Date:20020108
Docket No.: S.P. 05714

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Leng v. Hanson, 2002 NSSC 3]

BETWEEN:

CALVERT W. LENG

Plaintiff

- and -

GLEN ROBERT HANSON, PEPSI COLA CANADA LIMITED, a body corporate registered to carry on business in the Province of Nova Scotia, and CO-OPERATORS GENERAL INSURANCE COMPANY

Defendants

D E C I S I O N

HEARD BEFORE:	**The Honourable Justice Walter R. E. Goodfellow in the Supreme Court of Nova Scotia at Pictou, Nova Scotia (Chambers) on November 28, 2001**
ORAL DECISION:	**November 28th, 2001**
WRITTEN RELEASE OF ORAL:	**January 8th, 2002**
COUNSEL:	**Jamie MacGillivray for the Plaintiff** **Douglas Skinner for the Defendant, Co-Operators General Insurance Company**

GOODFELLOW, J: (Orally)

[1] This is an application brought by the Defendant, Co-Operators General Insurance Company under *Civil Procedure Rule* 25.01 for a preliminary determination on a question of law. It is a question of whether or not the exclusionary clause in the insurance policy prevails.

AGREED STATEMENT OF FACTS

> 1. On May 2nd, the Plaintiff, Calvert W. Leng ("Leng"), was involved in a motor vehicle accident (the "Accident") at approximately 3:00 p.m. at or near the MacKay Bridge in Halifax, Nova Scotia.
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> 2. At the time of the Accident, Leng was employed by and carrying out driving duties for Budget Rent A Car. ("Budget"). Leng was transporting a 2000 Ford Focus (the "Vehicle") from Budget's Kempt Road, Halifax location to their rental location at Halifax International Airport. At the time of the Accident, the Vehicle was owned by Leng's employer Budget Rent A Car and registered to Parkway Rentals.
>
> 3. The Defendant, Co-Operators General Insurance Company ("Co-Operators") is a body corporate registered to carry on business in the Province of Nova Scotia and at all material times provided insurance coverage on the Vehicle.
>
> 4. At the time of the Accident, Leng was covered under, and the beneficiary of, a policy of motor vehicle insurance with Co-Operators which was a SPF No. - 4 Garage Automobile Policy (the "Policy"). The Policy provided Section B - Accident Benefits, subject to certain exclusion clauses.
>
> 5. Leng alleges to have suffered injuries and loss as a result of the Accident.
>
> 6. In paragraph 10 of the Statement of Claim, Leng claims entitlement to benefits for medical expenses and loss of income under Section B of the Policy ("Benefits").
>
> 7. Co-Operators has denied Benefits and in such denial relies on Subsection (2) of the Special Provisions, Definitions and Exclusions Applicable to Section B of the Policy which states, in part, as follows:

(2) Exclusions:
(a) Except as provided in Subsection 3, the Insurer shall not be liable under this Section for bodily injury to or death of any person,

(ii) who is entitled to receive the benefits of any workers' compensation law or plan;

8. Leng was in the course of employment with Budget at the time of the Accident.

9. A "Form 67 - Report of Accident" was submitted to the Worker's Compensation Board (the "Board") by Leng and a ruling was made by the Board that Leng was entitled to receive benefits.

10. Under Section 30 of the *Worker's Compensation Act* 1994-1995, c.1, as amended, Leng elected not to pursue Benefits for loss of income and medical expenses despite his being entitled to do so.

[2] The Agreed Statement of Facts, seems to me, very clearly raises a *prima facia* entitlement by Mr. Leng to *Worker's Compensation Board* payments but as noted, he has made an election to pursue his common law right of action and it is left for me to determine what is the exclusion.

[3] It seems to me the answer to that is straight forward. It's entitlement. That entitlement is not based upon receipt of benefits, it's not based on applying for benefits, it's not based on - entitlement if you applied and were denied, because if you were denied benefits they it would mean you have no entitlement.

[4] In my view Mr. Leng has an entitlement to WCB benefits, his policy of insurance excludes entitlement. He makes his choice about whether or not to pursue his entitlement and that's entirely his decision. However, opting not to pursue entitlement does not obliterate the clear exclusion that arises by contract.

[5] In my view the very issue before me was dealt with thoroughly by Justice MacLellan in *MacDermid v. Economical Mutual Insurance Company* (2000), 184 N.S.R. (2d) 392 (S.C.) relying substantially on the Supreme Court of Canada Decision *Madil v. Chu* (1976), 71 D.L.R. (3d)

295 and I'll quote just one passage from the Supreme Court of Canada Decision at page 298:

> "If entitlement of itself carries with it the right to be paid, it follows, in my opinion, that a workman who is "entitled to benefits" under Part I of the Act is to be taken as being "entitled to receive benefits" within the meaning of Exclusion (2)(a)(ii) of the policy. To construe the words "entitled to receive the benefits" as they are used in Schedule "E" of the *Insurance Act* and in the policy as being ineffective unless the workman has elected to make a claim for compensation which the Board has found to be well founded, in my opinion must mean that in a case such as the present one where the facts are admitted which entitle an insured workman to benefits, he can nevertheless elect to recover against the insurer rather than the Board by the simple process of neglecting to make a claim against the Board. I think it must follow that such a workman can by his own act successfully deprive the insurer of an advantage which it otherwise would have enjoyed under the *Insurance Act* and the insuring agreement. It seems to be that this would mean that the insurer's undertaking as contained in the insuring agreement could be varied adversely to its interest after the happening of the event insured against by the independent act of the insured and such a situation in my view funs contrary to the law normally applicable in interpreting such an agreement.

[6] As I said, I think the determination by Justice MacLellan is definitive and I think it answers the question, the application for a declaration is granted and the end result, the claim of the Plaintiff against Co-Operators General Insurance Company is dismissed. I will hear counsel with respect to the matter of costs.

COSTS

[7] I've written a number of decisions indicating that costs should follow the event. It seems to me at this level, the decision of Justice MacLellan is very clear and that while I guess no harm in making the attempt, you make the attempt, you are unsuccessful, costs should follow the event. Costs of $700 plus disbursements of $50 payable forthwith. You will have to send me a new Order consented to form by Mr. MacGillivray, if you would please.

J.