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

B E T W E E N :

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and –

UNIFUND ASSURANCE COMPANY

Respondent

DECISION

COUNSEL

Julianne Brimfield – Strigberger, Brown, Armstrong LLP
Counsel for the Applicant, Economical Mutual Insurance Company
(hereinafter referred to as "Economical")

Derek Greenside – Kostyniuk & Greenside
Counsel for the Respondent, Unifund Assurance Company
(hereinafter referred to as "Unifund")

ISSUE

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95 and with Unifund having accepted priority after arbitration was commenced, the issues before me are the determination of the costs of the parties, costs of the arbitrator and Economical's entitlement to interest on the amount of the indemnity payment ultimately made by Unifund.

PROCEEDINGS

[2] The matter proceeded in July 2018 on the basis of Written Submissions, a Document brief and Books of Authority.

FACTS

[3] Liam Donnelly was struck by a vehicle, insured by Economical, while crossing the road as a pedestrian in Ottawa on October 15, 2014. He submitted an accident benefits claim to Economical. Economical commenced paying benefits on December 10, 2014.

[4] At the time of the accident, Mr. Donnelly lived with his mother in Ottawa. He was listed on his mother's policy with Unifund as an excluded driver.

[5] Economical first notified Unifund of this priority dispute on January 13, 2015. It is important to note that the Notice only referred to the fact that the claimant was a listed driver under the Unifund policy and made no mention of any dependency issue.

[6] Economical subsequently commenced this priority arbitration against Unifund on December 15, 2015, by way of service of Notice Demanding Arbitration.

[7] It had been Economical's position from the outset of this dispute that Unifund was the priority insurer.

[8] I was appointed as arbitrator in this matter on or about May 12, 2016.

[9] In response to an e-mail from the arbitrator dated May 17, 2016 requesting details of the priority dispute between the parties, counsel for the Applicant Economical identified both a listed driver issue and a dependency issue. It was therefore clear from the outset of my involvement that there were two distinct issues that were to be dealt with.

[10] The initial pre-hearing proceeded on July 18, 2016 which dealt with the productions to be exchanged by the parties.

[11] A second pre-hearing proceeded on October 17, 2016. It was noted that there was an Ontario Court of Appeal decision pending dealing with one of the issues involved in the present dispute, namely whether an excluded driver on a policy should still be considered to be an individual specified in the policy as a driver. It was noted that accordingly the present dispute should be held in abeyance pending the ruling of the Ontario Court of Appeal, as it would be determinative of the priority dispute before me if the Court found that an excluded driver listed on the policy was still an individual specified in the policy as a driver and hence an "insured" under such policy, placing the claimant at the highest rung of the priority ladder as set out in s. 268(2) of the *Insurance Act*. If so found, Unifund would be the priority insurer with no need to proceed with the dependency issue.

[12] A third pre-hearing was scheduled for March 7, 2017, however it was adjourned twice - first to May 18, 2017 and then again to August 28, 2017 – as the parties agreed that it was not worth proceeding with the pre-hearing as a Court of Appeal decision was pending on the listed driver/excluded driver issue.

[13] By e-mail dated August 25, 2017, counsel for Unifund proposed that the next pre-hearing be rescheduled/postponed again. Counsel for Economical agreed to postponing the pre-hearing again, but asked that counsel for Unifund confirm that his client would be agreeable to extending the two year deadline to complete this arbitration as required by s. 8(2) of O. Reg 283/95. Counsel for Unifund advised that he did not have instructions to agree to same.

[14] Ultimately, the parties participated in the pre-hearing on August 28, 2017. At that time, counsel for Unifund indicated that his principal was not prepared to agree to extend the time for arbitration with respect to the dependency issue. This left approximately 3½ months to deal with the dependency issue and complete any additional dependency investigation, as well as possible Examination Under Oath before expiry of the two year limitation on completing the arbitration. Up until that point in time, the impression left by the parties was that it was in the interest of both parties to avoid incurring the legal costs of arranging and attending EUOs in Ottawa with respect to the dependency issue, if possible, as the Court of Appeal's decision on the listed driver issue may be determinative of the priority issue herein. After the August 2017 pre-hearing, counsel for Economical took immediate steps to arrange EUOs of the claimant and his mother to address whether the claimant was a dependent of Unifund's insured. In addition, counsel for Economical brought a motion to extend the time for completion of the arbitration hearing.

[15] In disposing of the motion, I ruled on September 26, 2017 that immediate steps had to be taken to complete the dependency investigation and any EUOs, but acknowledged that a short extension beyond the two year requirement to complete the arbitration might be necessary in the event of reasonable scheduling difficulties that might be encountered by counsel involved. Costs of this motion were reserved.

[16] The investigation of dependency was complicated to some extent by the fact that the claimant sustained a catastrophic brain injury in the subject accident, earned cash in the pre-accident period which he had possibly under-reported to the Canada Revenue Agency, kept no actual records of his income and had lost his Notice of Reassessment. Notably, the claimant and his mother lived in Ottawa.

[17] The EUOs of the claimant and his mother (Unifund's insured) proceeded on November 23, 2017, in Ottawa.

[18] On December 1, 2017, after concluding its investigation of the dependency issue, Economical advised that it no longer intended to pursue the dependency issue. However, it continued to be Economical's position that Unifund was the priority insurer due to Mr. Donnelly being listed on the Unifund policy.

[19] On February 2, 2018, the Court of Appeal released its decision in *The Dominion of Canada General Insurance Company v. State Farm Mutual Automobile Insurance Company*, 2018 ONCA 101, regarding the excluded/listed driver issue, wherein it upheld Arbitrator Bialkowski's prior private arbitration decision that an excluded driver was "a person specified

in the policy as a driver of the insured automobile", where the claimant was shown as a listed driver on the face of the Certificate of Insurance, with the policy having attached an excluded driver endorsement in the name of the claimant.

[20] On February 5, 2018, counsel for Economical forwarded the above-noted Court of Appeal decision to counsel for Unifund and requested confirmation that Unifund would accept priority based on this ruling.

[21] Unifund promptly conceded priority and indemnified Economical for the benefits they had paid.

ANALYSIS AND FINDINGS

[22] Economical seeks costs of the arbitration proceeding and the costs proceeding herein. A copy of Economical's solicitor and client bill of costs totals $15,008.20, plus an anticipated $400 for Reply submissions, inclusive of disbursements.

[23] In addition, Economical seeks interest of $8,080.65 with respect to the indemnity payment ultimately paid by Unifund, calculated by them in accordance with the *Courts of Justice Act.*

[24] Economical takes the position that Unifund should be fully responsible for the Arbitrator's account.

[25] In response, Unifund claims that there was mixed success on the two issues before me and there should be no order as to costs and that the arbitrator's account be shared 50/50. Unifund also claims that the wrong interest rate was used in the interest calculation and the amount owing, if awarded, ought to be $6,198.52.

[26] 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).

[27] I am compelled to follow this general directive as contained in the Disputes Between Insurers legislation in the absence of special circumstances. The special circumstances here were that although Economical was successful on the listed driver issue, Unifund was successful on the dependency issue.

[28] I must then look to the *Arbitration Act*. Sections 54 to 56 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 (1).
>
> **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).
>
> **Arbitrator's fees and expenses**
> **55.** The fees and expenses paid to an arbitrator shall not exceed the fair value of the services performed and the necessary and reasonable expenses actually incurred. 1991, c.17, s.55.
>
> **Assessment**
> **Fees and expenses**
> **56.** (1) A party to an arbitration may have an arbitrator's account for fees and expenses assessed by an assessment officer in the same manner as a solicitor's bill under the *Solicitors Act*. 1991, c.17, s.56 (1).
>
> **Costs**
> (2) If an arbitral tribunal awards costs and directs that they be assessed, or awards costs without fixing the amount or indicating how it is to be ascertained, a party to the arbitration may have the costs assessed by an assessment officer in the same manner as costs under the rules of court. 1991, c.17, s.56 (2).
>
> **Idem**
> (3) In assessing the part of the costs represented by the fees and expenses of the arbitral tribunal, the assessment officer shall apply the same principles as in the assessment of an account under subsection (1). 1991, c.17, s.56 (3).
>
> **Account already paid**
> (4) Subsection (1) applies even if the account has been paid. 1991, c.17, s.56 (4).

Review by court

(5) On the application of a party to the arbitration, the court may review an assessment of costs or of an arbitrator's account for fees and expenses and may confirm the assessment, vary it, set it aside or remit it to the assessment officer with directions. 1991, c.17, s.56 (5).

Idem

(6) On the application of an arbitrator, the court may review an assessment of his or her account for fees and expenses and may confirm the assessment, vary it, set it aside or remit it to the assessment officer with directions. 1991, c.17, s.56 (6).

Time for application for review

(7) The application for review may not be made after the period specified in the assessment officer's certificate has elapsed or, if no period is specified, more than thirty days after the date of the certificate, unless the court orders otherwise. 1991, c.17, s.56 (7).

[29] In reaching my decision with respect to costs, I have considered the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure,* which include:

1. The principle of indemnity including, where applicable, the experience of the lawyer for the party entitled to the costs, as well as the rates charged and the hours spent by that lawyer;

2. The amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

3. The amount claimed and the amount recovered in the proceeding;

4. The complexity of the proceeding;

5. The importance of the issues;

6. The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

7. Whether any step in the proceeding was improper, vexatious or unnecessary; and

8. Any other matter relevant to the question of costs.

[30] I am also cognizant in awarding costs of proportionality and find that it really was not a factor in the case before me, as the costs of the parties was well within that which would have been expected given the amount involved of approximately $350,000.

[31] Pursuant to section 54(1) of the *Arbitration Act,* 1991, an arbitrator has the authority to award the costs of the arbitration.

[32] Section 54(2) of the *Arbitration Act* sets out what constitutes costs:

> *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.*

[33] Most importantly, Section 9(1) of Ontario Regulation 283/95 - *Disputes Between Insurers*, states that the costs of the arbitration, including the costs of the arbitrator, shall be paid by the unsuccessful parties to the arbitration:

> *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.*

[34] On the facts before me, there was actually mixed success. Economical was successful on the "listed driver" issue and therefore the ultimate finding that Unifund was the priority insurer. Unifund however, was successful on the "dependency issue". Consideration must be given to the fact though that Economical was prepared to let the "dependency issue" sit in abeyance while awaiting the Court of Appeal decision with respect to the "listed driver" issue. It was Unifund that insisted on proceeding with the "dependency" issue while awaiting the Court of Appeal decision. Costs were incurred that could have been avoided. In the circumstances, I have considered both the conduct of the parties and the mixed success on the earlier motion before me and the mixed success on two issues before me in the priority dispute in exercising my discretion with respect to the award of costs. Economical's solicitor and client account was slightly in excess of $15,000 and the amount in issue was approximately $350,000. I therefore do not see proportionality as an issue. Economical had proposed $5,000 or roughly 1/3 of their solicitor and client account, plus an additional $400 for the Reply submissions to resolve the costs issue. The formal offer was subsequently withdrawn. I find the amount initially requested by Economical totally appropriate in the circumstances and order that Unifund pay to Economical costs in the amount of $5,400. Such amount reflects the mixed success on the issues before me and is far less than traditional partial indemnity costs that would be awarded where there was complete success.

[35] As for the arbitrator's costs, I am of the view that same should follow the ultimate success of Economical in the priority dispute and the fact that the arbitrator's time was not increased in any substantial way by the "dependency" issue. It was not necessary for the arbitrator to attend EUOs in Ottawa or at any time consider the evidence with respect to dependency. Accordingly, I order that Unifund pay the arbitrator's account in full. The arbitration would not have been necessary had Unifund accepted that the claimant was "an insured" under the Unifund policy and therefore in priority to Economical.

[36] This leaves the issue of interest. Firstly, I am satisfied that interest is routinely ordered to be paid in priority disputes. Under the *Arbitration Act,* 1991, in the absence of an agreement to the contrary, interest is payable in accordance with the *Courts of Justice Act* in the same way as a money judgment in Court.

[37] Under the *Courts of Justice Act*, interest is payable from the date a cause of action arises, at the rate that prevailed at the bank rate in the quarter preceding the quarter in which the proceeding commenced.

[38} According to Economical, the rate prevailing when the notice was served (1st quarter of 2015) was 1.3% per annum. The rate prevailing when the arbitration was commenced (3rd quarter of 2017) was also 1.3% per annum.

[39] Economical claimed that an expedient means of calculating interest is to assume that payments were made evenly between the date of the first payment, which was on December 10, 2014, until the date Unifund first acknowledged that it was the priority insurer and became responsible for this claim, being March 13, 2018. Interest can be approximated based upon multiplying half the prevailing interest rate by the total indemnity amount for the stipulated duration. In this case, the formula would be 0.0065 x $347,256.26 x 3.26 years, equating to interest in the amount of $7,358.36.

[40] Additional interest owing on the outstanding indemnity can be calculated from the date of the acceptance of priority to the date the indemnity was paid, being March 13, 2018 to May 11, 2018, using the same method but the full interest rate. In this case, the formula would be 0.013 x $347,256.26 x 0.16 (59 days between date of acceptance of priority and date indemnity was paid), which equates to additional interest in the amount of $722.29.

[41] Therefore, Economical claims $8,080.65 in interest on the paid indemnity.

[42] The Respondent agreed that the prevailing pre-judgment interest rate during the first quarter of 2015 was 1.3%, but contended that the prevailing pre-judgment interest rate for the third quarter of 2017 was 0.8% and submitted that the appropriate pre-judgment interest rate should be the rate during the last quarter, before the arbitration was initiated, which would have been the third quarter of 2015. The prevailing pre-judgment interest rate during the third quarter of 2015 was 1.0%. The Applicant did not provide the Respondent with a copy of their accident benefits claims file until late March 2018. The Respondent reviewed the claims file and paid the indemnity owing promptly on May 11, 2018. The Respondent submitted that there should be no entitlement to pre-judgment interest under these circumstances.

[43] Unifund claimed that if interest was awarded the calculation ought to be:

> 0.005 x $347,256.26 x 3.25 years = $5,642.91 (representing interest between December 10, 2014 and March 13, 2018)
>
> 0.010 x $347,256.26 x 0.16 years = $ 555.61 (representing interest between March 13, 2018 and May 11, 2018)

[44] Unifund suggests a total of $6,198.52.

[45] Firstly, I am satisfied that Economical is entitled to interest as they have paid benefits to the claimant when Unifund was actually the insurer standing in priority and ought to have

been paying benefits all along. The payment of benefits commenced on December 10, 2014. The arbitration was commenced on December 15, 2015. According to the documents produced, the pre-judgment interest rate for the quarter preceding the commencement of the proceeding was 1.0%. In cases where payments have been made over a period of time (as opposed to a situation where there has been a significant lump sum payment), the reasonable approach would be to assume that the payments were made equally over the entire period, rather than engage accountants for a costly detailed calculation, the costs of which would far exceed the amount in issue. That is exactly what counsel have done in this case. The difference in the calculations completed by the parties is the determination of the interest rate to be used. I believe that the calculations made by Unifund are in accordance with the requirements of the *Courts of Justice Act*, namely a rate of 1% for the third quarter of 2015 (the quarter prior to the commencement of the proceeding), rather than the 1.3% suggested by Economical. I therefore find that Economical is entitled to a payment for interest of $6,198.52.

ORDER

[46] On the basis of my findings aforesaid, I hereby order:

1. That Unifund pay to Economical legal costs of $5,400, inclusive of HST;

2. That Unifund pay to Economical interest of $6,198.52;

3. That Unifund pay the full costs of the arbitrator.

DATED at TORONTO this 16th)

day of July, 2018.)

KENNETH J. BIALKOWSKI
Arbitrator