IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, s. 268 and Regulation 283/95 there under;

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ZURICH INSURANCE COMPANY

Applicant

- and -

CO-OPERATORS INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Kelly Smith for the Applicant

Mark K. Donaldson for the Respondent

ISSUES:

1. Is Zurich Insurance Company entitled to be reimbursed by Co-operator's Insurance Company for legal expenses incurred by Zurich in defending a FSCO arbitration brought by an injured claimant?

DECISION:

1. Zurich is not entitled to be reimbursed for the legal costs it incurred.

HEARING:

1. This matter was heard in the city of Toronto, in the province of Ontario on November 28, 2006.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident that occurred on November 29, 2002. On that date the claimant, Carlton Brown, was involved in a single vehicle accident while driving a 1995 Chrysler Neon owned by Connect Car and Truck Rental. The police report indicated that the rental vehicle was insured by Zurich Insurance Company ("Zurich"). The claimant submitted a completed application for accident benefits to Zurich, who handled the claim until it was finally settled by way of a lump sum settlement in September 2006.

On January 30, 2003 Zurich served Co-operators General Insurance Company ("Co-operators") with a Notice of Intention to Dispute Between Insurers taking the position that there was no valid policy of insurance with Zurich and that the claimant was married to Lurene Brown, who had a valid motor vehicle liability policy with Co-operators at the time of the accident. Co-operators took the position that the claimant was a named insured pursuant to Section 66(1)(b) of the statutory accident benefits schedule. That section deems a person to be a named insured if they rented the vehicle for a period of more than 30 days.

In the fall of 2004 I was appointed to arbitrate this priority dispute. In the fall of 2006 Zurich settled Mr. Brown's claim on a full and final basis. By the time of the hearing of this dispute, being November 28, 2006, the parties had resolved the main priority issue but the issue of whether Co-operators was required to pay the cost of Zurich's legal fees in defending the first party claim remained, and it is this issue that I must now resolve.

The first party claim was eventually settled with the claimant in September 2006 for the lump sum of $20,000 in addition to $12,204 in medical expenses that had already been paid. By this time, however, Zurich had spent approximately $49,873 defending the claimant's accident benefits claim. This involves two mediations, an arbitration and numerous pre-hearings and teleconference calls. Co-operators does not dispute the amount of the legal bill, nor question whether it was reasonable in the circumstance. Co-operators simply takes the position that it is not recoverable under the priority scheme as it presently exists in Ontario.

The essence of Zurich's argument is that by October 2004 or by March 2005 at the latest, Co-operators should have realized that they were first in priority and taken over the claim. If they had done so, Zurich would not have incurred the legal costs of defending the first party claim. Co-operators argues that it assumed responsibility for the accident claim on a risk assessment or cost benefit analysis basis shortly before the scheduled hearing and the arbitrator has no authority to award the legal fees. Alternatively, it takes the position that it is not appropriate in this instance.

In order to determine this issue it is necessary to briefly review the facts of this case.

At the time of the accident, the claimant, Carlton Brown, apparently produced a certificate of insurance slip to the police showing Zurich as the insurer of the rental vehicle. Zurich maintained that it did not have a valid policy of insurance on that particular vehicle at the time of the accident and as mentioned above, Co-operators insured Mr. Brown's wife. The priority question became more complicated as the marital status of Mr. Brown had to be clarified as well as whether there was a rental agreement for more then 30 days, and if so, with whom. On February 26, 2004, Carlton Brown was examined under oath with regard to his marital status as well as the particulars of the car rental including the rental period. This resulted in a number of undertakings being given and followed up on.

A further teleconference call with regard to the priority dispute was held involving myself and counsel for Co-operator's and Zurich on January 4, 2005. At that time it was agreed that Mr. Christopher Khan, the owner of the rental company from which Mr. Brown rented the vehicle should be examined under oath. This was necessary to clear up issues of insurance coverage, as the rental agreement was far from clear on a number of issues. Mr. Khan's examination was originally scheduled for March 7, 2005. Mr. Khan proved difficult to locate but was eventually located and a new examination date was set for July 6, 2005 and I issued a summons in that regard. Mr. Khan did not attend at the examination and on July11, 2005 a further teleconference was held at which time, due to my busy schedule, a hearing date was set for November 28, 2006.

Between July 2005 and November 2006 there was some activity on the file, including attempting to locate signed copies of the rental agreement and related matters. A number of teleconferences were held and on September 18, 2006 counsel for Zurich and Co-operators met in an attempt to

narrow the issues for the up coming arbitration. At that time counsel for Zurich advised counsel for Co-operators that the first party claim had been settled for a lump sum as indicated above. Subsequent to the meeting, the parties were able to agree to settle everything except the reimbursement of Zurich's legal fees spent in defending the first party claim.

Zurich claims that it is entitled to be reimbursed on the following grounds:

1. Regulation 283/95
2. Unjust enrichment
3. Restitution

Zurich submits that Regulation 283/95 gives an arbitrator the right to award the cost of defending a first party claim. It points out that it is not claiming it's costs of adjusting the claim but merely the legal expenses that it was put to in defending the first party claim. It relies upon my decision in Wawanesa Mutual Insurance Company vs. Kingsway General Insurance Company (unreported decision dated April 6, 2005). In that decision I made a distinction between priority disputes and loss transfer disputes and I held that IME's, DAC's and surveillance could be recovered in priority disputes. In that case I indicated that arbitrators do, pursuant to Section 31 of the Arbitration Act, have the power to dispense equitable relief and I did so. It is, in my view, one thing to compensate a company for expending monies to determine if a person is medically entitled to the benefits by having an IME or DAC. It is still another matter to extend this principle to the legal costs associated with a hearing.

I accept that an arbitrator does have the equitable jurisdiction to order legal costs in the appropriate case, whether it is by way of the doctrine of unjust enrichment or restitution. It is, in my view, however, only to be used in the most extreme of cases. The priority dispute system, legislated by way of Section 268 of the Insurance Act and Regulation 283/95 was developed to provide a quick, efficient and relatively inexpensive method of resolving disputes between insurers. As Mr. Justice Sharpe of the Ontario Court of Appeal noted in Kingsway General vs. Wawanosh (2002) 58 O.R. (3rd) 251:

> Regulation 283/95 sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with these provisions. Insurers subject to this regulation are sophisticated litigates who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in dispute with each other. In this context, it seems to me that clarity and certainty of application are primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretation or for carving out judicial exceptions designed with the equities of particular cases.……given the nature of these disputes and the disputants, as I have said, the dominate consideration must be

> clarity and certainty to ensure a predictable and efficient scheme of dispute resolution.

While these comments were made in a case involving the notice provisions of Regulation 283/95, I am of the view that the same approach should be applied to the Regulation as a whole. The intent of the legislature was to create a quick, efficient and predictable dispute resolution scheme. To allow for legal costs incurred in first part disputes to be recovered regularly in priority disputes could lead to an almost endless examination of accounts and their reasonableness. While this may seem unfair, as one insurer has incurred the cost handling of a case that the other insurer was ultimately responsible for, it should be remembered that in the next case that same insurer may be the beneficiary.

In this particular case I am not persuaded that I should exercise my equitable jurisdiction whether it be with regard to unjust enrichment or restitution. This is not a case where Co-operators just ignored the claim and simply waited until Zurich had incurred all the expenses and then agreed to settle the claim. Co-operators investigated the matter and shortly before the hearing made a cost benefit or risk analysis and agreed to pay the amount that had now become certain, as it had been settled by Zurich for a relatively small amount.

While there may have been delays in this case, I am satisfied that Co-operators did not delay this matter to avoid incurring expenses. There were issues that needed to be clarified and this took time. Just because Co-operators ultimately agreed to pay does not mean that they should have paid from the beginning.

Nothing in my decision should be read to mean that there is no situation where such legal expenses are recoverable. In the ordinary course, for reason expressed above, those costs are not to be recovered. There may be situations, however, where an insurer deliberated refuses to accept priority, simply to avoid expenses. They do so at their peril.

In my view, there are valid policy reasons for such legal costs not to be recoverable in this case and accordingly Zurich is not entitled to be compensated for them.

In the event that the parties are unable to agree on the issue of costs, I may be spoken to.

Dated this _____ day of January 2007.

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M. Guy Jones
Arbitrator