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COURT FILE NO.: 33901

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ING INSURANCE COMPANY OF CANADA (Applicant) - and - NON-MARINE UNDERWRITERS, MEMBERS OF LLOYD'S OF LONDON, ENGLAND (Respondent)

BEFORE: JUSTICE T.D. LITTLE

COUNSEL: Douglas A. Wallace, for the Respondent (Applicant)

Bruce S. Dawe, for the Appellant (Respondent)

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ENDORSEMENT

[1] This is an appeal from the award of arbitrator Lee Samis dated at Toronto February 23, 2005. The appeal is premised upon an agreement between the parties (the Arbitration Agreement) that permits a party to appeal the arbitrator's award as of right to the Ontario Superior Court on questions of law or mixed fact in law. The standard of review is one of correctness.

[2] The relevant legislation, being the *Insurance Act*, was changed in 1990, and one of the significant changes was to provide statutory "loss transfer" between insurers in circumstances like the ones before the court.

[3] The facts were generally agreed upon by the parties as was the legislative framework outlined on the first four pages of the arbitration award.

[4] The issue to be decided was whether or not the appellant remained "an insured" after purporting to exercise one of its three options as outlined in *Ellis v. London-Canada Insurance Company* [1952], O.R. 664, by purporting to repudiate the insurance contract and return all premiums collected to date to its insured.

[5] Those three options, as outlined in that case, were options available to an insurer at common law.

[6] In my view, the legislative scheme invoked in 1990 in Ontario, emphasizing first party no-fault accident benefits and incorporating the loss transfer re-allocation between insurers in specific cases, not only endeavoured to replace the common law, but did so.

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[7] The appellant acknowledges that Section 275. (1) is applicable in this case and that, but for the appellant's right to repudiate the contract with its insured for misrepresentation, the appellant would fall under the provisions of Section 275 as an insurer "of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose."

[8] The appellant states it repudiated its contract of insurance with its insured – returned all premiums – and as a result, the contract was void *ab initio*.

[9] Thus, the appellant alleges, it is no longer a "second party insurer" pursuant to Section 9 of the *Revised Regulations of Ontario* (1990), Reg. 664 as amended.

[10] I do not agree. By electing one of three options available to it at common law, the appellant effectively alleges that it ceased to be an insurer under the scheme once it elected to treat the insurance contract as void *ab initio*. That option, in my view, was not open to it any longer. The appellant remained "an insurer" as described by Section 1 of the *Insurance Act* as one who undertook or agreed or offered to undertake a contract of insurance irrespective of the fact that the contract itself was purportedly subsequently terminated.

[11] I find the new legislative scheme to have completely replaced the common law in this area. I find that the appellant remained "an insurer" according to the revised legislation and that the arbitrator was correct in holding that if the appellant Lloyd's was induced into the contract of insurance by misrepresentations or non-disclosure, it does not negate its obligations arising under Section 275 of the *Insurance Act*. Indemnification is a liability imposed by law upon the second party insurer. The appellant remains the second party insurer, according to the statute, irrespective of its efforts to void the contract by returning the premiums.

[12] The appeal is dismissed with costs payable to the respondent. If the parties cannot agree, they should make written submissions within 30 days.



Mr. Justice T.D. Little

DATE: June 21, 2005