

IN THE MATTER of the *Insurance Act*, R.S.O. 1990,
c.l.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:

MOTOR VEHICLE ACCIDENT CLAIMS FUND

Applicant

- and -

PEMBRIDGE INSURANCE COMPANY and SECURITY NATIONAL INSURANCE COMPANY

Respondents

AWARD

Counsel:

Drew Higginbotham (not appearing on the consent of all parties)

Counsel for the MOTOR VEHICLE ACCIDENT CLAIMS FUND

Heather Kawaguchi

Counsel for the respondent, PEMBRIDGE INSURANCE COMPANY ("Pembridge")

Shantel Perry

Counsel for the respondent, SECURITY NATIONAL INSURANCE COMPANY ("Security")

ISSUE:

This matter has an abbreviated history as the parties have proceeded expeditiously to a hearing before me.

The hearing was conducted through an exchange of written material. The only exhibits to the hearing consisted of a long form arbitration agreement, signed in counterpart, and an agreed statement of facts dated November 4, 2022 to which are appended 10 tabs or exhibits. Personal



information was deleted. My award was released on January 4, 2023. For the reasons provided, I found that neither of the Pembridge or Security policies of automobile insurance had been properly or effectively cancelled, both were available to the claimant for purposes of accident benefits and that the claimant had an unfettered choice as between Pembridge and Security. It was agreed amongst all parties that the Fund could not have priority such that the contested issue at the hearing was contested as between respondent insurers.

The current issue before me relates to costs of this proceeding as between Pembridge and Security. Pembridge takes the position that it "won" the arbitration and is entitled to costs. The scale and quantum of costs are in dispute. Security takes the position that it did not "lose" the arbitration as both policies stand on equal footing and the claimant had the choice as between the two insurers.

The claimant subsequently made a choice of insurers but the parties agree that this choice has no bearing on my determination of costs.

As a starting place, I have the jurisdiction to determine costs as between the parties pursuant to section 54 of the Arbitration Act, 1991, S.O. 1991, c. 17. It provides as follows:

Costs

Power to award costs

54 (1) *An arbitral tribunal may award the costs of an arbitration.*

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.*

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.*

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.*

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.*

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.*

Furthermore, the arbitration agreement executed on behalf of all parties provides, in part, as follows:

ARBITRATOR'S ACCOUNT

2. *The parties agree that if the respondent is found to be wholly or partially responsible for indemnification for Statutory Accident Benefits to the applicant, the said respondent will honour the account of the Arbitrator or a percentage thereof, as ordered by the Arbitrator. Otherwise, the applicant will honour the account of the Arbitrator.*

LEGAL COSTS

7. *The parties agree that if the respondent is found to be wholly or partially responsible for indemnification for Statutory Accident Benefits to the applicant, the said respondent shall pay to the applicant its costs of this Arbitration, or a percentage thereof, as awarded by the Arbitrator, with the quantum of such costs to be fixed by the Arbitrator under the Arbitration Act, 1991. Otherwise, the applicant will pay to the respondent its costs of the Arbitration as fixed by the Arbitrator under the Arbitration Act, 1991.*

While the agreement is explicitly silent in terms of authorizing me to determine costs as between respondents, I am impliedly authorized to do so by applying the terms of the arbitration agreement *mutatis mutandis* (my apologies for using a Latin phrase that I probably studied over 40 years ago and never thought I would ever use again). Moreover, section 54, set out above, authorizes me to determine costs as between or amongst parties.



Pembridge makes the submission that it conceded the deficiencies in the attempted or purported cancellation of its policy of automobile insurance. Security would not make the same concession and this necessitated the arbitration hearing. I determined that the Security policy suffered from the same deficiencies. Thus, I cannot accede to the submissions of Security that it did not "lose" the arbitration. Security disputed the availability of statutory accident benefits through their policy of insurance and I found that benefits were available.

Pembridge has referenced a series of offers made by way of e-mail and Security acknowledges the accuracy of those e-mail offers. On August 15, 2022, Pembridge offered to split indemnity equally with Security, split the cost of the arbitration equally and Pembridge would adjust the underlying claim going forward with the claim amounts divided equally between the insurers. This offer was rejected, and Security advised on August 26, 2022 that it would proceed with the arbitration.

Arguably, the arbitration produced a result which is comparable to this offer but I cannot say that Pembridge bettered the offer so that Pembridge would be entitled to substantial indemnity costs. The arbitration produced a result that both insurers stood on the same footing and that accident benefit coverage was available through these insurers in favour of the claimant. Once the claimant made an election, one insurer would end up paying all of the benefits and the other insurer would pay none of the benefits. I have been specifically told that I am not to consider the claimant's election when it comes to determining costs and I agree with this. I find that the outcome of the arbitration was equal to or comparable to the Pembridge offer such that Pembridge is entitled to partial indemnity costs but not entitled to substantial indemnity costs.

I note, for the sake of completeness, that on January 9, 2023, after my arbitration award had been released but before the claimant made a choice of insurers, Pembridge made a further offer which was rejected by Security with a counter offer made by Security on February 13, 2023. Pembridge made a counter offer on February 14, 2023 but, ultimately, Pembridge withdrew all offers effective February 27, 2023. I have not reviewed any of these offers in detail as none of these offers were made before the original hearing before me and none of these offers were open for acceptance at the start of the costs hearing.

It is plain and obvious to me that the outcome of the arbitration, from the perspective of Security, cannot be viewed in any way other than a "loss". Security embarked on the arbitration hearing



by taking a position that the policy in question was not available to provide accident benefits to the claimant. Security submits that it was entitled to due process. I couldn't agree more.

Security was entitled to take a position and require Pembridge to prove its position. I have accepted the submissions made by Pembridge, found that both the Pembridge policy and Security policy were not properly cancelled and were available to provide accident benefits to the claimant. Security took a position and I found otherwise. Security "lost" the arbitration.

Pembridge "won" the arbitration. Pembridge is entitled to cost of the arbitration hearing from Security on a partial indemnity basis.

Counsel for Pembridge is a 1998 call. Her billing rate on a complete indemnity basis ranged from \$300 per hour to \$319 per hour over the course of the matter. Her complete indemnity account rendered to her client, excluding preparation for and attendance at the hearing on April 14, 2023 to address costs, came to \$18,103.62 all inclusive.

It is submitted by Pembridge that this amount is reasonable, having regard for the fact that counsel for the Fund rendered an account on a complete indemnity basis in the amount of \$7,188.03. Counsel for the Fund was not required to prepare for or make written submissions in relation to the arbitration. Pembridge was originally the only respondent insurer. Pembridge identified Security as a potential respondent and took the necessary steps to add Security to this proceeding.

Counsel for Pembridge submits that I should allow 80% of \$18,103.62 as the award of costs granted in its favour and as against Security. This would amount to \$14,482.90 inclusive of HST.

The total amount that was in dispute as between the Fund and the respondent insurers, prior to my determination, was over \$120,000. This amount should be considered when determining costs that are proportional to the amount of the underlying dispute.

Security submits that each of the respondent insurers should pay 50% toward the costs of the Fund, pay 50% toward the costs of the arbitration and this proceeding to determine costs and bear their own costs for the arbitration itself. This was more or less the offer made by



Pembridge on August 15, 2022. This was the offer rejected by Security on August 26, 2022. I cannot accept this submission as appropriate, given all of the facts and circumstances of this proceeding as I have reviewed. Security was entitled to put Pembridge to the test. Pembridge succeeded and Security should pay costs as I set out herein.

Consequently, Security is liable to pay 100% of my arbitration account for services rendered to and including the release of my original award on January 4, 2023. My revised arbitration account will follow in that regard.

In addition, Security is liable to pay 65% of my arbitration account for services rendered after the release of my original award to and including the release of this award. This is a proper partial indemnity award in favour of Pembridge to complete the determination of costs incidental to the hearing on the main issue.

Security was absolutely entitled to contest the assertion by Pembridge that it was entitled to costs and the quantum and scale of such costs. Thoughtful and careful submissions were made in that regard but, for the reasons set out and for reasons that were discussed at the hearing on costs, I have found that Pembridge was entitled to costs. The cost hearing could have been avoided or shortened had Security taken a different position. Thus, they are responsible to pay more than 50% of the account but less than substantial indemnity costs which would amount to approximately 80% of my account. Thus, I order security to pay 65% of my current account which will follow in due course.

The Fund incurred legal fees in the all-inclusive amount of \$7,188.03. The Fund agreed to recover \$5750 all-inclusive and the respondent insurers agreed to pay this amount, subject to apportionment as between them or my determination of responsibility to pay such amount. I note that the amount agreed upon represents 80% of the total legal fees. I would characterize this amount as akin to substantial indemnity costs. This amount should be paid by Security or, if both insurers have already funded this payment, then the necessary adjustment should be made between the respondent insurers.

I wish to make it clear to the parties that I have reviewed and considered all of the documents submitted by counsel for Pembridge under cover of e-mail of March 22, 2023 and by counsel for Security under cover of e-mail of April 10, 2023. I have reviewed the case law submitted by



counsel for Security and need not review any of the specifics for purposes of this award but I was and am appreciative of the cases, my opportunity to review them and the submissions of counsel.

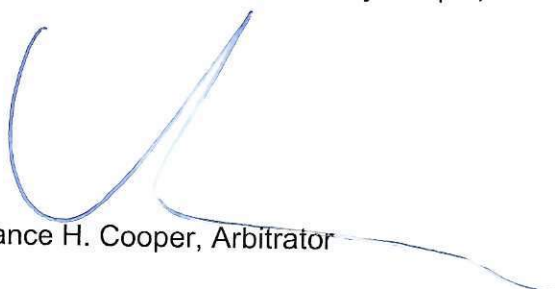
I do wish to specifically reject the argument that Pembridge is somehow unjustly enriched by a cost award or that somehow Security would be unjustly penalized by a cost award. Parties are entitled to contest a variety of civil proceedings. In Ontario, the starting place in a civil proceeding in the Superior Court of Justice and in private arbitrations in the insurance world, be that a priority dispute or loss transfer dispute, is that "winners" should recover costs from "losers". There is no element of unjust enrichment. The "loser" is entitled to due process and entitled to put the opposite party to the proof of its position. Once that occurs, it does not lie in the mouth of the "loser" to assert that some equitable principle should deprive the "winner" of its costs.

I find that Pembridge is entitled to its costs of this proceeding, including the cost of preparing for and conducting the hearing in relation to costs, in the total amount of \$12,750 inclusive of HST. I would characterize this amount as akin to partial indemnity costs.

If there are any outstanding issues as between the respondents insurers or as amongst all of the parties, I remain seized of this matter

Finally, I am most appreciative of the efforts, expertise and ability of counsel for their courtesy and cooperation extended to me and to each other from the inception of the arbitration through to its conclusion.

Dated at Toronto, this 28th day of April, 2023.



Vance H. Cooper, Arbitrator