

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Primum Insurance Company v. ING Insurance Company of Canada

BEFORE: Justice D. Brown

COUNSEL: M. Isaacs, for the Applicant, Primum Insurance Company
D. Wallace, for the Respondent, ING Insurance Company of Canada

DATE HEARD: February 5, 2007

ENDORSEMENT

[1] Primum Insurance Company (“Primum”) applied for an order overturning the decision on a preliminary issue of Ms. Philippa Samworth, an Arbitrator appointed to conduct a priority dispute arbitration in respect of Statutory Accident Benefits (“SABs”) under the *Insurance Act*. This application concerns the scope of an arbitrator’s jurisdiction on such an arbitration.

Facts

[2] An agreed statement of facts prepared by the parties for the arbitration stipulated that in June, 2005 Cindy Otten was driving a motorcycle near Guelph, Ontario when she lost control and sustained injuries. Ms. Otten was the registered owner of the motorcycle.

[3] Her fiancé, Mr. Van Dieren, was the named insured under a standard Ontario automobile policy of insurance issued by Primum. The motorcycle owned and driven by Ms. Otten was added to the Primum policy; Ms. Otten was identified as its principal driver.

[4] At the time of the accident Ms. Otten also owned a vehicle insured under a policy of insurance issued by the respondent, ING Insurance Company of Canada (“ING”). She was the named insured under that policy.

[5] Ms. Otten applied to ING for SABs in respect of the accident, which ING paid.

[6] The priority rules under section 268(5) of the *Insurance Act*, R.S.O. 1990, c. I.8 provide that where a person is a named insured under an automobile insurance policy she shall claim

SABs against that insurer. ING took the position that Ms. Otten should be deemed a named insured under the Primmum policy which would mean that Primmum would be higher in priority than ING for responsibility to pay SABs. Primmum disagreed. Section 7(1) of Ontario Regulation 283/95 made under the *Insurance Act* (the “*Dispute Regulation*”) provides that if insurers cannot agree as to who is required to pay benefits “the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991*.” In July, 2005 ING commenced a priority dispute arbitration asserting that Primmum stood higher in priority than ING to pay SABs to Ms. Otten.

[7] Under an arbitration agreement dated August 18, 2006 (the “Agreement”), the parties appointed Ms. Philippa Samworth as arbitrator (the “Arbitrator”). At the arbitration, ING raised the following preliminary issue:

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 Primmum?

ING argued that the Arbitrator did possess such jurisdiction; Primmum that she did not.

[8] In reasons dated August 30, 2006 the Arbitrator held that an arbitrator appointed pursuant to the *Dispute Regulation* and the *Arbitration Act, 1991* (the “Arbitration Act”) had the jurisdiction to determine whether or not Ms. Otten was deemed to be a ‘named insured’ under the automobile policy issued by Primmum.

[9] Primmum appealed the Arbitrator’s decision on the preliminary question pursuant to section 17(8) of the *Arbitration Act*.

Scope of arbitrator’s jurisdiction under the *Dispute Regulation*

[10] Section 1 of the *Dispute Regulation* provides that “all disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation.” Section 7(1) goes on to provide:

If the insurers cannot agree as to who is required to pay benefits or if the insured person disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991*.

On their face, these provisions give broad jurisdiction to an arbitrator to deal with questions related to a priority dispute. No restrictions are placed on the type of question that an arbitrator may consider in the course of dealing with a dispute.

[11] Except for special provisions dealing with the public nature of arbitration decisions and costs, section 8(1) of the *Dispute Between Insurers Regulation* provides that “the *Arbitration Act, 1991* applies to an arbitration under” the regulation. Broad scope is given to the jurisdiction of an arbitrator under the *Arbitration Act*:

- (a) an arbitrator “may determine any question of law that arises during the arbitration”: s. 8(2) (emphasis added);
- (b) questions of law are to be determined by the arbitrator unless she applies to a court for the determination of a question or the parties consent to a court deciding the question: s. 8(2);
- (c) an arbitrator may rule on her own jurisdiction to conduct the arbitration: s. 17(1);
- (d) an arbitrator may rule on an objection as a preliminary question: section 17(7);
- (e) an arbitrator shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies: s. 31; and,
- (f) the appeal provisions in section 45 of the *Arbitration Act* contemplate that an arbitrator may decide questions of law and mixed fact and law. In this case the Agreement between the parties permits appeals as of right to this Court on questions of law or mixed fact and law.

[12] When one combines the powers given to an arbitrator under the *Dispute Regulation* with those under the *Arbitration Act*, in my view an arbitrator appointed to deal with a SAB priority dispute possesses the jurisdiction to consider and decide any question regarding the dispute, including any question of law or mixed fact and law, such as those that arise in the course of interpreting a statute or contract. If a party disagrees with the arbitrator’s determination of such a question, it may appeal to this Court.

Application of these principles to the present case

[13] In her decision the Arbitrator, after considering the provisions of the *Dispute Regulation* and the *Arbitration Act*, concluded:

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 taken 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 that I have that jurisdiction.

[14] I agree with the Arbitrator’s conclusion. In my view Primmus’ submission that the Arbitrator would exceed her jurisdiction by considering ING’s argument ignores several important points.

[15] First, Primmus confuses the jurisdiction of an arbitrator to consider a question of law with the correctness of the arbitrator's answer to the question posed. Given the breadth of the arbitrator's jurisdiction over SAB priority disputes, she can entertain an argument on any question of law related to the dispute. Her conclusion on a question of law is not final. If a party disagrees, it can appeal. When the appeal routes are exhausted, the parties will know the correct answer to the question of law.

[16] Second, implicit in Primmus' submission is a suggestion that the Arbitrator will determine incorrectly the question of law raised by ING's argument. I am certainly not prepared to assume in advance of an arbitral hearing that an arbitrator, and in particular this Arbitrator who is well experienced in the area, will reach an incorrect conclusion on a question of law. If the parties think that the judicial determination of a question of law would assist the conduct of the arbitration, section 8(2) of the *Arbitration Act* permits such an application. In this case the parties did not avail themselves of that mechanism. I have no doubt that the Arbitrator will engage professionally in the process of statutory and contractual interpretation and if a party disagrees with her result, it enjoys the right to appeal.

[17] Finally, I do not accept Primmus' argument that the decision of the Court of Appeal in *Kingsway General Insurance Co. v. West Wawanosh Insurance Co.* (2002), 58 O.R. (3d) 251 (C.A.) limits the jurisdiction of the Arbitrator to consider questions raised during the arbitration. In dealing with the appropriate interpretation of the limitation period contained in the *Dispute Regulation* the Court of Appeal stated, at para. 10:

...it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.

Clarity and certainty are desirable goals for any process of statutory interpretation. At the same time one must acknowledge that the prevailing paradigm for statutory interpretation enunciated by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 recognizes "the important role that context must inevitably play when a court construes the written words of a statute": at para. 27. When "words, like people, take their colour from their surroundings" (*Bell, supra.*, at para. 27), clarity and certainty become more elusive goals. It will be up to the Arbitrator to apply all the current principles of statutory interpretation in determining whether ING's argument that Ms. Otten can be deemed a 'named insured' is tenable at law, or not.

[18] For these reasons, I dismiss Primmus' application.

Costs

[19] At the conclusion of the hearing I asked counsel for their submissions on costs in the event the application succeeded or failed. Counsel agreed that the successful party on this motion should be awarded costs of \$3,500, inclusive of G.S.T., in any event of the cause, but not payable forthwith. Accordingly, I order Primmum to pay ING costs of this application fixed at \$3,500, inclusive of G.S.T., in any event of the cause.

D. Brown J.

DATE: February 6, 2007