

IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, C.1.8, S. 268(2) AND IN THE MATTER OF THE *ARBITRATIONS ACT*, S.O. 1991 AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AXA INSURANCE (CANADA) Applicant
- and -
OLD REPUBLIC INSURANCE COMPANY Respondent

Heard On: May 30th, 1997
Ted R. Schieck
Counsel for the Applicant
Axa Insurance (Canada)

Jim Tomlinson and
Francine Rosenzweig
Counsel for the Respondent
Old Republic Insurance Company

AWARD

The Issue

The issue in this arbitration is a very narrow one. It is whether Tony Hayward is a "named insured", under a policy of insurance issued by the Old Republic Insurance Company ("the Old Republic"), within the meaning of that term as contained in Section 268 (5) of the *Insurance Act*. At all material times Tony Hayward was an employee of Hewlett-Packard. His employer made one of its automobile available to him for his regular use. Tony Hayward and his wife Pauline lived in, and were ordinarily resident in Ontario. Pauline Hayward owned an automobile which was insured by Axa Insurance (Canada) ("the Axa"). She was the named insured in that policy. On August 1st, 1995, while driving his employer's automobile, Tony Hayward was involved in a motor vehicle accident. At the time Pauline Hayward was a passenger in the automobile. She was injured in the accident and became entitled to Statutory Accident Benefits ("SABS"). She claimed those benefits from her insurer, the Axa, and was paid. Within the appropriate time limits, the Axa provided the Old Republic with notice of dispute contending that, pursuant to the provisions of Section 268 of the *Insurance Act*, the Old Republic was the insurer liable to pay the SABS.

AXA's contention is developed in this way:

- (1) because of the provisions of Section 91 (4) of Ontario Regulation 776/93 (as amended) Tony Hayward is a deemed named insured under the Old Republic policy;
- (2) Pauline Hayward is the spouse of a named insured under the Old Republic policy;
- (3) because of the provisions of Section 268 (5) of the *Insurance Act*, she has a claim for her SABS against the Old Republic as well as against the Axa under the policy of which she is the named insured;
- (4) because of the provisions of Section 268 (5.2) her claim must be against the Old Republic, since it is the insurer of the vehicle in which she was an occupant at the time of the accident.

Rather than setting out the texts of those regulatory and statutory provisions in this text I am

attaching them as a Schedule to this Award.

The essential foundation of any liability on the part of the Old Republic is a finding that Tony Hayward is a named insured under its policy. While he clearly was an insured, because he was operating the automobile with its owner's consent, he was not named as an insured in the policy. In common parlance in the insurance industry, he was an unnamed insured. Mr. Schieck argued that because of the provisions of Section 91 (4) of the Regulation, he is deemed to be a named insured under the policy. The essential elements to the application of Section 91 (4) are:

- (1) the insured automobile is made available to a person for regular use;
- (2) that person lives in and is ordinarily resident in Ontario.

In this case Tony Hayward fulfills those conditions. Therefore the Regulation says that, for the purpose of payment of SABS, set out in the Regulation, Tony Hayward is deemed to be a named insured under the Old Republic policy.

The provisions of Section 268 (2) to (5.2) of the *Insurance Act* set out a statutory scheme which determines what insurer is liable to pay SABS in a given situation. If Tony Hayward was not a named insured under the Old Republic policy, Pauline Hayward's only claim would be against the Axa policy. Section 268 (5) dictates that if she is a named insured she shall claim under that policy. If, however, Tony Hayward is a named insured under the Old Republic Policy then she also has a claim against it, as the spouse of its named insured. I stress that it is only if she was the spouse of a named insured that she would have more than one insurer against whom to claim and thereby trigger the provisions of Section 268 (5.2). That provision would dictate that the Old Republic was liable.

The statutory scheme, in its application to this case, would say that the Old Republic is liable only if Tony Hayward is a named insured under its policy. Otherwise the Axa is solely liable. The Regulation deems Tony Hayward to be a named insured under the Old Republic policy. In my view the sole question in the case is whether the Lieutenant Governor in Council, in the exercise of its power to issue regulations, had the legislative power to deem someone to be a named insured within the meaning of that term as used in Section 268 (5) of the *Insurance Act*.

As I noted above, in the absence of Tony Hayward being a named insured, the statutory scheme would fix liability for the SABS on the Axa. By deeming him a named insured the Regulation would change the result envisaged by the statutory scheme and fix liability upon the Old Republic.

The terms "named insured" and "insured" have long had specific meanings in the insurance industry. At their simplest the "named insured" is the person named in the contract of insurance as the insured. The "insured" means a person who, whether by statute or by contract, has some or all of the rights of the named insured. This distinction is recognized in the definition of "insured" contained in Section 224 (1) of the *Insurance Act*.

The statutory scheme contained in Section 268, indicates that in certain circumstances, the Legislature intended different consequences to flow from situations involving named insureds and from situations involving insureds. I am driven to conclude that the words were intended to have their ordinary meanings as used in the insurance industry. Section 91 (4) of the Regulation purports to redefine the expression "named insured" by deeming that in certain circumstances an unnamed insured, or an insured, shall be a named insured. In doing so, in my opinion, it has purported to define an expression used in a statute. It is trite that a statute cannot be amended by regulation. In my view the attempt to define the statutory term, "named insured", by regulation is not effective in law.

In AXA Insurance v. Markel Insurance Company of Canada (December 9th, 1996) and State Farm v. Canadian Surety (November 26th, 1996) Arbitrators, Fidler and Malach argue persuasively that the intention of Section 91 (4) of the Regulation was that it was to have the result for which the Axa contends. It does not appear, however, that they were asked to rule upon the question of whether the intended change would be made by the Lieutenant Governor

in Council or whether it could only be made by the Legislature.

In Axa Home Insurance Company v. Western Assurance [1994] O. J. No. 281, Roberts J. was called upon to consider a regulatory provision, which was a forerunner of Section 91 (4), and which purported to extend the definition of the expression "named insured" found in Section 286 (5). At paragraph 10 of his judgment he specifically found "that the attempt to extend the definition of named insured.....was incorrect in law". With deference I agree. While Roberts J. did not say so explicitly, I think that it is implicit in his judgement that the error 'in law to which he referred was that by attempting to extend the definition of "named insured", contained in the statute, the Lieutenant Governor Council exceeded its legislative jurisdiction.

Thus, notwithstanding the changes which have been made to the Regulation, since the judgment of Roberts J., I think that his judgement is still good law. I hold that insofar as section 91(4) of the Regulation purports to alter the statutory scheme by deeming one type of unnamed insured to be a named insured, in Section 285 (5), the Lieutenant Governor in Council has exceeded its jurisdiction. In my view, that kind of change to a statute can only be made by the Legislature. Section 91 (4) of the Regulation can have no effect upon the meaning of the expression "named insured" as contained in Section 268 (5) of the *Insurance Act*.

It is, in my opinion, clear that on August 1st, 1995, Tony Hayward was not a named insured under the Old Republic policy. Therefore, pursuant to Section 268 (5), Pauline Hayward was required to claim her SABS only against the Axa.

In the result the application is dismissed with costs. Those costs will include the account of ADR Chambers. Each party has forwarded a deposit ADR Chambers will credit the total amount of the deposits to its account, upon the expectation that the parties will be able to make the necessary adjustment to give effect to the order as to costs.

If counsel have difficulty fixing the amount of costs, I can be spoken to by way of a conference telephone call.

Award issued at Toronto this 9th day of June, 1997.

"P.T. Galligan"

THE HON. PATRICK T. GALLIGAN, Q.C.