IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I.8, SECTION 268 AND REGULATION 283/95 MADE UNDER THE INSURANCE ACT;

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

Applicant

- and -

KINGSWAY GENERAL INSURANCE COMPANY

Respondent

AWARD

This matter was heard at Toronto on Tuesday, June 15, 1999. Mr. Mark K. Donaldson attended on behalf of State Farm Mutual Automobile Insurance Company. Mr. Vance Cooper attended on behalf of Kingsway General Insurance Company.

This matter was submitted to me to arbitrate pursuant to the Arbitrations Act, 1991 by an Arbitration Agreement[1] executed by the parties on June 7, 1999. They have asked me to arbitrate a dispute between the two insurers as to certain issues which may determine which insurer has the obligation to pay accident benefits with respect to injuries sustained by Robert Scheffler in an accident which occurred on March 23, 1998. The parties ultimately proceeded based on an Agreed Statement of Fact which is annexed to this award.

The parties made written submissions, made oral submissions, made supplementary written submissions and made a joint submission with respect to costs. In accordance with the Arbitration Agreement the parties have preserved their right to appeal my decision, without leave of a court.

THE PARTIES TO THIS DISPUTE

State Farm Mutual Automobile Insurance Company is an automobile insurer carrying on business in the Province of Ontario. It had issued policies of insurance to Hannelore Scheffler.

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1 The original Arbitration Agreement was amended at the hearing to delete confidentiality provisions pursuant to Ontario Regulation 283/95, s. 8 (2).

These policies of insurance applied to a 1989 Pontiac automobile and a 1988 Oldsmobile automobile owned by Hannelore Scheffler.

Kingsway General Insurance Company is also an automobile insurer doing business in the Province of Ontario. It had also issued a policy of automobile insurance but its policy was issued to Robert Scheffler with respect to a 1972 Harley Davidson motorcycle. In accordance with the law of Ontario all of the policies of insurance would provide the statutory accident benefits which are mandated by the Insurance Act. These accident benefits provide for "no fault" benefits to be paid to an individual injured as a result of a motor vehicle accident.

THE ISSUE BETWEEN THE PARTIES

In the circumstances of this accident, Robert Scheffler is an insured person under policies issued by State Farm and is also an insured person under the policy issued by Kingsway. Hence the insurers must look to the priority rules under the Insurance Act to determine which insurer has the obligation to pay the statutory accident benefits. The parties are sophisticated in their understanding of these rules and have been able to narrow the issues in dispute considerably. The essence of the dispute is to determine whether or not subsection 66 (1) of the *Statutory Accident Benefits Schedule*[2] deems Robert Scheffler to be "the named insured" under the State Farm policy issued to his mother with respect to the vehicle involved in this accident.

Subsection 66 (1) provides as follows:

> "An individual who is living and ordinarily present in Ontario shall be deemed for the purpose 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 an accident,
> (a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity;..."

As a result of some arbitration decisions and court decision on the issue, the parties are satisfied that State Farm will have the obligation to pay the statutory accident benefits if the provisions of subsection 66 (1) are met. If not, then Kingsway has the obligation to pay those benefits. The two issues for me to decide at this time are as follows:

1. Was the vehicle provided to Robert Scheffler "made available for his regular use"?
2. Was the automobile made available by a "corporation, unincorporated association, partnership, sole proprietorship or other entity"?

THE FACTS

The accident in question occurred on March 23, 1998, outside of the motorcycling period of the year. Robert Scheffler owned a 1972 Harley Davidson motorcycle which was insured by

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2 *Statutory Accident Benefits Schedule, Accidents on or after November 1st, 1996*, O. Reg. 403/96, s.66., as amended.

Kingsway. Robert Scheffler would be a named insured with respect to the policy of insurance issued by Kingsway. At the time Robert Scheffler lived with his mother, Hannelore Scheffler, near Stayner, Ontario. He was employed at Wolf Steel located in Barrie, Ontario. The evidence indicates that it takes about forty-five minutes to one hour to get from the residence to Wolf Steel. Scheffler was in a car pool with other employees of Wolf Steel. The three members of the car pool would rotate, each driving a car for one week at a time. Robert Scheffler would use his mother's Pontiac Sunbird when it was his turn to drive the employees to work. The accident occurred when Robert Scheffler was driving to work with other members of his car pool.

Hannelore Scheffler had two vehicles, a 1989 Sunbird and a 1988 Oldsmobile station wagon. She was the named insured on each of State Farm's two policies for these vehicles but Robert Scheffler was listed as a driver for the purpose of each of these policies as well. Importantly, Robert Scheffler was not the named insured. There were only the two licensed drivers in the household, Robert Scheffler and his mother, Hannelore. Robert Scheffler had a set of keys for each car. During the motorcycling season Robert Scheffler had his motorcycle available to him but continued to use her cars about one-half of the time nonetheless. Motorcycling season had not commenced at the time of this accident.

Robert Scheffler would use one of his mother's vehicles, usually the Pontiac Sunbird, in the car pool. He would sometimes use one of the cars to go to the gym. Infrequently he would perform errands such as picking up feed for the farm animals, using one of the vehicles.

Robert Scheffler always asked his mother for permission to use one of her cars, more as a courtesy or out of respect than as a formal request for permission. Mrs. Scheffler had never refused his request for one of her motor vehicles although she may have directed him to one or the other of the vehicles.

WAS THE VEHICLE INSURED BY STATE FARM MADE AVAILABLE FOR ROBERT SCHEFFLER'S REGULAR USE?

I conclude that the vehicles insured by State Farm were made available for Robert Scheffler's regular use.

It is to be noted that the regulation does not require that Robert Scheffler actually have used the vehicle regularly. The regulation requires us to examine its availability. Actual use is evidence of the availability of the vehicle.

Here where Robert was shown as a listed driver for insurance purposes, provided with his own set of keys, and never refused use of one of the vehicles, it appears that the vehicles were made available for his regular use. His habitual and regular and repeated use of the vehicles for the purposes of commuting and other errands and short trips is further evidence of the availability of the vehicles for his regular use.

The language employed by the regulation does not require that the use be frequent, exclusive, or personal. The mere fact that there is some use which can be said to be regular is sufficient to give the individual status under the policy.[3]

The facts of this case are, in part, similar to the facts discussed by Arbitrator Malach in Dominion of Canada v. Co-Operators General Insurance Company.[4] In that decision Mr. Malach held as follows:

> "Having considered all of the case referred to above, I conclude that the GTAI van was being made available for regular use by John Berlec. Mr. Berlec had keys to the vehicle, and had exclusive use of the vehicle 24 hours daily, seven days weekly. That clearly constitutes habitual, repeated, constant and regular use. The fact that the use of the vehicle was to be restricted for maintenance purposes, does not change the categorization of the use as "regular".

I conclude that the vehicle in question was made available for the regular use of Robert Scheffler and, in fact, was regularly used by him.

WAS THE VEHICLE MADE AVAILABLE TO ROBERT SCHEFFLER BY AN "OTHER ENTITY" WITHIN THE MEANING OF CLAUSE 66 (1) (a) of the *SABS*?

The deeming provision of the *Statutory Accident Benefits Schedule* requires more than a vehicle being provided for an individual's regular use. That vehicle must be made available to the individual by "a corporation, unincorporated association, partnership, sole proprietorship or other entity;"

In this case, the vehicle is made available by an individual, Robert Scheffler's mother, Hannelore Scheffler. The parties require me to decide whether or not Hannelore Scheffler is an "other entity" in the context of clause 66 (1) (a) of the regulation.

The parties directed my attention to the heading found in the regulation immediately preceding section 66. That heading provides as follows:

"COMPANY AUTOMOBILES AND RENTAL AUTOMOBILES"

It is submitted that this heading ought to be taken into account in looking at the meaning of clause 66 (1) (a) and that I should conclude that section 66 is not intended to apply to instances where vehicles are made available by individuals.

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3 Riesner v. Liao [1993], O.J. No. 805 (General Division), affirmed by Divisional Court [1994], O.J. No. 1033.

4 February 9, 1999 decision of Stephen M. Malach, Q.C., Aribtrator.

The Interpretation Act seems to preclude this use of headings.[5] Case law referred to by the respondent confirms that I should not consider headings.[6] The applicant has referred to the case of Victoria & Grey Trust Co. v. Crawford et al.[7] In that case Justice Holland, in an oral judgment, referred to section 9 of the Interpretation Act and has quoted Maxwell on the interpretation of statutes (1969) as an authority that headings may explain ambiguous words. With respect, the passage quoted from Maxwell is not authority that allows use of headings to resolve ambiguity. The passage states:

> "HEADINGS
> The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute, but they may explain ambiguous words, a rule which, whatever the assistance which it may render in construction, cannot stand logically with the exclusion of marginal notes, for headings like marginal notes -- as Avory J. pointed out in R. v. Hare -- 'not voted on or passed by Parliament but are inserted after the Bill has become law.'"[8]

I declined to draw any conclusion from the presence of a heading preceding section 66 of the regulation.

In the circumstances of this case I have concluded that Hannelore Scheffler is not an "other entity" within the context of clause 66 (1)(a) of the regulation.

While the parties have put definitions before me which support the possibility that the term "entity" could encompass almost any thing or being, I cannot conclude that the drafters of clause 66 (1) use this language with the intention of describing individuals. I note that throughout the regulation that people are referred to as "individual"[9] and in other places as "person"[10]. I find it difficult to conclude that subsection 66 (1) was intended to embrace individuals or persons without using either term, and used, instead, the term "other entity". As the drafters have used different words - "individual" versus "other entity" - , different meanings should be given to the terms: *Driedger on the Construction of Statutes*, 3d Edition, p. 164. As a matter of ordinary parlance it would be very unusual to refer to an individual as an "entity", notwithstanding broad dictionary definitions which might sanction this use.

In submissions made supplementary to our original hearing, the parties have addressed a further interpretation issue. Clause 66 (1)(a) necessitates that the vehicle be "made available" by a corporation, unincorporated association, partnership, sole proprietorship or other entity." This appears to be a case where it is appropriate to use the *ejusdem generis* rule or limited

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5 R.S.O. 1990, s.9.

6 Re Peters and District of Chilliwack, (1987), 43 D.L.R. (4th) 523 (B.C.C.A.) and Ontario Catholic Teachers' Association of Ontario, [1992] O.J. No. 2287.

7 (1986) 57 O.R. (2d) 484, decision of R.E. Holland J.

8 Maxwell on the *Interpretation of Statues*, 1969, 12th edition, page 11.

9 For example in the language of 66 (1) itself.

10 See *SABS* section 67 as an example.

class rule, as an interpretive aid. As quoted in *Driedger on the Construction of Statutes*, 1994, Justice La Forest defined the rule as follows:

> "Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term, to the genus of the narrow enumeration that precedes it."[11]

In my view the list contained in clause 60 (1)(a) described businesses and organizations that might own automobiles. The list embraces entities which might have business purposes or other objects. But it clearly describes entities that have some goals and structure, other than private individuals. When this list is followed by the words "or other entity" one is driven to the conclusion that the section refers to other varieties of organizations similar to those specified. Applying this interpretation of the scope of "other entity", I do not conclude that Hannelore Scheffler is an "other entity" as contemplated by the regulation.

Additionally I find that the interpretation urged by the respondent would offend the presumption against tautology.[12] If the term "other entity" is to be interpreted in its broadest sense, embracing any person, being or organization, then the Legislature's words "a corporation, unincorporated association, partnership, sole proprietorship" are a complete waste. I conclude that those who drafted clause 66 (1)(a) intended to be somewhat restrictive in deciding who could make available vehicles to persons who might be "deemed to be the named insured under a policy". Furthermore, I observe that the Legislature could have described a broad class capable of making vehicles available simply by ending clause 66 (1)(a) after the words "regular use". The Legislature did not do so. Additional words were added.

Because in ordinary parlance an individual would not be referred to as an "entity", and because the limited class rule would suggest that "other entity" should be construed narrowly, and because of the presumption against tautology, and because the Legislature could have easily created a broad class in clause 66 (1)(a) but did not do so, I conclude that the term "other entity" does not include Mrs. Hannelore Scheffler.

CONCLUSION

Subsection (1)(a) of the Arbitration Agreement requires me to answer the following question:

> "Who, as between State Farm Mutual Automobile Insurance and Kingsway General Insurance Company has priority to pay Statutory Accident Benefits to or for the benefit of Robert Scheffler?"

In view of the interpretation I have given to clause 66 (1)(a) of the statutory accident benefits regulation, I conclude that Robert Scheffler is not deemed to be a named insured under the

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11 Quoted from National Bank of Greece (Canada) v. Katsikonouris (1990), 74 D.L.R. (4th), 197 (Supreme Court of Canada).

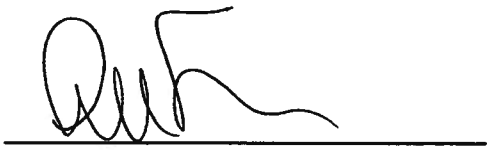
12 Vijevekumar v. State Farm, (1999) 44 O.R. (3d) 545 at p.550, Ont. C.A. per Laskin J.A.: "This presumption means that the legislature is presumed to avoid unnecessary meaningless language."

State Farm policies. Therefore Kingsway, where Robert Scheffler is a named insured, is obliged to respond with respect to payment of statutory accident benefits.

In accordance with the Arbitration Agreement, the question set out in subsections 1(b) and 1 (c) of the Arbitration Act are reserved for me to be answered following a resumption of the arbitration.

In accordance with the agreement of the parties subsequent to the hearing, and as submitted culminating in correspondence of August 11, 1999, State Farm should recover from Kingsway costs of $6,500.00, plus GST, plus $750.00 for disbursements which is inclusive of GST.

DATED at Toronto this 20th day of October, 1999.



Lee Samis

Attachments:

1. Arbitration Agreement
2. Agreed Statement of Fact