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INSURANCE ISSUES

An Ontario Court sets out the factors for determining who the "lessee" of a rented/ leased vehicle is for the purposes of determining the priority of insurers providing coverage.

***Aviva v Wawanesa*, 2018 ONSC 5778, per Nakatsuru, J.**

FACTS AND ISSUES:

On October 29, 2010, the Plaintiff Liu was rear-ended by a vehicle driven by the Defendant Mahamood, which was rented from New Horizons Car Truck Rentals. Mahamood was in the process of delivering furniture for his employer, Fine Furnishings. Liu sued Mahamood, Fine Furnishings and New Horizons Car Truck Rentals for vehicular negligence for $3,000,000.

Mahamood did not have any insurance of his own, and Fine Furnishings was insured by Wawanesa. New Horizons Car Truck Rentals was insured by Aviva. The issue was as to which insurer (as between Aviva and Wawanesa) was the first loss insurer under the *Ontario Insurance Act*, R.S.O. 1990 c. I.H, section 277(1.1). In other words, the question was as to who the "lessee" of the vehicle was – Mahamood or Fine Furnishings. Section 277 provides as follows:

> 277 (1) Subject to section 255, insurance under a contract evidenced by a valid owner's policy of the kind mentioned in the definition of "owner's policy" in section 1 is, in respect of liability arising from or occurring in connection with the ownership, or directly or indirectly with the use or operation of an automobile owned by the insured named in the contract and within the description or definition thereof in the policy, a first loss insurance, and insurance attaching under any other valid motor vehicle liability policy is excess insurance only.
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> (1.1) Despite subsection (1), if an automobile is leased, the following rules apply to determine the order in which the third party liability provisions of any available motor vehicle liability policies shall respond in respect of liability arising from or occurring in connection with the ownership or, directly or indirectly, with the use or operation of the automobile on or after the day this subsection comes into force:

1. Firstly, insurance available under a contract evidenced by a motor vehicle liability policy under which the lessee of the automobile is entitled to indemnity as an insured named in the contract.

2. Secondly, insurance available under a contract evidenced by a motor

vehicle liability policy under which the driver of the automobile is entitled to indemnity, either as an insured named in the contract, as the spouse of an insured named in the contract who resides with that insured or as a driver named in the contract, is excess to the insurance referred to in paragraph

3. Thirdly, insurance available under a contract evidenced by a motor vehicle liability policy under which the owner of the automobile is entitled to indemnity as an insured named in the contract is excess to the insurance referred to in paragraphs 1 and 2.

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(4) In this section,

"lessee" means, in respect of an automobile, a person who is leasing or renting the automobile for any period of time, and "leased" has a corresponding meaning.

Mahamood was a college student employed by Fine Furnishings, which was owned and operated by Mehta. When Mahamood wanted to increase his income, he made an arrangement with his employer to do so by delivering furniture for them as well. He signed a "subcontractor agreement". Mahamood believed that he was both an employee and an independent contractor of Fine Furnishings. Mahamood did not work for any other employer, he did not pay any truck rental fees, and he did not own a credit card. He could refuse a furniture delivery but when he did agree to do one, he rented a truck from New Horizons because Fine Furnishings had an account there.

On behalf of Fine Furnishings, Mehta deposed that Fine Furnishings was not responsible for the rental charges – Mahamood was. Since Mahamood did not have his own credit card, Mehta used his personal credit card and was to be reimbursed by Mahamood for rental charges which were charged to that credit card by agreement between Mehta and Mahamood. Mehta deposed that he entered into a subcontracting agreement with Mahamood regarding furniture delivery because he did not want Fine Furnishings delivery people to be characterized as employees. Fine Furnishings never contacted New Horizons to reserve or rent the vehicle involved in the accident. Mahamood was not expressly required to rent a vehicle from New Horizons Car Truck Rentals.

On the date of the accident, Mahamood rented a truck from New Horizons. He did not provide the rental company with a credit card. New Horizons had an account for Fine Furnishings on its computer system, and Mehta's VISA card was associated with the account. Mahamood's booking of the truck in question was to be charged to that card.

The rental agreement was signed by Mahamood, and it did not list Fine Furnishings on the agreement. Only Mahamood's name and signature appeared. He was identified as the vehicle's renter, his home address was listed, and the telephone number listed was the Fine Furnishings business number. New Horizons deposed that it could not list Fine furnishings on the rental agreement "due to a limitation in the computer system given the lack of a line space". The Court noted that there was a space for remarks or additional noted which was

not filled out.

New Horizons deposed that it believed it was contracting with Fine Furnishings. On its Incident Reporting Form, prepared after the accident, New Horizons noted the renter to be Fine Furnishings.

Aviva argued that Fine Furnishings, not Mahamood, was the lessee of the truck. It noted that the rental was paid for by a credit card associated with Fine Furnishings.

HELD: For Wawanesa; Mahamood held to the the lessee and Aviva held to be the first loss insurer.

The Court held that the case turned on the statutory interpretation of section 277. The Court held that the definition of "lessee" in section 277(4) was "straightforward" and the principles had been decided in ***Intact Insurance Company of Canada v. American Home Assurance Company of Canada***, 2013 ONSC 2372 and ***The Insurance Corporation of British Colombia v. Lloyds Underwiriter***, 2017 ONSC 670.

The Court held that the test for determining the identity of the "lessee" was as to who the rental company could sue to enforce the car rental contract.

Nakatsuru, J. held that when considering all of the relevant factors, the lessee in this case was Mahamood,

1. The Court held that the rental contract provided that the rentee was Mahamood. The fact that payment was to be charged to a credit card associated with Fine Furnishings was held to be "far from determitive" and, indeed, "of little significance". The fact that the New Horizons internal record keeping system tracked the rental to Fine Furnishings for the purposes of tracking and securing payment was held not to affect the provisions of the contract which set out the term between the rental company and the lessee. The Court held:

> [20] In my opinion, I need not go further than the rental agreement in this case. Mr. Mahamood signed it. He rented the truck. He is the person New Horizons must sue to enforce the car rental contract. He is therefore the lessee. It does not matter why he was renting it or what he was going to use the truck for. It does not matter how the rental would be paid for and by whom. The focus of the inquiry should be on the contractual arrangement made to rent or lease the vehicle. Defining a "lessee" with reference to the act of renting or leasing in s. 277(4) means that what is captured by the provision is the contractual arrangement to obtain a vehicle for some consideration. This is to be compared to a scenario where vehicles are lent to others without consideration such as between family members or friends. Hence, the primacy of the contractual arrangement in determining the identity of the lessee.
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> [21] On the rental agreement before me, there is no indication of any involvement of Fine Furnishings aside from their telephone number which Mr. Mahamood gave as his contact number. The contract is between Mr. Mahamood and New Horizons. While much

evidence was lead on this application, a significant portion of it conflicting, none of it affects this incontrovertible and fundamental fact.

[22] Aviva relies upon the internal documents of New Horizons that indicates that Fine Furnishings holds the business account by which the rental vehicle would be paid. However, these are internal documents and computer systems. They are used by New Horizons for tracking and securing payment for the rental vehicle. It is not a contract by which the lessee rents or leases the vehicle. There is no evidence of any separate contract between New Horizons and Fine Furnishings to supply rental vehicles for their use. Finally, the belief of a representative of New Horizons as to who the renter was in this case does not amount to a valid contractual arrangement.

[23] Aviva focuses its argument on this pre-existing and standing account between New Horizons and Fine Furnishings in arguing that Mr. Mahamood did not lease the truck. Aviva submits that a critical fact is that the rental was paid for by a credit card associated with Fine Furnishings. This is a credit card of the owner, Mr. Mehta. They argue by analogy to Justice Penny's reference to a similar arrangement in The ***Insurance Corporation of British Columbia v. Lloyds Underwriter***. In my view, each case must be determined on its own facts. In an appropriate case, I do not deny this may be a consideration in answering the question of between which parties the contractual arrangement lies. This is so especially if there is some ambiguity in the contract. However, who actually pays for the rental vehicle is far from determinative of this issue. In the instant case, leaving aside for the moment that it was Mr. Mehta's personal credit card rather than Fine Furnishing's business credit card that was used to pay for the rental truck, who pays for the rental is of little significance. Indeed, it is of little significance in most cases. For example, if a car is rented by a husband and he signs the rental arrangement, the fact that his spouse pays for it using her credit card does not make the spouse the lessee. It is the individual who contracts for the rental vehicle who is the lessee and not the person or entity that supplies the funds. Or to take another example as posited by Wawanesa in a different context: if a student rents an apartment and signs a lease, but their parents supply the rental monies, the landlord must still sue the student for any non-payment of rent since the contract is with the student. Applying the test set out by Justice Perell, individuals who do no more than pay for the rental vehicle will not be legally liable for the contract. In other words, they are not lessees within the meaning of s. 277.

[Emphasis added]

2. The Court also held that the issue of whether Mahamood was an employee of an independent contractor of Fine Furnishings while renting the vehicle was "immaterial".

3. Nakatsuru, J. held that to require the court to go into an in-depth

analysis, including of significant financial records to look at questions as to who was paying for the vehicle rental or as to whether or not the driver was an employee or independent contractor of his/her employer would defeat the Legislature's intent "to implement a single and straightforward mechanism to determine priority amongst insurers" such that "[d]isputes about it should be rare" and that resolution of any disagreements that do arise "should be expeditious and unproblematic":

> [25] The definitions of "employee" and "independent contractors" from other contexts were argued as applicable at this hearing: ***671122 Ontario Ltd. v. Sagaz Industries Canada Inc***., 2001 SCC 59 (CanLII). These issues are not simple to resolve. If I had to resolve them, I would be called upon to make specific findings of fact based on conflicting evidence; findings which raise credibility assessments. Also, there are significant legal and practical consequences to Mr. Liu's litigation of any determination of whether Mr. Mahamood was acting as an employee or an independent contractor; consequences important enough that Mr. Liu has intervened in this dispute between insurance companies. In my view, all of this may be germane to some issue at trial, but for the purpose of determining the priority of insurance policies, they are immaterial. The simple question that needs to be answered is: who was the lessee for the purpose of s. 277(1.1)? The answer should not require in-depth inquiries into large factual records or analysis of unrelated complex areas of the law.
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> [26] The legislature intended to implement a simple and straightforward mechanism to determine priority amongst insurers. Disputes about it should be rare. Where there is a disagreement, resolution should be expeditious and unproblematic. Such a resolution is best brought about by the test put forth by Justice Perell. That test is in keeping with the definition found in s. 277(4) and the intent of the legislation.

4. The Court held that the ***ICBC*** case was distinguishable because in that case, the driver who rented the vehicle was authorized to do so as a representative of her corporate employer, which was not the case here:

> [27] In coming to this decision, I fully appreciate that corporations can contract to rent automobiles. I also appreciate corporations can only act through an authorized representative to sign a contract. Thus, there may be instances like ***in The Insurance Corporation of British Columbia v. Lloyds Underwriter*** where the lessee is someone other than the person who signs the rental agreement. On the facts of that case, Justice Penny found that the driver who rented the vehicle did so as an authorized representative of her corporate employer. That was the critical finding in that case. I find that Mr. Mahamood's case is not similar. Rather, the mere fact that the person who signs the agreement and rents a vehicle is doing business for an employer or is renting the vehicle for the benefit of someone else, does not mean they are no longer the lessee for the purposes of s. 277(1.1). To hold otherwise would defeat the

> legislative purpose of the section and would only encourage frequent and protracted inquiries into the identity of some "true" or de facto lessee. In my opinion, it should only be the exceptional case where it will be necessary to look beyond the four corners of the rental agreement.

5. The Court noted that it was within the power of rental/leasing companies to employ standard form agreements that make it clear when the rentee/lessee is some entity other than the party who signs the rental agreement:

> [28] Finally, I note that if rental car agencies like New Horizons wish to avoid circumstances such as that which occurred here, it can put into place other contractual arrangements or make provisions in the standard form agreements that they use that will make it clear when it is some other person or entity than the signatory to the rental agreement that is entering into the contract to rent a vehicle. This should not be difficult.

COMMENTARY:

The Alberta legislation setting out the priorities of insurers that might be involved in a rental/leased vehicle situation is the *Insurance Act*, R.S.A. 1980, c. I-3 section 956 and the *Miscellaneous Insurance Provisions Regulation*, Alta Reg 120/211, section 7.1. It is much more complex in structure than Ontario's section 277. However, even under Alberta's complicated legislation, one of the factors that must be considered in determining the respective priority of the various insurers is the identity of the "rentee" or "lessee" of the rental/lease vehicle. We submit that the Ontario case law is applicable in determining that question in Alberta.

Although Nakatsuru, J. purports to follow and apply the ***Intact*** and ***ICBC*** cases, he did not give the same weight to the various factors considered as the Courts did in those cases. The Court held that the issue is as to which entity the rental/leasing company would have to look to for recovery of the rental fee as a matter of contract law, as ***Intact*** and ***ICBC*** held.

1. However, Nakatsuru, J. held that who pays the rental fees is "of little significance in most cases" whereas this was held to be of significant importance in the previous cases. In ***Intact***, the Court held that an employee who rented a vehicle for his employer's business, paying by way of a credit card in his name was the rentee. The fact that he was entitled to reimbursement from his employer for that amount was held to be a matter between him and the employer in which the rental company was not involved. In ***ICBC*** the Court held that because the employee was required to rent the vehicle from that rental company where the employer had an account, using a credit card for which all the charges went to her employer, the employer was the rentee.

2. Nakatsuru, J. considered the fact that Mahamood had signed the rental agreement to be very significant, whereas the Courts in ***Intact*** and ***ICBC*** held that this is not a significant, and certainly not a definitive,

factor. In both of those cases, the employee had signed the agreement.

That said, we submit that this case is in line with the ***Intact*** and ***ICBC*** cases.

1. In the prior cases, it was undisputed that the driver was an employee renting the vehicle on his/her employer's business. Nakatsuru, J. recognized that a corporate may rent a vehicle through an authorized representative, and be the "lessee" notwithstanding that the employee signs the rental agreement.

2. That was not the case here. It appears that Mahamood did the furniture delivery for his employer, not in his capacity as an employee, but as his sideline. He could control his deliveries and was responsible to pay the truck rental (by arrangement with his employer). The credit card employed was not that of the employer company but of its principal. The employer's principal's card was used only because Mahamood did not have one of his own.

Nakatsuru, J. justified his decision on the basis that the object of the legislation was to provide a simple mechanism for determining insurer priorities in rental/ lease situations where disputes would be "rare" and when they did arise they would be capable of "expeditious and unproblematic" resolution. With respect, the Legislature would appear not to have succeeded in that goal. This case, along with the ***Intact*** and ***ICBC*** cases shows that in such cases determining who the lessee is will involve more than a superficial review of readily available facts. The situation is even more complex in Alberta with the six layers of insurer priority in leased/rented vehicle situations.

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