arbitration in accordance with The Insurance Act Regulation 283/95 claiming that Primmum is the priority insurer responsible for paying the accident benefits.

PARTIES POSITIONS:

The position taken by ING is that Cindy Otten, as the registered owner of the motorcycle that she was operating on the date of the loss, should be deemed to be a named insured under the ING policy for the purpose of statutory accident benefits. Counsel for ING made no arguments before me in this preliminary matter as to how Ms. Otten would become a deemed named insured. On the other hand counsel for Primum argued extensively and provided Facts and case law to suggest that there was no legal avenue available to ING to argue that Cindy Otten should be made a deemed named insured. His four main points were:

1. One must distinguish between a named insured and a deemed named insured;
2. There is no legal basis for deeming an individual to be a named insured under an automobile policy (other than s.66 under The Statutory Accident Benefits Schedule);
3. As s.66 provides for the only process where an individual can be a deemed "named insured" under a policy the legislation must be interpreted as excluding any other avenues for deeming an individual to be a named insured;
4. That the result of this inquiry will lead us down the path as to whether the Primum policy is valid at all and will raise issues of misrepresentation;
5. While acknowledging that an Arbitrator has the right to make an award based on equitable remedies under The Arbitration Act (see s.31) that that right does not extend to re-writing a contract.

ING's position was that Primum was "putting the cart before the horse." Their submission was that this preliminary issue dealt with whether I have jurisdiction to determine whether Ms. Otten is deemed to be a named insured under the automobile policy as a function of my jurisdiction relating to priority disputes. He argued that I have that jurisdiction and that the issues raised by Primum are more properly heard in a full Arbitration hearing and not as a preliminary dispute.

It is my view that while Primum may have some very compelling arguments as to whether or not Cindy Otten can be deemed a named insured, that those arguments are more properly made in a full Arbitration hearing. The reasons for my conclusion are set out below.

ANALYSIS:

Under The Insurance Act R.S.O. 1990 Regulation 283/95 s.1 provides:

"All disputes as to which insurer is required to pay benefits under s.268 of the Act shall be settled in accordance with this Regulation."

In my view this section leaves the Arbitrator with a very broad jurisdiction to determine all matters in issue for the purposes of determining who should pay accident benefits. This dispute is about whether ING or Primum should pay accident benefits to Cindy Otten.

The issue that ING has raised in this dispute is that priority rests with Primmum. The argument in support of that revolves around the question of whether Ms. Otten can be “deemed a named insured.” Without deciding the issue, whether ING’s position has little or no merit is not the basis for ousting an Arbitrator’s jurisdiction. The position take by Primmum is much like a motion for summary judgment under the Rules of Civil Procedure. However, the preliminary issue put before me was not whether ING had a reasonable cause of action or whether this could be decided in a summary fashion. The issue put before me was specifically whether I had jurisdiction to determine whether or not Ms. Otten was deemed to be a named insured under the Primmum policy in the context of a priority dispute. I am satisfied I have that jurisdiction.

Subsection 17(1) of The Arbitration Act, 1991 provides that:

“An Arbitral Tribunal may rule on its own jurisdiction to conduct the Arbitration and may in that connection rule on objections with respect to the existence of validity of the Arbitration Agreement.”

I am therefore satisfied that I may, in accordance with the provisions of The Arbitration Act make decisions relating to my own jurisdiction. Further, I have reviewed the Arbitration Agreement and I am satisfied that clearly this dispute is with respect to who is liable to pay statutory accident benefits to Cindy Otten. The wording of the Arbitration Agreement clearly falls under s.1 and s.7(1) of Ontario Regulation 283/95.

I ask myself in reviewing The Arbitration Act and The Insurance Act that if I do not have jurisdiction to hear the issue then who does given the limited involvement of the courts in these matters and particularly given Regulation 283/95.

In my view all the issues so eloquently argued by Mr. Isaacs in the course of the preliminary argument are more properly to be argued before me at a full hearing when both ING and Primmum have had the opportunity of completing the exchange of productions, any discoveries that are required and all the other pre-Arbitration matters.

EXPENSES:

According to the Arbitration Agreement expenses shall follow the event and if there is any dispute as to the quantum of costs of this preliminary issue then the parties can address that at the further pre-hearing scheduled for September 15, 2006.

Dated at Toronto, this 30th day of August, 2006

Philippa G. Samworth