

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8 as amended,
AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17, as amended**

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY and
UNIFUND ASSURANCE COMPANY

Respondents

**AND IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8 as amended,
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AND IN THE MATTER OF AN ARBITRATION

BETWEEN

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

UNIFUND ASSURANCE COMPANY

Respondent

REVISED COSTS AWARD

COUNSEL

Tara Lemke - Nelligan, O'Brien Payne LLP
Counsel for Aviva Insurance Company
hereinafter "Aviva"

Ashleigh Leon – Miller Thomson LLP
Counsel for Economical Mutual Insurance Company
hereinafter "Economical/Perth"

Derek Greenside – Kostyniuk & Greenside LLP
Counsel for Unifund Assurance Company
hereinafter "Unifund"

ISSUE

[1] In the context of priority disputes pursuant to s.268 of the *Insurance Act*, R.S.O. c.1.8, a decision was rendered in the two above styled matters on May 24, 2016 with a costs award. It was later disclosed that there was a purported offer to settle and special circumstances requiring a reconsideration of the award of costs.

BACKGROUND

[2] On July 3, 2014, Barry Clarke and his son Liam Clarke were involved in a motor vehicle accident. The vehicle Barry Clarke was driving was a temporary substitute vehicle insured with Aviva while his wife's vehicle was in for repairs. Both Barry Clarke and his wife had personal insurance policies on their respective personal automobiles. Barry Clarke's vehicle was insured with Unifund and the wife's vehicle insured with Economical/Perth.

[3] Barry Clarke sustained fatal injuries and his son personal injuries in the subject collision.

[4] Applications for Accident Benefits were submitted to Aviva, as insurer of the 2003 Chevrolet on behalf of the Estate of Barry Clarke and Liam Clarke. The OCF-1s were dated July 29, 2014 and received by Aviva on August 8, 2014.

[5] Aviva sent a Notice of Dispute Between Insurers to both Unifund Assurance Company and Perth Insurance Company on August 18, 2014.

[6] On September 25, 2014, after requests from Perth for further documentation, Aviva sent Perth the OCF-1s submitted on behalf of the Estate of Barry Clarke and Liam Clarke. The CD/DVD containing the OCF-1s was received by Perth on September 30, 2014.

[7] On October 15, 2014, Perth wrote to Aviva confirming that it would accept priority from Aviva with respect to the accident benefits claim submitted by the Estate of Barry Clarke.

[8] Perth has indemnified Aviva \$50,665.72 in relation to accident benefits payments made by Aviva in relation to the claim of the Estate of Barry Clarke.

[9] On November 14, 2014, Perth sent a Notice to Applicant of Dispute Between Insurers to Unifund with respect to the claim for benefits made by the Estate of Barry Clarke, alleging that Unifund was higher in priority than Perth for the payment of accident benefits. The Notice to Applicant of Dispute Between Insurers was also provided to the Estate of Barry Clarke on February 26, 2015.

[10] Aviva initiated private arbitration with respect to the accident benefits claim of Liam Clarke as against both Perth and Unifund on April 28, 2015. Aviva did not initiate arbitration proceedings with respect to the accident benefits claim of the Estate of Barry Clarke.

[11] Perth initiated private arbitration with respect to the accident benefits claim of the Estate of Barry Clarke as against Unifund on June 2, 2015.

[12] The arbitrator was retained with respect to both above styled arbitration proceedings on July 30, 2015. Prior thereto, counsel for Unifund proposed in an e-mail dated July 6, 2015 that both the Economical/Perth and Unifund policies were at the same priority level and that the claimants ought make an election. Counsel for Economical/Perth did not agree on the basis that s.268(5.2) placed Unifund in higher priority. Furthermore, correspondence was forwarded from counsel for Unifund to counsel for Economical/Perth on July 23, 2015 asking for a Certificate of Appointment of Estate Trustee from Economical/Perth's insured as he suspected that an election would ultimately have to be made.

[13] The arbitration of the two disputes proceeded and it was ultimately found that both Economical/Perth and Unifund stood equal in priority and that the claimants ought be put to an election, exactly what had been proposed by counsel for Unifund at the outset of the arbitration proceeding.

APPLICABLE LEGISLATION

[14] The Disputes Between Insurers legislation deals with the issue of costs. Section 9 (1) of O. Reg. 283/95 states:

9. (1) Unless otherwise ordered by the arbitrator or agreed to by all the parties before the commencement of the arbitration, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful parties to the arbitration. O. Reg. 283/95, s. 9 (1).

(2) The costs referred to in subsection (1) shall be assessed in accordance with section 56 of the *Arbitration Act, 1991*. O. Reg. 283/95, s. 9 (2).

[15] I am compelled to follow this general directive as contained in the Disputes Between Insurers legislation in the absence of special circumstances. Here there were special circumstances as there was what was essentially on offer to settle that was made.

[16] Section 54 of the *Arbitration Act 1991*, S.O. , c. 17 reads as follows:

Costs

Power to award costs

54. (1) An arbitral tribunal may award the costs of an arbitration. 1991, c.17, s.54

What constitutes costs

(2) The costs of an arbitration consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration. 1991, c.17, s.54 (2).

Request for award dealing with costs

(3) If the arbitral tribunal does not deal with costs in an award, a party may, within thirty days of receiving the award, request that it make a further award dealing with costs. 1991, c.17, s.54 (3).

Absence of award dealing with costs

(4) In the absence of an award dealing with costs, each party is responsible for the party's own legal expenses and for an equal share of the fees and expenses of the arbitral tribunal and of any other expenses related to the arbitration. 1991, c.17, s.54 (4).

Costs consequences of failure to accept offer to settle

(5) If a party makes an offer to another party to settle the dispute or part of the dispute, the offer is not accepted and the arbitral tribunal's award is no more favourable to the second-named party than was the offer, the arbitral tribunal may take the fact into account in awarding costs in respect of the period from the making of the offer to the making of the award. 1991, c.17, s.54 (5).

Disclosure of offer to arbitral tribunal

(6) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than costs. 1991, c.17, s.54 (6).

ANALYSIS AND FINDINGS

[17] I will deal with the two disputes individually as well as on an overall basis. Firstly, I find that the e-mail exchange between counsel for Economical/Perth and Unifund in July 2015 was essentially an offer to settle and in light of the legislation aforesaid ought be considered in my award of costs.

[18] In *Economical v. Unifund* it is clear that this proceeding was concluded on the very basis that was proposed by counsel for Unifund at what was essentially the outset of the arbitration proceeding. The dispute involved a settled payment of \$50,665.72. The arbitration could have been avoided in its entirety if Economical/Perth had accepted the proposal put forward by counsel for Unifund in its e-mail of July 6, 2016 to simply put the Estate of Barry Clarke to an election as to the insurer it wished to provide benefits. However, the arguments raised by Economical/Perth with respect to the impact of the "temporary substitute vehicle" and "other vehicle" provisions of the standard automobile policy on priority were not without merit and certainly worthy of consideration. Accordingly, Unifund is only entitled to its partial indemnity costs for this dispute. Aviva was not involved in this dispute as Economical/Perth early on realized it was higher in priority to Aviva yet maintained that Unifund was higher in priority than it. Economical/Perth indemnified Aviva and continued its dispute against Unifund but ultimately without success.

[19] In *Aviva v. Economical / Unifund* other considerations come into play. This dispute involved the claim of Liam Clarke. It involved the payment of \$789.25 but the file was not closed and further claims could have been potentially submitted. In this dispute, Unifund took the

position that Aviva was in priority for Liam Clarke's claim as Liam was not principally financially dependent on his parents. Unifund was unsuccessful in this argument. Unifund was successful with respect to its position that as between Economical/Perth and Unifund the claimant ought be put to an election just as it had proposed at the outset. I find that there was mixed success. Also to be considered is the fact that Economical/Perth did not argue that Aviva was responsible for the claim of Liam Clarke and was prepared to proceed without submissions from Aviva. It was only Unifund that raised the dependency issue and forced Aviva's involvement by way of the necessary involvement in all pre-arbitration telephone conferences and written submissions. Had Unifund simply agreed that it was either Unifund or Economical/Perth in priority rather than raising the dependency issue, then Aviva could have maintained minimal involvement in the proceeding. This did not happen and Aviva's involvement in the overall process increased and it was required to make submissions with respect to dependency. These factors balance Unifund's success on the central issue. I therefore find in the exercise of my discretion that Unifund and Economical/Perth on an overall basis share equally in the payment of the partial indemnity costs of Aviva for its participation in the entire process, a process in retrospect in which it should have had minimal involvement.

[20] As for Unifund's costs, I am of the view that Unifund's success on the central and more complex issue involved in both disputes entitles it, in my view, to the bulk of its partial indemnity costs. On an overall basis with respect to both disputes, I find that Economical/Perth pay 85% of Unifund's costs on a partial indemnity basis. The remaining portion would be attributable to its unsuccessful position with respect to the dependency issue.

[21] I have also considered the submissions of Economical/Perth that the proceedings were drawn out significantly by reason of production issues raised by counsel for Unifund. I am not satisfied on the evidence that the proceedings were unnecessarily drawn out by reason of production issues.

[22] As for the arbitrator's costs, as I have found the more significant legal issues involved the impact of "temporary substitute vehicle" and "other vehicle" coverages on priority, with the dependency issue being a relatively minor issue in terms time and complexity. Unifund was successful in the more complex priority issue but unsuccessful on the dependency issue. It should be noted that there was no accounting analysis whatsoever involved in the dependency dispute. It should be further noted that the claim of the Estate of Barry Clarke involved benefits totalling \$50,665.72, while the claim of Liam Clarke only involved about \$789.25 at the time. Taking these factors into consideration, in the exercise of my discretion, I find that

Economical/Perth pay 85% and Unifund 15% of the arbitrator's account as the time involved in the dependency dispute was relatively insignificant. The vast majority of the legal analysis involved the impact of "temporary substitute vehicle" and "other vehicle" coverages on priority.

[23] I do not propose to assess the costs awarded to Aviva and Unifund at this time. If counsel cannot resolve the issue, I would appreciate receiving a Bill of Costs and Docket Printout from counsel for the parties awarded costs and submissions from each party. However, to assist the parties I would be inclined on the information available to me, yet subject to the submissions that I have invited, to suggest that on an "overall basis" Economical/Perth pay 85% of Aviva's partial indemnity award (60% of reasonable full indemnity costs) and Unifund 15% of that amount. I would suggest that Unifund be paid by Economical/Perth 60% of its reasonable full indemnity costs by way of regular partial indemnity costs after deduction of 15% of the full indemnity amount for Unifund's lack of success on the dependency issue. As previously indicated, Economical/Perth would pay 85% of the arbitrator's costs and Unifund 15% of the arbitrator's costs, as the bulk of legal analysis involved the examination of the "temporary substitute vehicle" and "other vehicle" provisions of the standard automobile policy and its impact on priority.

DATED at TORONTO this 23rd)
day of June, 2016.)

KENNETH J. BIALKOWSKI
Arbitrator