IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. 18, section 275

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

LIBERTY MUTUAL INSURANCE COMPANY

Applicant

- and -

MARKEL INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Maurice Benzaquen for the Applicant

Kevin S. Adams for the Respondent

ISSUES:

1. Was Nadesan Kumaravel a named insured or deemed named insured on the Liberty policy of motor vehicle liability insurance at the time of the accident?

DECISION:

1. Nadesan Kumaravel was not a named insured or deemed named insured on the Liberty policy at the time of the accident.

HEARING:

1. The arbitration was held in the city of Toronto, in the province of Ontario, on February 13 and 14, 2006 before me, M. Guy Jones, arbitrator.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident which occurred on September 10, 2001. On that date, the claimant, Saththiyabama Kumaravel, a pedestrian, was struck by a heavy commercial motor vehicle insured by Markel Insurance Company of Canada ("Markel"). As a result of those injuries, Ms. Kumaravel made an application for accident benefits to Liberty Mutual Insurance Company ("Liberty"). Liberty had issued a policy of motor vehicle liability insurance to Mr. Nadarajah Senthilnathan. The claimant's husband, Nadesan Kumaravel was a "listed driver" on that policy.

In accordance with the provisions of the Statutory Accident Benefits Schedule and associated regulations, Liberty paid accident benefits to the claimant, however, it has commenced these arbitration proceedings against Markel taking the position that the claimant as a dependent of a listed driver is not entitled to receive accident benefits from Liberty, rather Liberty says that the claimant should recover against Markel, the insurer of the motor vehicle that struck her.

Priority between insurers is governed by section 268 of the Insurance Act, the applicable part of which states:

> (2) the following rules apply for determining who is liable to pay statutory accident benefits:
>
> 2. in respect of non-occupants,
>
> (i) the non occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured.
> (ii) If recovery is unavailable under sub paragraph (i), the non-occupant has recourse against the insurer of the automobile that struck the non-occupant.

The issue before me in this preliminary matter is basically whether the claimant, Ms. Kumaravel is "insured". Section 268 (2)(2)(i) requires that the claimant be an "insured". Section 224 (1) of the Insurance Act defines "insured" as

> "a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person".

A person's entitlement to accident benefits depends on whether they are an insured person pursuant to section 2 of the statutory accident benefits schedule, which states:

> "insured person" in respect of a particular motor vehicle liability policy means,
>
> (a) the named insured, any person specified in the policy as the driver of the automobile, the spouse or same sex partner of the named insured, and any dependent of the named insured, spouse or same sex partner.

It is worthy of note that prior to Bill 164, section 2 of the Statutory Accident Benefits Schedule did not include a "person specified in the policy as a driver of the insured automobile" (listed driver) in the definition of "insured person". Bill 164 changed the definition and included the listed driver in the applicable definition, however, both parties agree that the spouse of a listed driver is not entitled to accident benefits under Bill 164 or Bill 59, which is the applicable legislation in this particular case.

Markel argues that the claimant's husband, Mr. Nadesan Kumaravel is a deemed named insured at common law, or alternatively, pursuant to section 66 of the Statutory Accident Benefits Schedule. I will deal with each submission separately.

WAS MR. NADESAN KUMARAVEL A DEEMED NAMED INSURED?

In order for Markel to be successful in this argument, Mr. Nadesan Kumaravel must be the named insured as opposed to simply a listed driver.

Liberty argues that the term "named insured" has a common and well understood meaning in motor vehicle insurance. The term "named insured" is not defined in the Insurance Act. As noted by Director's Delegate Draper in Portch vs. Markel Insurance Company [1995] W.L. 1743551, after extensive rule of the law,

> "named insured" has a specific meaning in the Insurance Act. Although it is not defined, it is used consistently to mean the person or the entity in whose name the policy is issued.

In our case the application for automobile insurance was completed by Mr. Nadarajah Senthilnathan. It covered two vehicles, a 1989 Honda Accord, owned by Mr. Senthilnathan and a 1985 Toyota. The application specified that Mr. Senthilnathan would use the Honda vehicle ninety percent of the time and his wife ten percent of the time. His second motor vehicle, the Toyota also listed Mr. Senthilnathan as the owner but listed Mr. Nadesan Kumaravel as a listed driver and that Mr. Kumaravel would be using it one hundred percent of the time.

The certificate of insurance issued by Liberty named Mr. Senthilnathan as the insured and listed Mr. Kumaravel as the principle driver.

Based on the above alone, it would seem that the claimant, Ms. Kumaravel was the spouse of a listed driver rather than a named insured. Markel argues, however, that as a principle driver of the Toyota, the claimant's spouse, Nadesan Kumaravel is a defacto or deemed named insured under the Liberty policy. Markel submits that since the term "named insured" is not defined in

the Insurance Act, it is capable of a wide interpretation. Its position is, that based on the particular facts of this case, Mr. Kumaravel really was the named insured.

While I would be prepared to accept that in the right circumstances, someone other than the applicant and owner could be the "named insured", we must examine the facts of this particular case in order to determine if it is an appropriate situation to make such a finding.

The essence of Markel's argument is that Mr. Kumaravel had the use of the vehicle, paid for essentially all of its upkeep and insurance. Markel suggests that the vehicle was only in Mr. Senthilnathan's name in order to get low insurance rates and for all practical purposes it was Mr. Kumaravel's automobile. In support of this proposition, it points out that not only was Mr. Kumaravel listed as driving the vehicle one hundred percent of the time but Mr. Kumaravel paid Mr. Senthilnathan roughly $125-$200 per month for the use of the car with the exception of one five month period where he paid nothing. Markel noted that Mr. Kumaravel paid the cost of the insurance for the time in question which was approximately $100 per month and therefore Mr. Kumaravel was in essence paying for the insurance. Mr. Kumaravel also paid a considerable amount to maintain the car – approximately $2,000 - $2,500 during the time he used it. Mr. Kumaravel paid for the license plate sticker on one occasion and Mr. Senthilnathan paid on another occasion.

While these facts, on their own, might suggest that Mr. Kumaravel and Mr. Senthilnathan had devised a plan to simply obtain lower insurance for Mr. Kumaravel and examination of the full facts of this case suggest otherwise.

Mr. Kumaravel and Ms. Kumaravel both testified at the hearing. Mr. Kumaravel testified that the Toyota was owned by his brother in law, Mr. Senthilnathan. When Mr. Kumaravel arrived in Canada he had no vehicle but his brother in law told him that if he obtained a driver's license he could drive Mr. Senthilnathan's Toyota, as he, Mr. Senthilnathan already had a Honda for a vehicle. He testified that he considered Mr. Senthilnathan as almost like family and in fact lived in adjacent apartment buildings. The Toyota was parked at Mr. Senthilnathan's apartment building as he was the registered owner and it was only a short distance away. Mr. Senthilnathan paid for the parking. Mr. Kumaravel did not pay anything towards the purchase of the Toyota.

In addition to providing Mr. Kumaravel with the use of the car, Mr. Senthilnathan did a number of other things for Mr. Kumaravel, including finding him a job when he arrived in Canada.

Mr. Kumaravel also testified that Mr. Senthilnathan used the car himself on occasion. The person driving the car generally paid for the gas. Mr. Kumaravel estimated that he used the car approximately eighty percent of the time and Mr. Senthilnathan twenty percent of the time. Mr. Kumarvel further testified that Mr. Senthilnathan had not expected any money for the use of the car or its insurance, but Mr. Kumaravel did pay roughly $150 per month as a good will gesture. He paid this throughout the time that he drove the car with the exception of a period of approximately five months. Mr. Kumaravel indicated that Mr. Senthilnathan had a disability and therefore had limited funds and Mr. Kumaravel was therefore helping him out with monthly payments.

Mr. Kumaravel also testified that he had not applied for the insurance but rather Mr. Senthilnathan had handled this. He understood that he was simply added to the insurance policy so that he could legally drive the car.

Ms. Kumaravel, in her testimony, confirmed the very close relationship between her husband and Mr. Senthilnathan and indicated that they had been good friends for a very long period of time and helped each other out. To the extent that she was aware of the issues relating to the use and the cost of the car, her evidence tended to support the evidence of Mr. Kumaravel.

After considering all the evidence with regard to this particular issue, one is left with the impression that Mr. Kumaravel and Mr. Senthilnathan were simply very good friends who helped each other out. I find that they did not devise a plan to obtain lower insurance rates, but simply worked out an arrangement which worked best for their circumstances.

Markel also argued the principle of "fair exchange" should apply in this situation. They argue that Liberty by having the person who is the principal driver as only as a listed driver, got to limit accident benefit exposure while still receiving a substantial premium for accident benefit coverage. While it may be that in certain circumstances the accident benefit coverage was more limited, there was no evidence before me that Liberty charged anything other than the normal rate for the assessed risk.

In light of the above, I find that Mr. Kumaravel was simply what is commonly referred to as a listed driver and not a named insured.

DEEMED NAMED INSURED – SECTION 66

Markel also submitted that a claimant's spouse, Mr. Kumaravel should be a deemed named insured pursuant to section 66 of the Statutory Accident Benefits Schedule because:

> 1. the insured automobile was made available for his regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or,
> 2. the insured automobile was rented by Mr. Kumarvel for a period of more than ninety days.

Section 66 of the Statutory Accident Benefits Schedule states:

> (1) an individual who is living and ordinarily present in Ontario shall be deemed for the purposes of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,
>
> > (a) the insured automobile is being made available for the individuals' regular use by a corporation, unincorporated association, partnership, sole proprietorship, or other entity; or
> > (b) the insured automobile is being rented by the individual for a period of more than thirty days …

Dealing first with the section 66 (1)(a) argument, Markel takes the position that there was a quasi commercial arrangement for the exchange of goods and services between Mr. Senthilnathan and

Mr. Kumaravel and therefore the Liberty vehicle was made available for regular use by Mr. Kumaravel by an "other entity".

I am prepared to accept, in the appropriate circumstances, that a person may be an "other entity" for the purposes of section 66(1)(a) of the Statutory Accident Benefits Schedule.

Section 66 (1)(a) was designed, in my view, to capture the risk when a business organization is a named insured. In order for an individual to be a "other entity", for the purposes of section 66 (1)(a) the individual must be operating, in essence as a business. Based on my finding of facts in this case, the relationship between Mr. Senthilnathan and Mr. Kumaravel was not a commercial or business relationship. It was simply two close friends helping each other out. The facts of this case do not fall within the requirements of section 66 (1)(a) of the Statutory Accident Benefits Schedule.

Markel's final argument is that section 66 (1)(b)applies, as the insured automobile was rented by Mr. Kumaravel for a period of more than thirty days. Markel argues that the term "rented" is not defined in the Insurance Act, one should use the common dictionary definition of the term. It points to the definition, for example in Black's Law Dictionary, 6th edition, which defines rent as:

> "consideration paid for use or other occupation of property. In a broader sense it is compensation for fee paid, usually for the use of rental property, land, buildings, equipment, etcetera."

The Supreme Court of Canada in Johnson vs. British Canadian Insurance Company, [1932] SCR 680, drew a distinction between rent, lease and license. It found that in order for the arrangement to be considered rent, there must be:

(a) agreement between the parties,

(b) an agreement of payment,

(c) agreement for exclusive use of the vehicle, and

(d) an agreement for a specified period of time.

The above criteria are not met in this case. The vehicle was not given to Mr. Kumaravel exclusively for his use alone. Mr. Senthilnathan could, and in fact did, use the Toyota on occasion. Furthermore, it was not given for a specified period of time. In addition, there was no clear agreement with regard to payment. At very most, there may have been a license situation in place between Mr. Kumaravel and Mr. Senthilnathan. There certainly was not a rental situation as envisaged by section 66 (1)(b) of the Statutory Accident Benefits Schedule.

In light of the above, I find that Mr. Kumaravel was not a named insured as envisaged by the Insurance Act and the Statutory Accident Benefits Schedule. Rather, he was a person specified in the policy as a driver of the insured automobile (listed driver). As such, the claimant was not an insured for the purposes of section 268 (2)(2)(i) and accordingly, pursuant to the priority provisions of section 268 (2)(2)(i) the claimant had recourse against the insurer of the automobile that struck the non-occupant, and that is Markel, accordingly they are responsible for the payment of accident benefits to or on behalf of Ms. Kumaravel.

This was simply a preliminary issue hearing. Should the parties be unable to reach agreement on any of the other issues in dispute, a further pre-hearing may be arranged with my office.

In the event that the parties are unable to agree with regard to the issue of costs, I may be spoken to.

Dated in Toronto, this _____ day of July, 2006.

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M. Guy Jones
Arbitrator