

ONTARIO COURT OF JUSTICE (GENERAL DIVISION)
MOTIONS COURT
IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE ARBITRATIONS ACT, 1991

AND IN THE MATTER OF A DISPUTE BETWEEN
INSURERS PURSUANT TO THE *INSURANCE ACT, 1995*

BETWEEN:

AXA INSURANCE
Michael W. Kerr for the Plaintiff (Appellant)

and

MARKEL INSURANCE COMPANY OF CANADA
Mark S. Wilson for the Defendant (Respondent)

HEARD: MAY 5, 1997

DAY J. (ORALLY)

FACTS

On or about June 14, 1995, Lev Iakovenko ("Mr. Iakovenko") was injured in a single motor vehicle accident while operating a 1981 General Motors tractor truck (the "tractor"). The registered owner of the tractor was Yefim Sadetsky ("Mr. Sadetsky"). The true owner was Mr. Iakovenko. Title was in the name of Mr. Sadetsky to secure amounts owing him in his sale of the tractor to Mr. Iakovenko. For purposes of this Appeal Mr. Iakovenko and Mr. Sadetsky are one. The tractor was licensed as a commercial vehicle. The operating authorities, commonly referred to as running rates, were in the name of Canadian Transport Systems Corp. ("CTS"). The registration of the plate was in the name CTS. Once the vehicle plate was registered in the name CTS the tractor became insured under the CTS Fleet Policy with Markel Insurance Company of Canada ("Markel").

The relationship between CTS and Mr. Iakovenko was governed by an owner/operator contract dated June 2, 1995. Schedule "A" of that agreement provides *inter alia* that:

The undersigned Carrier hereby acknowledges the receipt of the equipment as above described...

I find that this language is one indicator only and must be tested against considerations as to which party made the tractor available as determined below.

Mr. Iakovenko regularly used the tractor in the course of his engagement with CTS. At the time of the accident he was in the course of his engagement and was an occupant of the tractor as defined under sections 224 (1) and 268 (5.2) of the *Insurance Act*, R. S. O. 1990 c. 1-8.

Following the accident Mr. Iakovenko made a claim to his own insurer, AXA Insurance ("AXA") in which he is the named insurer, from which accident benefits have been paid.

THE ARBITRATION

The parties submitted to arbitration whether AXA or Markel should be the responsible insurer. The arbitrator found that in as much as AXA is the actual named insurer, coverage must be provided by AXA thereby relieving Markel of having to assume that responsibility.

The applicant AXA claims that the arbitrator erred in law by not finding that Markel was the

deemed named insurer by virtue of section 91 of the Regulation 781/94 under the *Insurance Act* as amended by section 24 of O. Reg 781/94 by adding the following language:

(4) Subject to subsection (7), if an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or if an insured automobile is rented for a period of more than 30 days to an individual who is living and ordinarily present in Ontario, the individual shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation. [Emphasis added]

The applicant argues that while the tractor was made available to CTS in the first place under the contract, CTS effectively made it available for regular use of Mr. Iakovenko evidenced by it being plated in CTS's name, quite apart from ownership, without which Mr. Iakovenko could not make regular use of the vehicle. Hence under the above quoted section.

CTS is deemed to be the named insurer under the policy. The applicant argues that the arbitrator erred in law by not giving full recognition to the language above quoted to attribute insurance responsibility to CTS.

Counsel for the respondent argued that the above quoted section cannot change the fact that Mr. Iakovenko made the tractor available for CTS from which all other functions flow. Hence he argues that the tractor *per se* was not made available by CTS; rather Mr. Iakovenko was restricted in its commercial use by the contract with CTS which does not disturb the reality that the vehicle *per se* was made available by Mr. Iakovenko and not made available by CTS.

The main section of Regulation 776/93 under the *Insurance Act* from which this dispute emerges is s.91 the heading of which is "Company Automobiles, Rental Automobiles". While this is a heading only and is not part of the legislation *per se* it can be used as an aid to interpreting the section contained under it. Clearly the existing facts do not come under a category of Company Automobiles and Automobiles as commonly understood.

I am persuaded by the argument of the respondent in this respect reinforced by the line of cases prior to the subject of amendment and the decision of Roberts J. in *Axa Home Insurance Company v. Western Assurance Company* 93-CQ-36386 released 16 February 1994 particularly the bottom paragraph on pp. 6 - 7:

I have considered the provisions of Section 3(l) of the Regulation as that provision is written and in light of the scheme of the *Insurance Act* as a whole. I find that Section 3(l) deals solely with the identification of persons covered by the no-fault provisions. It does not extend the definition of "named insured" for any other purposes and, in particular, does not extend the definition of "named insured" under Section 268(5) to include those persons eligible for no-fault benefits as defined in Section 3(l).

I specifically find that the attempt to extend the definition of named insured in the above manner by the Ontario Insurance Commission was incorrect in law.

Quite apart from my persuasion on the merits it does not lie for me to revisit the decision of the arbitrator except where there is an error in law or unless the decision is patently unreasonable. I see no error in law. I do not find the decision of the arbitrator to be patently unreasonable.

Moreover I find correct his finding of fact, or perhaps better stated, mixed fact in law that the subject tractor was not made available by CTS, rather made available by Mr. Iakovenko, so as not to have it included under s. 91 (4) of the Regulation.

Accordingly the application is dismissed

DAY J.

Released: May 29, 1997