

COURT FILE NO: 07-CV-326827PD1**DATE: 20080501****SUPERIOR COURT OF JUSTICE - ONTARIO****RE: ZURICH INSURANCE COMPANY**

Applicant

- and -

CO-OPERATORS GENERAL INSURANCE COMPANY

Respondent

BEFORE: The Honourable Madam Justice Darla A. Wilson**COUNSEL:** *Jean-Claude Rioux,*
for the Applicant*Mark K. Donaldson,*
for the Respondent**HEARD: April 25, 2008****WILSON D.A., J:****ENDORSEMENT**

[1] This is an application brought by Zurich Insurance Company ("Zurich") for an order setting aside the order of the private arbitrator Guy Jones dated January 3, 2007. Arbitrator Jones was asked to determine whether Zurich was entitled to be reimbursed by Co-operators Insurance Company ("Co-operators") for the legal fees incurred by Zurich in dealing with an accident benefits claim. There was a priority dispute between the two insurers which was resolved after settlement of the accident benefits claim in September 2006. In defending the claim, Zurich incurred legal fees of approximately \$50,000 for which it sought reimbursement from Co-operators after the latter agreed that it was the policy that had to respond to the claim for benefits. The insurers, however, could not

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agree on the issue of payment of the legal costs incurred by Zurich in defending and eventually resolving the claim.

[2] I am indebted to counsel for their able arguments. A number of points were agreed upon and no issue was taken with the manner in which the claim was handled, the settlement of the accident benefits or the quantum of the legal fees. The insurers agreed to have Arbitrator Guy Jones arbitrate their dispute. The arbitration proceeded November 28, 2006 on the sole issue of whether Zurich was entitled to be reimbursed for the first party legal expenses incurred defending the accident benefits claim.

[3] On January 3, 2007, Arbitrator Jones delivered his decision concluding that Zurich was not entitled to reimbursement from Co-operators for the legal expenses incurred. It is from this decision that Zurich appeals.

[4] Mr. Rioux, on behalf of the moving party, submitted that Arbitrator Jones erred in law in finding that while an arbitrator does have equitable jurisdiction to order legal costs in the appropriate case, it is only to be used in the most extreme of cases (emphasis mine). In deciding not to exercise his discretion in the case before him, Arbitrator Jones noted that Co-operators had a legitimate reason for not paying the claim at the outset and stated that their conduct was reasonable. He went on to say that there were policy reasons for not allowing legal costs incurred in first party disputes to be recovered on a regular basis. Mr. Rioux argued that Arbitrator Jones used an incorrect legal test in declining to find Co-operators responsible for the legal fees. Instead of being used in the most extreme cases, Mr. Rioux stated that the test to be employed was whether it was "fair and reasonable" to order the reimbursement of costs.

[5] Mr. Donaldson argued that his client had acted reasonably throughout and noted that the Arbitrator made a finding to this effect. He stated that the decision of Arbitrator Jones was correct based on the facts of the case.

[6] The Arbitration Agreement provides for the right of appeal to the court on a question of law or mixed fact and law. The case law makes it clear that the standard of review on an appeal from a private arbitration is one of correctness: see *887574 Ontario Inc. v. Pizza Pizza Limited*, [1995] O.J. 936, *National Ballet of Canada v. Glasco* (2000), 49 O.R. (3d) 230. In my opinion, the appropriate standard of review to apply for this appeal is the standard of correctness.

[7] Arbitrator Jones found as a fact that the position taken by Co-operators was legitimate and was not designed to avoid payment of benefits. He stated,

...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

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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...

While he acknowledged the jurisdiction to order payment of legal costs, he did not believe it was appropriate on the facts of the case and declined to do so. I agree with Arbitrator Jones's assessment of the facts in this case and do not find any error in law. I do not accept the argument that Arbitrator Jones used the incorrect test in the case when deciding not to award reimbursement of legal fees. It is an exercise of discretion based on the particular facts of a case and he declined to do so for reasons clearly enunciated in his decision.

[8] The application is therefore dismissed. Counsel agreed on costs fixed in the sum of \$2500.00 inclusive of GST. This sum is payable by Zurich to Co-operators.


Wilson D.A., J.

Released: May 1, 2008