IN THE MATTER of the *Insurance Act,* R.S.O. 1990, c.I.8, s. 268 (as amended) and Regulation 283/95 (as amended);

AND IN THE MATTER of the *Arbitration Act,1991,* S.O. 1991, c.17, (as amended);

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ALLSTATE INSURANCE COMPANY

Applicant

- and –

THE CO-OPERATORS GENERAL INSURANCE COMPANY

Respondent

AWARD

Counsel:

Heather Kawaguchi
Counsel for the Applicant, Allstate Insurance Company ["Allstate"]

Daniel Strigberger and Mélia Muboyayi
Counsel for the Respondent, the Co-operators General Insurance Company ["Co-operators"]

The following documents were "marked" as exhibits at the hearing which proceeded before me by Zoom on Monday, June 6, 2022.

Exhibit 1 - Arbitration Agreement

Exhibit 2 - Agreed Statement of Facts and Exhibits and Transcripts of the Examinations under Oath of the claimant, Hussein T. ["claimant"], and his brother, Hassan T. ["brother"]
Exhibit 3 - Respondent's Document Brief

I did not receive any evidence apart from the documents, described above and filed. I have attached the Agreed Statement of Facts, without exhibits, which is appended to this award as Schedule A. I have redacted the full names of the claimant and the brother and the full name of Allstate's insured by reason of privacy interests.

This is a priority dispute where the facts are not particularly challenging or contested. That said, it is clear that the facts are murky. Moreover, it is an example of the axiom that bad facts make for bad law. Whatever decision I reach will impose priority on an insurer that is somewhat undeserving of that outcome. This is a contest between Allstate [its insured's vehicle coming into contact with an uninsured motorcycle operated by the claimant] and Co-operators, who was arguably duped by the scheming of the claimant and his brother to secure automobile insurance at a lower cost.

The issue to be decided by me is: did the claimant have "regular use" of the GMC vehicle at the time of the accident to make him a deemed named insured under the Co-operators policy, in accordance with section 3 (7) of the Statutory Accident Benefits Schedule?

For purposes of this award, the claimant, Hussein T., will be described as "the claimant" and his brother, Hassan T., will be described as "the brother".

The claimant purchased a GMC Savana cargo van in 2017-2018. It was registered to the brother and insured under the brother's policy with Co-operators. The brother caused or allowed commercial class license plates to be attached to the vehicle and the Co-operators policy indicated the vehicle was being used for business purposes. The

policy indicates the brother to be the owner and principal driver. The former is likely false on a beneficial basis, looking past the fact of registration, and the latter is clearly false.

The claimant testified at his EUO to owning and operating two businesses: HHH Flooring installation Inc. and HHH Flooring, an unincorporated sole proprietorship. There was no evidence tendered regarding the former. The latter was registered to the claimant effective December 8, 2015, expiring December 7, 2020.

Both the claimant and the brother considered the GMC vehicle to be the property of the claimant. He paid for the maintenance and upkeep of the vehicle and paid, through the brother, for the insurance.

From the agreed statement of facts, I learned the following. The claimant resided at 7 Sun Ave in Scarborough at the time he was involved in a motor vehicle accident on Sunday, July 14, 2019. He had driven the GMC vehicle to a plaza to test drive and purchase a motorcycle. The claimant was operating the motorcycle, which was uninsured, when it came into collision with a vehicle insured by Allstate. The claimant did not have a license to operate motorcycles.

Co-operators insured the brother respecting the GMC Savana. This vehicle was registered to the brother with commercial class license plates. Both the claimant and his brother considered the GMC to be the claimant's vehicle. The claimant paid for the maintenance and any upgrades to the vehicle. The claimant paid for the insurance by giving the money to his brother who paid it to Co-operators.

At the time of the accident, the claimant was registered as the sole proprietor of HHH Flooring Installation [referenced as "HHH Flooring" hereafter]. The GMC vehicle was used for work purposes in relation to this sole proprietorship. Tools and equipment were kept in it. The vehicle was kept at the claimant's residence. There was one set of keys for the GMC which were kept at the claimant's home. The GMC vehicle was the

claimant's only vehicle which he used for both work and, to a lesser extent, pleasure. There was nothing prohibiting the claimant from using the vehicle at any time or for any personal activities or errands. The claimant did not have to ask his brother for permission to operate the GMC vehicle. The brother would occasionally drive the GMC vehicle but would normally drive his personal use vehicle. The brother did not have to ask the claimant for permission to drive the GMC vehicle.

I reviewed the transcript of the examination under oath of the claimant held on September 8, 2020 and gleaned the following facts. The GMC vehicle was "under" the brother's name, but it was the claimant's vehicle. The claimant and the brother worked together in relation to the business of HHH Flooring. While it was the claimant's business, the brother worked with the claimant. The brother is not an employee. Rather, he "shares" a part in the business. This is not reduced to writing. The GMC vehicle is used for business purposes. It is primarily driven by the claimant but sometimes by the brother. The claimant and the brother worked together. The brother drove the GMC vehicle from time to time. The vehicle was paid for by the claimant as was the insurance. The claimant paid for maintenance, repairs, and upgrades. The equipment and tools of the business of HHH Flooring were kept in the vehicle. The claimant and the brother are still involved in the business of HHH Flooring. The claimant is primarily involved in obtaining work. The brother and others perform hands-on work.

I reviewed the transcript of the examination under oath of the brother similarly held on September 8, 2020 and gleaned the following facts. The brother was living at the same address as the claimant at the time of the accident. The GMC vehicle was the property of the claimant. The vehicle was registered in the name of the brother and insured in the name of the brother. The brother wanted to work with the claimant. The claimant was in the flooring business and was able to secure work. The brother and the claimant worked together. The brother drove the GMC vehicle sometimes. The brother did not need to ask the claimant for permission to use the vehicle. The claimant did not need to ask the brother for permission to use the vehicle. The brother had a Mazda vehicle

which he used for personal purposes. The claimant might use the Mazda, but this was a rare occurrence. The GMC vehicle was used for work by both the brother and the claimant.

The brother worked with the claimant. The claimant had started the business 2-3 years before the brother joined him. The claimant paid 100% of the insurance costs for the GMC vehicle. This was money paid by the claimant to the brother and from the brother's bank account to Co-operators. The brother did no work separate and apart from HHH Flooring. All jobs would require the same tools which were situate in the GMC vehicle. There was nothing stopping the claimant from using the GMC vehicle for errands or personal use. The GMC vehicle was registered to the brother and insured by the brother because the claimant did not have an insurance history. They were trying to save money. Co-operators was not informed of this situation. According to the brother, he and the claimant were working together most of the time though the vehicle would be driven by the claimant most of the time. An inquiry was made at some point in time to add the claimant to the Co-operators policy. This was not done as it was going to increase the cost of insurance and make it expensive.

At question 121 and following, it was put to the brother that the GMC vehicle was not his vehicle but his brother's vehicle. The brother testified it was a "work vehicle". The claimant "was getting all the work and he paid for the vehicle, but we were both using the vehicle to make money both of us.".

The priority rules for an occupant of a vehicle are set out in section 268 (2) of the *Insurance Act* which provides:

Liability to pay

> (2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
>
> iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,
>
> iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

Section 3 (7) of the Statutory Accident Benefits Schedule [referenced subsequently as the "SABS"] provides:

> (7) For the purposes of this Regulation,
>
> > (f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,
> >
> > (i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or ...

There is no dispute that the claimant was an individual living and ordinarily present in Ontario at the time of the accident.

This dispute turns on:

1. whether, at the time of the accident, the claimant had "regular use" of the GMC vehicle,
2. whether, at the time of the accident, the GMC vehicle was an insured automobile "being made available" to the claimant, and
3. whether the GMC vehicle was made available for the claimant's regular use by a "corporation, unincorporated association, partnership, sole proprietorship or other entity".

Did the claimant have regular use of the GMC vehicle at the time of the accident? It is not necessary that the claimant be driving the vehicle for it to be available for his regular use. The claimant used the vehicle to travel to a plaza to test drive and acquire the motorcycle which was involved in the subject accident. Moreover, the vehicle was always or virtually always available to the claimant for his use. He was able to use the vehicle at any time he chose, including for personal use and outside of business hours. There was one set of keys for the GMC vehicle which were kept at the claimant's house. He did not require the brother's consent or permission to operate the vehicle. I find, on all the evidence, that the claimant had regular use of the GMC vehicle at the time of the accident. It was available to him all the time and for any purpose. Indeed, he drove the vehicle to the Plaza shortly before the accident. I find that the GMC vehicle was made available to the claimant at the time of the accident.

Was the GMC vehicle made available for the claimant's regular use by a "corporation, unincorporated association, partnership, sole proprietorship or other entity"?
While it is true that the brother was the registered owner of the GMC vehicle and was the policy holder with Co-operators, I reject the form of those transactions or circumstances as they were orchestrated by the claimant and his brother to obtain insurance at a lower cost. This is unfortunate and I am by no means ignorant to the ramifications of this conduct. I am certainly not condoning this sort of conduct.

However, the evidence discloses, and I find, that the claimant and his brother were involved in a joint venture, be that a partnership, sole proprietorship or business arrangement, in relation to HHH Flooring. The claimant was the beneficial owner of the GMC vehicle. While he was not the policy holder, he paid for the insurance and he was in substance, if not in form, the beneficiary of the policy of insurance. The brother, being the policy holder, and the claimant together effected a scheme to obtain insurance at a lower cost. The claimant and the brother were involved in the business enterprise of HHH Flooring. The GMC vehicle was made available to the claimant either by HHH Flooring [he was the registered owner of the business but he and his brother were effectively partners or joint venturers] or by himself as the beneficial owner of the vehicle or by the brother as the registered owner of the vehicle.

While it is true that the claimant and the brother did not clearly organize or delineate the business relationship, the evidence discloses that they were involved in a joint business enterprise or relationship, and I so find.

A sole proprietorship, partnership or other entity has no legal status separate from the people who make up the sole proprietorship, partnership other entity. The vehicle being registered in the name of the brother is the same as the business itself owning the vehicle. The claimant and the brother worked together. The claimant did not consider the brother to be an employee. Rather, they shared in the business. The GMC vehicle was used for work purposes for HHH Flooring. Tools and equipment were stored in the GMC vehicle. The plates attached to the vehicle were commercial plates. The Co-operators policy indicates the vehicle is rated as a business vehicle.

In order for s. 3 (7)(f) to be triggered, the GMC vehicle must be provided by an unincorporated association, partnership, sole proprietorship, or other entity [as distinct from an individual]. Thus, there must be a business relationship between the claimant and his brother which I have found, above. This is in keeping with the finding of Arbitrator Bialkowski in *Wawanesa Mutual Insurance Company v. State Farm Mutual Insurance and Aviva* (April 11, 2017)

The sole proprietorship or other entity does not need to be a named insured under the brother's policy in order for the deeming provision to apply. This is in keeping with the finding of Justice Perell in *Kingsway General Insurance Company v. Gore Mutual Insurance Company*, 2010 ONSC 5308 who cites, with approval, Arbitrator Samis in *Security National Insurance Co. v. Markel Insurance Company* (November 20, 2009). "The deeming provision [*s.3 (7) (f) for our purposes*] applies if the vehicle that is the subject of the contract of insurance is made available to an individual for regular use by the sole proprietorship or other entity regardless of whether that sole proprietor or other entity is a named insured under the policy of insurance on the vehicle".

An "other entity" has been interpreted as an individual operating, in essence, as a business. It is more than two friends helping each other out, but a person can be an "other entity". Partnership is a broadly defined term. Section 2 of the *Partnership Act* defines a partnership as "the relation[ship] that subsists between persons carrying on business in common with a view to profit".

I have found the claimant and the brother to have organized their affairs in a coordinated fashion to pursue the business of HHH Flooring. I am certainly not condoning the conduct of the brother in relation to his dealings with Co-operators. The vehicle was being used for the business of HHH Flooring. It was provided by this business entity for the regular use of the claimant. It was insured by Co-operators.

There is no mechanism for Co-operators to avoid the operation and applicability of the priority rules on the basis that the brother may have misrepresented facts on the application for insurance, either in relation to ownership, use or operation. There are remedies available to Co-operators. Section 233 (1) of the *Insurance Act* provides that a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited. However, section 233 (2) explicitly provides that subsection (1) does not invalidate such statutory accident benefits as are set out in the SABS. A wilful misrepresentation may affect entitlement to benefits as between the insurer and their

insured. The insurer may rely on the exclusions outlined in section 31 of the SABS to deny certain benefits.

Counsel for Co-operators makes the argument that the claimant was making the GMC vehicle available to himself as himself and not as a sole proprietor. I certainly appreciate the thought behind the submission. However, I cannot ignore the facts. This vehicle was inextricably wound up in and part of the business of HHH Flooring. It was used for the business of HHH Flooring by both the claimant and the brother. It was filled with tools and equipment used by HHH Flooring. It was used predominantly by the claimant and for the business of HHH Flooring. I find that HHH Flooring made the GMC vehicle available to the claimant at the time of the accident.

Counsel for Co-operators makes the argument that the regular use provisions are triggered where a sole proprietor is making a vehicle available for their own use under an owner/operator agreement, and that the accident happens while they are using the vehicle under that agreement. While I can sympathize with the plight of Co-operators, I do not think that the law supports this submission. The Court of Appeal for Ontario, in *Security National Insurance Company v. Markel Insurance Company*; and *Kingsway General Insurance Company v. Gore Mutual Insurance Company,* 2012 ONCA 683 stated the following:

> *[61] A sole proprietorship is the entity in issue in this appeal. J. Anthony VanDuzer describes the nature of a sole proprietorship in his book The Law of Partnerships &*
> *Corporations, 3rd ed. (Toronto: Irwin Law, 2009), at p. 7. It is "the simplest form of business organization. It comes into existence whenever an individual starts to carry on business for her own account without taking the steps necessary to use some other form of organization, such as a corporation." From a legal and practical standpoint, "there is no separation between the sole proprietorship business organization and the person*

who is the sole proprietor". As a result, "all benefits from the business accrue to the sole proprietor and all obligations of the business are his responsibility".

[62] As with the other organizations, I see no legitimate reason why a sole proprietorship should not be permitted to make a vehicle available to the sole proprietor. The subsection contemplates that an individual operating a sole proprietorship can make a vehicle available to him or herself. Put differently, there is no requirement that the two parties be divorced from one another. In my view, on a plain reading of s. 66(1)(a), this is clear.

I do not think this decision should be interpreted and applied so narrowly as to require there to be owner/operator agreements in place and for the vehicle subject to such agreements to be involved in the subject accident. For the reasons I have set out, I have found that the claimant had regular use of the GMC vehicle at the time of the accident, that the GMC vehicle insured under the Co-operators policy was being made available to the claimant and that the GMC vehicle was being made available for the claimant's regular use by HHH Flooring which was a partnership, joint venture or other entity comprised of the claimant and the brother.

I confess to being troubled by the result. In this particular matter, there are no sinners battling with saints. Rather, both Allstate and Co-operators are saints. Allstate was a stranger to both of these people [insuring a vehicle which came into collision with an uninsured motorcycle operated by the claimant]. Co-operators entered into a policy with the brother. While this was admittedly a commercial policy and the vehicle was licensed as a commercial vehicle, it seems clear on the evidence that the vehicle was beneficially owned by the claimant and not the brother and that the insurance arrangement was made to reduce insurance costs. On these very unique facts, I have found the claimant and the brother to be involved in a business enterprise, be that a partnership, joint venture or other entity, and that this business enterprise made the GMC vehicle available to the claimant for his regular use.

For the reasons given, I find Co-operators to be the priority insurer in relation to the claims of the claimant arising from the motor vehicle accident of July 14, 2019. I remain seized of this matter to address any issues in relation to the quantum of reimbursement, interest, and legal costs [taking into account the success of the parties, any offers to settle, the conduct of the preceding and the principles generally applicable in litigation before the courts of Ontario]. I will wait to hear from counsel as to whether I will be required to address any of the foregoing.

In addition, I must determine who bears the cost of the arbitration pursuant to the provisions of the arbitration agreement. I will wait to hear from counsel as to whether I will be required to address this subject as well.

I am most appreciative of the efforts, expertise, and civility of counsel and for their courtesy and cooperation extended to me and to each other from the inception of the arbitration through to its conclusion. The matter proceeded efficiently from the time of the first pre-arbitration teleconference in September 2021, through to its hearing in June, 2022. I wish to thank counsel for their thoughtful, comprehensive, and intelligent submissions, both in writing and at the oral hearing.

Dated at Toronto this 3rd day of November, 2022.

Vance Cooper, Arbitrator