

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, and Regulation 283/95
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17
AND IN THE MATTER OF an Arbitration

BETWEEN:

CHUBB INSURANCE COMPANY OF CANADA

Applicant

- and -

THE PERSONAL INSURANCE COMPANY

Respondent

PRELIMINARY DECISION – PRODUCTION ISSUE

Counsel:

Kevin S. Adams for Chubb Insurance Company of Canada (Applicant) hereinafter called Chubb

Jason Duyck for The Personal Insurance Company (Respondent) hereinafter called The Personal

Background:

On January 19, 2017, the claimant was a pedestrian who was struck by a vehicle insured with Chubb. She submitted an Application for Accident Benefits to Chubb. Chubb subsequently forwarded a Notice of Dispute and Demand for Arbitration to The Personal. The claimant is not a named insured on any policy of insurance issued by The Personal: either as the named insured or a listed driver. She is not the spouse of an insured of The Personal. She is not a dependant of an insured of The Personal.

Chubb claims that the claimant should have been the insured under a policy of insurance The Personal issued to one KSP in 2015. This bears policy number K6016430. KSP added a 2016 Ford F-150 truck to that policy on March 7, 2016.

It is alleged by Chubb that the claimant is a lessee of the 2016 Ford F-150 truck together with KSP. Chubb alleges the Ford F-150 was leased by Canadian Road Management to these two individuals. Chubb therefore argues that as the claimant was co-lessee of the Ford vehicle she should have been shown as the named insured under The Personal policy. As noted in an earlier decision of mine, relating to productions issues of mine Chubb claims that if the claimant

is not named under that policy then it was due to an administrative or underwriting error on the part of The Personal.

This latter claim by Chubb has resulted in numerous production discussions and arguments through the course of various pre-hearings held in this matter. Generally, counsel had been able to come to some agreement with respect to productions. However, on February 4, 2019, I was requested to make an Order with respect to production. The issue was how broad a production order would Chubb be entitled to from The Personal with respect to policy K6016430. Chubb sought applications, certificates, underwriting files, agent files, etc. In particular, Chubb at that time sought the following “The Personal’s internal underwriting rules and the underwriting guidelines filed with FSCO applicable for policy number K6016430 and any other motor vehicle liability policies issued to or naming the claimant the claimant or her company J.H.S. Construction Limited.

At that time I declined to order production of the internal underwriting rules and underwriting guidelines on the basis that they did not appear to be relevant. I did however, order the relevant documents within The Personal’s possession specifically relating to any policies, applications or certificates for the 2016 Ford F-150 truck. I also ordered The Personal produce their underwriting file and the agent’s file specifically relating to that policy and relating to the Ford truck only.

This then brings us forward to the most recent production issue that has arisen. Much of what is being asked to be produced by Chubb now flows from information that was secured through the EUO of RM an underwriter with The Personal. Some of the requests flow from refusals made during the course of that EUO and others are with respect to undertakings made.

Counsel submitted written submissions and case law with respect to the production issue as well an oral argument was made on June 15. During the course of the oral argument it was clear that some of the production issues had been resolved and further that Chubb’s productions request was more fine-tuned or narrowed.

Issues:

As I understand, the remaining issue is whether The Personal should produce, to Chubb, copies of any guidelines, underwriting rules, or directions given to the agent with respect to the identification of the owner of the vehicle or the lessee of the vehicle prior to binding coverage. I note that this is my terminology with respect to what is being sought.

Documents Filed:

Each counsel submitted a Factum. In addition each counsel submitted any documents that they felt were relevant. I also was provided with a copy of the transcript of the EUO of RM, the underwriter. Lastly counsel provided some case law.

When reviewing the position of the parties, I will refer to the relevant facts that they put before me.

Position of Chubb:

Chubb argues that in order for me to determine whether it was an underwriting error or administrative oversight that the claimant was not the named insured under The Personal policy, I need to have before me the full facts as to whether or not the agent followed prescribed rules set out by The Personal to their sales representatives when either opening a new policy or, as in this case, adding a new vehicle to an existing policy. Chubb argues that in order for me to determine whether there was an underwriting error or an administrative oversight I need to know what the proper process is and determine whether The Personal followed that process. Chubb argues that whether or not the failure of The Personal to follow these guidelines is the basis upon which I can in effect re-write The Personal's policy and deem the claimant a named insured under the policy is not relevant to this motion for production. Chubb argues that it is ultimate issue in this Arbitration and not a basis upon which appropriate production should be considered. As Mr. Adam's put it, it is "putting the cart before the horse".

As to the facts that Chubb relies upon, Mr. Adams took some time to go through the information provided by the underwriter on his EUO. Firstly, the underwriter who was examined was not the "sales agent" who actually handled the call from KSP to add the Ford truck to his existing policy. Therefore, RM could only speak very broadly about how the underwriting guidelines and sales representatives/brokers of The Personal were expected to work. Of note, is the fact that the actual sales agent/broker was not produced for the EUO.

The information from the underwriter was that each sales agent has before them a screen on which certain questions are to be answered. Some of the screens were produced as part of this production motion. While the sales agent has the individual on the phone they ask the questions on the screen and then populate that screen in the appropriate place with the answer given. When that information is put in, that may prompt another screen to come up with additional questions or that you move onto the next step in the process.

RM also gave evidence that there are some scripted questions that are to be asked of the individual who has called in to seek a policy change, buy a policy or a policy addition. RM indicates that if someone was calling in to insure a vehicle one of the questions that would be asked is who owns the vehicle. RM indicated that he would expect the agents to ask that

question. His evidence is also that there would be nothing else requested in terms of proof of ownership.. Rather the agent bases their information on the assumption that they will be given accurate information unless there are specific concerns that are presented during the course of the call.

RM indicated that there are rules with respect to the process that the sales agent is to follow. However, his answers were difficult to follow as to whether there was any specific underwriting rules that dealt with the obligation of the sales agent to ask who the owner was, whether the vehicle was leased or owned and who the lesser or lessee was. On one hand he would say that those types of questions didn't necessarily have to do with an underwriting rule but would rather be part of the computer program process that the agent would have to use. Yet elsewhere it is evident he suggested that there may be checklists with respect to this.

Mr. Adams pointed out to questions 121 through 124 where RM indicated that the sales agent once they knew it was a leased vehicle would be required to confirm who the lessee was. However, the screen did not prompt them to, RM's evidence was they would just know to do that. Then at question 125 RM indicates that this information would come to the agent as a part of their training but it would also be in the screen. If they didn't put that information in the screen then they wouldn't be able to put that information forward.

Unfortunately I am left with a very unclear picture as to how exactly an agent for The Personal is trained and what rules, guidelines or check lists they might have with respect to the questions and process to be followed when an individual calls in seeking to add a leased vehicle. I am equally unclear as to whether there were actually any training manuals or underwriting rules dealing with that particular issue.

Chubb's position is that that uncertainty mandates such an order for production and that it is relevant to the key issue that I may ultimately have to determine.

The Position of The Personal:

The Personal takes the position that Chubb has been provided with more than sufficient information to understand the process, know what was required of the agent and in fact what the agent actually did in this particular case. Further, The Personal submits that Chubb had sufficient documentary disclosure to determine how the vehicle, in issue here, was added to the policy so that a decision can be made on priority. The Personal points to the access that Chubb has had to the systems that is used (photocopies of pages of various screens that the agent would use) transcripts of the actual phone call that was made as well as the information provided by RM.

The Personal submits that the additional information being sought is neither helpful nor relevant. Further, The Personal submits that the underwriting information requested is proprietary.

The Personal also submits that Chubb's requests are not proportional to the issue in litigation. It has no probative value and will not advance the case. The breadth of what is being requested is not needed in order to determine the issue in dispute and is disproportionate to the narrow issue before me.

The Personal's final position is that I should not order the production of these documents because there is no basis in law upon which I can find that The Personal is in priority to Chubb. The Personal submits that if I accept Chubb's argument then I will create a contract of insurance between two parties who never had any intention of creating the contract.

In that regard, The Personal notes that the policy (K6016430) was already in existence with the named insured KSP before the Ford F-150 truck sought to be added. The evidence is clear that this was not a new policy being created but a new vehicle being added to an existing policy. Therefore, The Personal argues that had it known that the claimant was the primary lessee on the lease agreement for the Ford F-150 it would not have therefore added the vehicle to KSP's policy. Rather the agent would have told KSP when he called in that only the claimant could apply for insurance on the vehicle. This would then mean that the vehicle would never have been added to KSP's policy and the claimant would have had to apply for a separate policy of insurance. Whether she chose to apply to The Personal or not is another issue. Further, whether The Personal would have even accepted the claimant as an insured is another question.

While there may be some merit to the latter arguments on the part of The Personal that is not the stage of the Arbitration that we have reached yet. Indeed, that would appear to be the substantive issue that I may ultimately have to determine. Presently, I am only dealing with productions that are relevant to the question as to whether the claimant should be deemed insured on The Personal policy based on an underwriting error or administrative oversight.

Analysis and Decision:

Section 25 (6)(b) and Section 29 (2) of the *Arbitrations Act* provides me with jurisdiction to make an order for the production of records sought by a party. Indeed there seem to be no dispute between the parties before me that I have jurisdiction to make the order requested by Chubb. The only question is whether the order is too broad or overreaching.

Had counsel for Chubb continued to pursue the very broad requests that were made for production through the EUO and set out in his Factum, I would have likely to have been inclined to refuse to make the order for production. However, during the course of argument that request was substantially narrowed. Accordingly, I am prepared to make some limited order with respect to the production of some of the items requested by Chubb but with an effort to strictly limit the order to only those documents that may be relevant to the issue and keeping in mind the proprietary nature of some of this information.

I am assisted in this endeavour by the decision of Arbitrator Novick dated June 6, 2019 in the case of Economical Mutual Insurance Company & Wawanesa Mutual Insurance Company.

In that case, Economical sought an order for the production of Wawanesa's underwriting records related to two specific policies. It was alleged that these records were needed to clarify gaps in the information that had been obtained as well as to reconcile some inconsistencies.

Wawanesa resisted the production of the underwriting records claiming they were not relevant and that they were overreaching. Much of the case dealt with an analysis as to how broad the request was. Arbitrator Novick acknowledged that a broad request for underwriting files could be invasive and inappropriate.

She ultimately concluded that the records requested to be produced could help clarify some inconsistencies and unanswered questions that arose from the documents and the examinations under oath. Many of the facts and the issues considered by Arbitrator Novick are similar to those before me.

Arbitrator Novick concluded that the type of request before her is one that in some cases may be considered beyond the bounds of what should be produced in many cases. However, she found that they were potentially relevant to the unique circumstances of the case and therefore should be producible. She held that a review of the underwriting records is the only way to determine what may have been communicated to Wawanesa, and by whom about the claimants use of the relevant vehicle at the time of the accident.

I find that some production of the information requested by Chubb is relevant to the question of whether the claimant should be deemed insured under The Personal policy based on a potential underwriting error or administrative oversight. I make this order without deciding at all whether that would be any grounds for concluding that there is any jurisdiction for me to make such a finding when the ultimate argument is brought before me. That remains a live issue.

What I am prepared to order produced is the following:

1. Any specific underwriting rule, guideline or checklist that The Personal has for their agents setting out specific questions or information they are to seek when an existing policyholder calls in to request the addition of a leased vehicle.

If there is any questions or clarification needed with respect to the parameters of this order, I am happy to deal with this at the next scheduled pre-hearing.

Costs:

I am awarding the costs of this production motion to Chubb. Initially the motion was for undertakings that had not been complied with or that The Personal had withdrawn their agreement to comply with. While the initial relief sought by Chubb was much broader, the issue was narrowed during the course of argument which allowed the parties to hone in on the relevance of the documents being sought and reduce the oral argument time.

Therefore, The Personal will pay the Arbitrators fee with respect to the preparation, hearing and decision on the production issue. The Personal will also pay Chubb's legal fees with respect to the motion for production.

If counsel cannot agree on costs that can be addressed at the next pre-hearing which is scheduled for July 15, 2020.

DATED THIS 6th day of July, 2020 at Toronto.

A handwritten signature in black ink, appearing to read 'PLG', with a long horizontal line extending to the right.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP