IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, Section 268 AND REGULATION 283/95 THEREUNDER

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

INTACT INSURANCE COMPANY

Applicant

- and –

QBE INSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Antonietta Alfano – Intact Insurance Company
Counsel for the Applicant, Intact Insurance Company
(hereinafter referred to as "Intact")

Kevin Adams – Rogers Partners
Counsel for the Respondent, QBE Insurance Company
(hereinafter referred to as "QBE")

ISSUE – MOTION FOR ORDER FOR "DUMMY HEARING"

[1} In the context of a priority dispute pursuant to s. 268 of the *Insurance Act*, R.S.O. 1990, c.I.8, involving the issue of "regular use" and having ruled that I do not have the authority to order the attendance of a witness (employer) who is not a party to be examined in advance of the arbitration hearing itself, the issue before me is whether I can order such witness to attend in advance of the full hearing to be examined as part of the arbitration hearing. This is essentially a motion for an Order allowing the calling of evidence out of order. Such examination is often referred to as a "dummy hearing" in priority disputes and is often done with the consent of the parties. In this case, the Respondent objects to proceeding in that fashion.

PROCEEDINGS

[2] This preliminary issue was dealt with by way of written submissions in September 2018.

FACTS

[3] This Arbitration involves a priority dispute pursuant to s. 268 of the *Insurance Act*, R.S.O. 1990, c.I.8, with the central issue being that of "regular use". I understand that the claimant Victor George was operating a vehicle insured with Intact in the early morning hours of Sunday, July 31, 2016. Intact alleges that the claimant had regular use of a vehicle owned by his employer and available to him at the time of the accident. It is alleged that as a regular user of such vehicle, the claimant becomes a deemed named insured under the QBE policy putting QBE in priority to Intact.

[4] I have already ruled that the applicable legislation does not provide me with the authority to order the Examination Under Oath of a witness who is a non-party to the dispute to attend in advance of the arbitration hearing itself.

[5] I am advised that the Respondent has already provided the Applicant with a "will say" statement of the employer's representative and employment documentation. No additional production request has been made before me.

[6] The Applicant seeks an Order requiring the attendance of a representative of the employer to attend on a "dummy hearing" in advance of the calling of other evidence and submissions.

ANALYSIS AND FINDINGS

[7] The Applicant Intact seeks an Order pursuant to the authority provided by s. 20(1) of the *Arbitration Act*, S.O. 1991, c.17, for the examination of a representative of the employer whose vehicles are insured by QBE with respect to the regular use issue in this priority dispute. Intact takes the position that to proceed with such "dummy hearing" would enable it to assess credibility and then decide whether to enter into a resolution or set a date for further evidence and submissions.

[8] The Respondent QBE objects to proceeding in this fashion. QBE submitted that an arbitrator should only order bifurcation of an arbitration on liability and damages issues on consent of all parties, or in the most exceptional of cases which warrant bifurcation. *Elcano Acceptance Ltd. v Richmond, Richmond, Stambler & Mills,* [1986] OJ No. 578 (Ont CA), stands for the proposition that (at para 11) "[s]eparate hearings should only be ordered in the interest of justice and in exceptional cases." *Bourne v Saunby*, [1993] OJ No 2606 (Gen Div) provides a list of 14 factors (at para 30) to be considered on a question of bifurcation, focusing on the ability to sever discreet issues and whether bifurcation will create significant savings of time/expenses or potentially end the litigation.

[9] QBE has submitted that it is not necessary or possible to properly weigh the factors set out in *Bourne* because Intact does not seek to bifurcate the hearing for determination of an issue which may be dispositive of the claim. Rather, Intact seeks to bifurcate *part* of the evidentiary hearing on priority issues to permit the examination and cross-examination of one responding witness, such that the evidence of the Respondent will be taken (out of order) before the evidence of the Applicant. The "dummy hearing" proposed by Intact has no prospect of disposing of any issue in dispute (unless it leads to Intact's voluntary withdrawal of the priority dispute).

[10] QBE objected to proceeding with a "dummy hearing", because:

- it is unnecessary;
- it does not create efficiency; and
- it displaces the usual order of presentation of evidence creating unfairness for QBE.

[11] QBE claimed that bifurcation of the hearing is unnecessary since Intact will be permitted to cross-examine Mr. Luzskow at the arbitration hearing, when all other evidence is tendered. QBE claimed that bifurcation will actually create inefficiency, since (other than the evidence of Mr. Luzskow) all other evidence on priority issues will still need to be lead by both parties at a separate hearing. There is no efficiency created simply by taking the evidence of the parties' witnesses out of order, which is all the "dummy hearing" will achieve.

[12] As Respondent, QBE takes the position that it has the right to know the case it must answer. Forcing the evidence of QBE's witness (including his evidence in chief and cross-examination) to be taken first through bifurcation will potentially create unfairness to QBE, since QBE will be unable to call evidence in response to the Applicant's evidence without re-calling Mr. Luzskow to give evidence a second time at another hearing at a later date.

[13] Section 19 of the *Arbitration Act* provides:

> *19 (1) In an arbitration, the parties shall be treated equally and fairly.*
> *(2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.*

[14] QBE submitted that an Order bifurcating the hearing of the evidence on priority issues would threaten the fairness of the hearing.

[15] QBE requests that a hearing date be set for the (actual) arbitration hearing to include presentation of both parties' evidence/examination of witnesses (beginning with the Applicant's and followed by the Respondent's) and argument to determine the priority issues, which will be much more efficient process than bifurcation of the hearing of the parties' evidence.

[16] In my view, what is being sought is not an Order for bifurcation but an Order requiring the evidence to be called out of order. I am satisfied that there is some unfairness to the Respondent in having one of its witnesses forced to testify before knowing fully the case it

has to meet and therefore possibly having the witness attend a second time on a different date. The question becomes whether the unfairness so created is outweighed by possible savings of time/expenses or potentially putting an end to the litigation altogether. I am satisfied that there exists some possibility that the hearing of the witness' evidence and the opportunity to assess credibility might lead to claim resolution. I am not satisfied on the facts before me that proceeding with a "dummy hearing" will result in any substantial costs savings. The dummy hearing would likely be a half day event. A full hearing would likely involve the evidence of the claimant and legal argument and be a full day.

[17] The facts in this case are quite different than many other fact situations found in priority disputes. For example, in a priority dispute involving a dependency issue, the examination on a dummy hearing of a non-party (mother or father) or a claimant who already had attended on an Examination Under Oath without full exploration of the dependency issue, may well result in a substantial time/expenses savings. With the full evidence available, the costs to be incurred in having to retain forensic accountants might well be avoided, resulting in substantial savings and may well offset any unfairness in having evidence called out of order. Hopefully, such dummy hearing would be done on consent without the necessity of an Order.

[18} I find that the facts before me here do not offset the unfairness in ordering a witness to be examined out of order and possibly having to attend twice in circumstances where a "will say" statement and employment documents have been provided. I am satisfied that such production allows the Applicant to know the case it has to meet. I would be happy to address any further production requests in a further pre-arb telephone conference. Otherwise, I am content to arrange a one day hearing before year-end and look forward to hearing from counsel in that regard.

ORDER

[19] I hereby order that:

1) The Applicant's motion is dismissed; and

2) Costs of such motion reserved to the conclusion of the dispute.

DATED at TORONTO this 17th)

day of September, 2018.)

KENNETH J. BIALKOWSKI
Arbitrator