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Axa Boreal Assurances v. Co-operators Insurance Co.

Between
Axa Boreal Assurances, applicant, and
The Co-operators Insurance Company, respondent

[1999] O.J. No. 2626

Court File No. 97156/98

Ontario Superior Court of Justice

Glass J.

Heard: May 25 and June 29, 1999.

Judgment: July 5, 1999.

(5 pp.)

Insurance -- Automobile insurance -- Accident benefits -- Insured person, defined -- Statutes -- Operation and effect -- Delegated legislation -- Regulations -- Validity of, amendment of empowering statute -- Validity of, ultra vires, whether purpose authorized by empowering statute.

Appeal by the plaintiff **Axa** Boreal Assurances from a finding that it, and not the defendant **Co-operators** Insurance, was responsible for paying the accident benefits for a truck driver who was injured in an accident. The driver was making commercial deliveries, driving a truck that was insured with **Axa**. The driver was not a named insured under the policy, but was a listed driver. The truck was regularly used by this driver. The driver had insurance with the **Co-operators** for his personal motor vehicle. The **Co-operators** argued that the driver was a deemed named insured under the **Axa** policy and that **Axa** was the priority insurer responsible for paying the accident benefits. **Axa** argued that section 91(4) of the Statutory Accident Benefits Schedule, which addressed company vehicles and stated that regular users of company vehicles were to be deemed named insureds, was ultra vires the Lieutenant Governor in Council because it amended the Insurance Act by a regulation, when the change should have been made by the legislature when amending the Insurance Act.

HELD: Appeal dismissed. The driver of the truck was deemed a named insured under the Axa policy. Section 91 of the Schedule was not ultra vires of the Lieutenant Governor in Council. The regulation in section 91(4) of the Schedule did not amend the statute, and validly deemed an individual to be a named insured under a policy insuring the automobile for statutory accident benefits.

Statutes, Regulations and Rules Cited:

Insurance Act, ss. 121, 268(1), 268(5).

Statutory Accident Benefits Schedule, s. 91, 91(4).

Counsel:

Todd McCarthy, for the applicant.

Philippa Samworth, for the respondent.

GLASS J.:--

Introduction:

1 This is an appeal by way of application from the decision of Arbitrator Bruce Robinson dated October 30, 1998. Mr. Hounsel was an occupant of an insured vehicle that was involved in an accident on December 20, 1995. The accident happened in the State of Ohio in the United States. The vehicle was insured under a policy of insurance with **Axa Boreal**. The occupant was also the driver of the vehicle. The vehicle was a tractor truck owned by Pollock Rentals Limited and leased to Grant Jutzi Inc., now known as Grant Transport National Inc. The tractor truck was insured with **Axa**. Mr. Hounsel was not a named insured under the policy but was a listed driver. The vehicle was assigned to Mr. Hounsel for his use on a continuous basis. He also carried insurance with **The Co-Operators Insurance Company** for his personal motor vehicle. Stephen Hounsel was in [sic] Ontario resident employed by Grant Transport has a truck driver. At the time of the accident, the truck was being used to make commercial deliveries within the meaning of the Ontario Standard Automobile Insurance policy. This truck was used by Mr. Hounsel from November 12, 1995. After the accident, Stephen Hounsel applied for accident benefits and received them from the **Co-operators** under the Schedule applying after December 31, 1993 and before November 1, 1996. The **Co-operators** paid benefits to Stephen Hounsel pending the determination of the priority dispute. The **Co-operators** claimed that **Axa** was the priority insurer responsible for paying the Schedule benefits.

Decision:

2 The judgment in this application is that Axa is the priority insurer responsible for paying the benefits to Mr. Hounsel. The Insurance Act and its regulations are consistent with each other. Section 121 of the Insurance Act authorizes the Lieutenant Governor in Council to make regulations establishing benefits for the purposes of Part VI that must be provided under contracts for motor vehicle liability insurance. The section allows the regulations to establish terms, conditions, provisions, exclusions and limits related to the benefits. The regulation in section 91(4) of the Schedule has not amended the statute. The regulation is not ultra vires the Lieutenant Governor in Council of the Province of Ontario. Section 91(4) of the Schedule validly deems an individual to be the named insured under the policy insuring the automobile for statutory accident benefits.

The Facts:

3 The motor vehicle is a tractor truck operated by Stephen Hounsel, insured by

Axa Boreal, and leased by Grant Transport. Grant Transport leased the vehicle while another truck was being repaired. Grant Transport employed Mr. Hounsel, and the truck was assigned to Mr. Hounsel for his use. He used it all the time. The vehicle was used to make commercial deliveries.

4 Mr. Hounsel had an accident in the State of Ohio, in the United States on December 20, 1995. Although he was not the named insured under the Axa policy, he was a listed driver under that policy.

5 Mr. Hounsel insured his personal motor vehicle with The Co-operators and was the named insured under that policy.

6 Initially, Mr. Hounsel applied for accident benefits under the policy with The **Co-operators**. That company paid benefits pending the determination of a priority dispute with **Axa**.

7 The **Co-operators** takes the position that Mr. Hounsel is a deemed named insured under the **Axa** policy and that accident benefits are to be paid pursuant to that policy. **Axa** submits that section 91(4) of the Statutory Accident Benefits Schedule is ultra vires the Lieutenant Governor in Council because it is amending the Insurance Act by a regulation when the regulation changes priorities. It can only be done by the legislature amending the statute itself.

The Issues:

8 The application sets out the following issues:

- (a) Was Mr. Hounsel required to claim accident benefits from The Co-operators?
- (b) Was Mr. Hounsel a named insured under the Axa policy?
- (c) Could the arbitrator determine the priority under the Insurance Act by reference to the Schedule only?
- (d) Did the arbitrator consider and apply the entire insurance scheme in determining priority?

9 The major issue is whether the regulation found in section 91(4) of the Schedule is ultra vires of the Lieutenant Governor in Council? Axa argues that the change in this regulation had to be made by the legislature when amending the Insurance Act.

Analysis of the Facts and the Issues:

10 In this application, both parties advanced many cases favouring their respective positions. The arbitrator in his reasons for award reviewed many of those cases. I do not find error in his reasons. In particular, the arbitrator relied on the reasoning of Mr. Justice Laskin in *Warwick v. Gore Mutual* (1997) 32 O.R. (3d) 76 (C.A.) and Madam Justice Lax in *Axa Insurance (Canada) v. Old Republic Insurance Company* [1998] O.J. No. 918 (Gen. Div.). The arbitrator found those decisions binding, and he accepted that they found the regulations as being valid.

11 In particular, Justice Laskin in the *Warwick* decision noted that the Court was dealing with the legislation in force prior to section 91(4) of the Schedule, but His Lordship at page 88 in a postscript stated that Ms. Warwick under the new Schedule would be an insured person under both insurance policies because the definition of insured person was expanded in the regulation. Justice Laskin stated, "If anything, this expanded definition confirms that insured persons under a particular automobile insurance policy are determined by the Schedule, not by the Act". Earlier in that decision at page 83, Justice Laskin held that the legislature, in section 268(1) of the Insurance Act, intended that entitlement to these benefits would be determined by regulation. The statute authorized the definition of insured person in the Schedule. At page 84, Laskin J. found that the scheme for entitlement for no-fault benefits points inexorably to the definition of "insured person" in the Schedule. Justice Laskin referred to another decision of the Ontario Court of Appeal in *Alchimowicz v. Continental Insurance Co. of Canada* [1996] O.J. No. 2989 in which the Court found that the legislation left the determination of no-fault benefits to be determined by regulation in the Schedule.

12 Madam Justice Lax in *Axa Insurance (Canada) v. Old Republic Insurance Company* had similar issues to those in the case before the arbitrator here. She found that the decision of the Court of Appeal in *Warwick v. Gore Mutual* was binding upon her and therefore the section 91(4) of Schedule Benefits Regulation was not inconsistent with section 268(5) of the Insurance Act. If there were any inconsistency, the Regulation would apply because the legislature expressly

authorized it.

13 In the case before me, the arbitrator followed the decisions in *Warwick v. Gore Mutual* and *Axa Insurance v. Old Republic Insurance*. In doing so, the arbitrator found that Mr. Hounsel pursuant to section 91(4) of the Schedule was deemed to be a named insured both for the purpose of the SABS and for the purpose of being a named insured under the policy.

14 Section 91 of the Schedule addresses company automobiles and rental automobiles. Section 91(4) focuses on circumstances in which an insured automobile is made available for regular use to an individual and the named insured is a corporation, unincorporated association, partnership, sole proprietorship or other entity. There, the individual shall be deemed to be the named insured. The company insures the company vehicle made available to the employee and the employee is treated as the owner thereby being able to call on that insurance policy for schedule accident benefits.

Judgment:

15 The arbitrator ruled correctly. The answers to the issues listed above are:

- (a) Mr. Hounsel was not required to claim accident benefits from The Co-operators.
- (b) Mr. Hounsel was deemed a named insured under the Axa policy.
- (c) The arbitrator could determine the priority under the Insurance Act by reference to the Schedule only.
- (d) The arbitrator did consider the entire insurance scheme when determining priority in this case.
- (e) The regulation found in section 91(4) of the Schedule of Accident Benefits was intra vires of the Lieutenant Governor in Council.

16 The appeal by way of application is dismissed with costs in favour of The Co-

operators. If counsel wish to make submissions regarding costs, they may arrange an appointment for submissions orally or for written submissions.

GLASS J.

cp/s/mcc