

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:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

INSURANCE CORPORATION OF BRITISH COLUMBIA

Respondent

DECISION

Appearances:

Co-operators General Insurance Company (Applicant): Daniel Strigberger

Insurance Corporation of British Columbia (Respondent): Debbie Orth

Introduction:

This matter comes before me pursuant to the *Arbitration Act, 1991*, Section 268 of the *Insurance Act*, R.S.O. 1990 (c. 1.8 as amended) and Ontario Regulation 283/95 as amended.

I have been retained as a private Arbitrator to decide a priority issue as between the above-noted insurers with respect to a motor vehicle accident that occurred on February 23, 2008.

The Co-operators General Insurance Company (hereinafter called "Co-op") insures Mr. M.T. However they claim their policy was properly cancelled at least one week prior to the accident.

Mr. M.T. applied to Co-operators for statutory accident benefits. Co-operators takes the position that the Insurance Corporation of British Columbia (hereinafter called "I.C.B.C.") is responsible for paying statutory accident benefits as they insured the vehicle that M.T. was an occupant of at the time of the accident. The accident did occur in Ontario.

The matter is complicated by the involvement of Cumis General Insurance Company and that complication leads to the motion that is presently before me for productions.

In this motion I.C.B.C. claims that due to certain facts relating to the involvement of Cumis General Insurance Company (hereinafter called "Cumis") in this priority dispute that documents within the Cumis file should be produced and as well that Daniel Strigberger's file and communications within that file between various parties be produced. Essentially I.C.B.C. claims that through the interaction between Co-op, Cumis and Daniel Strigberger that any solicitor client privilege that might have existed has been implicitly waived.

Relevant Facts:

The material before included an Affidavit of Margot Jory with various exhibits attached and the facts that are relevant to this motion flow from Ms. Jory's Affidavit.

Margot Jory is a specialist for National Claims Accident Benefits at the Co-operators General Insurance Company, Coseco Insurance Company and Cumis General Insurance Company. Ms. Jory says in her Affidavit that she has been involved in and has been overseeing the claim relating to M.T. as well as matters relating to the priority dispute. Ms. Jory speaks in her affidavit to the company structure of Co-operators. She advises that Co-operators Group Limited (CGL) is the co-operative holding company for the Co-operators group of companies. This group of companies includes a number of companies but specifically includes Cumis and Co-operators General Insurance Company (CGIC/Co-op). An extract from the company's website supports what Ms. Jory says.

Ms. Jory gives evidence that there is one board of directors that oversees Cumis and Co-operators. The president and C.E.O. of the Co-operators oversees both Co-op and Cumis as does the V.P. of claims. The upper management is the same. Further, Ms. Jory deposes that Co-op and Cumis share SABS claim managers and team specialists. The claims adjusters handle files for both insurers. There are no internal firewalls between the accident benefits file and there is no internal firewall as between Cumis and Co-op.

That then brings me to Cumis' involvement in the priority dispute relating to M.T.

As noted, Co-op issued an automobile policy to M.T. bearing policy number 4000695463. On March 12, 2018 M.T.'s lawyers wrote Co-op and submitted a completed OCF-1 on behalf of M.T. Co-op as required pursuant to Regulation 283/95 started adjusting the file but at the same time advised M.T.'s lawyers that their policy had been cancelled for non-payment prior to the accident. Mr. M.T. is represented by Diamond & Diamond. Co-op also asked M.T.'s lawyers to provide information with the driver of the vehicle that Mr. M.T. was in and the policy number with respect to his insurance.

Instead of responding to the e-mail Diamond & Diamond sent a letter dated March 23, 2018 to Cumis Insurance submitting a fresh OCF-1 on behalf of M.T. Under Part 4 of the OCF-1 which was attached to Ms. Jory's Affidavit M.T. indicated he was applying under his grandfather's Cumis policy. This is Policy #01572099 and it did insure M.T.'s grandfather.

The Co-operators adjuster then sends Cumis a letter, April 23, 2018, which according to Ms. Jory's Affidavit was a "boilerplate letter". However, the letter does indicate that Co-operators is pursuing a priority dispute. The letter indicates that a Notice of Dispute between insurers is being served and a copy being sent to the insured. Co-operators in this letter takes the position that M.T. was principally dependent for financial support on his grandfather and as there was a valid policy with Cumis at the time that that policy should respond prior to Co-operators. The letter also says:

"At this time please accept this letter as our formal demand for arbitration. We hope it will not be necessary to pursue the arbitration route, however, to preserve our rights to pursue this matter we are now issuing our formal demand for arbitration in respect of this priority dispute."

A further letter follows from the same adjuster to Cumis dated May 30, 2018. It notes that Cumis had responded advising they would not be accepting priority on the grounds that there was no principal financial dependency on the grandparents. In this letter the Co-op adjuster states as follows:

"At this time we ask that you accept carriage of this file or we will be filing a request for arbitration. We hope that it will not be necessary to pursue the arbitration route, however to preserve our rights to pursue this matter we are now issuing our formal demand for arbitration in respect of this priority dispute. If we cannot agree on who is responsible for paying benefits or do not receive a response from you we will propose an arbitrator and proceed with the arbitration."

According to Ms. Jory's affidavit both these letters are "crafted using boilerplate language". Ms. Jory advises that despite the wording in these letters Co-op would never have actually initiated arbitration against Cumis. She gives two reasons why Co-op gave Cumis a priority dispute notice:

1. To comply with Section 4 of Ontario Regulation 283/95; and, to give the claimant the right to object to a file transfer, pursuant to Section 5; and,
2. There are internal factors relating to lost costs of the advisors who wrote the book of business for Co-op and Cumis. As a company practice, the Co-operators wants to ensure that lost costs are associated with the correct advisor and policy. It has nothing to do with the adjudication of the claim itself.

Turning back to the facts, after the priority dispute notice was sent out the Cumis adjuster retained Dan Strigberger to conduct a priority dispute EUO of M.T. and his grandfather. The purpose of this was to investigate priority.

Mr. Strigberger never conducted the EUO for Cumis. Cumis received a completed financial questionnaire from M.T. which satisfied Co-op and Cumis that M.T. was not a dependant of his grandfather and therefore the Cumis policy would not stand in priority.

It is also important to note that at the same time Co-operators put Cumis on notice they also put the I.C.B.C. on notice with respect to their policy relating to the owner/driver of the vehicle in which M.T. was an occupant.

In the interim, Co-operators continued to adjust and handle M.T.'s accident benefit file.

In or around November 1, 2018 I was retained to act as an arbitrator for a priority dispute between Co-operators and the I.C.B.C. At some point I.C.B.C. served a Notice to Dispute on Cumis taking the position that Cumis was the priority insurer due to the dependency issue. Mr. Strigberger was retained by Co-operators to handle the arbitration on their behalf as against I.C.B.C.

At the first pre-hearing Mr. Strigberger advised that he would be acting on behalf of both Co-operators and Cumis in the arbitration as their interests were in common both taking the position that there was no dependency and that the Cumis policy was not in priority to I.C.B.C.

At the first pre-hearing on January 28, 2019 counsel for I.C.B.C. advised that it was her position that Mr. Strigberger had a conflict of interest. It was I.C.B.C.'s position that he could not act for both Cumis and Co-operators. However, counsel for I.C.B.C. wanted an opportunity to review the issue and then would advise as to whether I.C.B.C. would be claiming that Mr. Strigberger was in conflict and seeking an order that Cumis would have to seek separate counsel.

At the next pre-hearing on February 26, 2019 counsel for I.C.B.C. confirmed their position not only that Mr. Strigberger could not act for Cumis but that he was conflicted out now from acting for either party. I.C.B.C. took the position that Mr. Strigberger was to be removed as solicitor of record for both Co-operators and Cumis.

The motion to have Mr. Strigberger removed from the record was scheduled to be heard on May 31, 2019. Mr. Strigberger was to file an Affidavit. Ms. Orth could then have cross-examination if needed and then the parties would make submissions.

Mr. Strigberger ultimately filed the Affidavit of Margot Jory sworn April 5, 2019. There was no cross-examination on the Affidavit.

Ultimately no Factums or submissions were filed prior to the May 31, 2019 date. Mr. Strigberger attended at that time. Ms. Orth did not attend but advised by letter of June 3rd that she had thought the call had been booked for May 30th and when no one attended on the line she assumed that the matter had been adjourned. The motion ultimately was rebooked for July 25th. A Notice of Motion was filed with me just prior to the motion date and the motion was not for a declaration that Mr. Strigberger be removed from the record but had been revamped as a motion for productions. At the motion Ms. Orth confirmed that she was no longer pursuing an order that Mr. Strigberger be removed from the record but rather was advancing a claim that various documents should be produced as any solicitor client privilege had been waived.

That is the background to this motion. The motion itself is requesting the following documents:

1. A complete copy of the Cumis file, including:
 - i. A complete copy of any Cumis adjusters' notes. If notes are kept on an online portal, then a print-out of the portal;
 - ii. A complete copy of Cumis' communications with M.T. or his counsel, including notes relating to telephone calls, e-mails or in-person meetings;
 - iii. A complete copy of Cumis' communication with their counsel, Dan Strigberger, including notes relating to legal opinion, telephone calls, e-mails or in-person meeting.
2. A complete copy of Daniel Strigberger's (including any other lawyer at his firm) file as it relates to his retainer with Cumis for the priority dispute against Co-operators, including:
 - i. A complete copy of any of Mr. Strigberger's notes;
 - ii. A complete copy of Mr. Strigberger's communications with M.T. or his counsel, including notes relating to telephone calls, e-mails, or in-person meetings; and,
 - iii. A complete copy of Mr. Strigberger's communications with Cumis, including notes relating to legal opinions, telephone calls, e-mails or in-person meetings.
3. An order requesting Cumis to advise I.C.B.C. of any verbal communication relating to the decision not to pursue the arbitration between the following individuals:
 - a. Mr. Strigberger or any other lawyer at his firm or any adjusters; or,

b. Mr. Strigberger or any other lawyer at his firm and M.T. or his counsel.

4. I.C.B.C. seeks costs of the motion and Co-operators seeks their costs in responding to the motion.

Parties Positions:

I.C.B.C. submits that while Co-op and Cumis argue that they now have a joint retainer with Mr. Strigberger that that was not always the case.

They submit that when Mr. Strigberger was retained by Cumis it was to respond to Co-operators' arbitration request. I.C.B.C. submits that at that point Cumis and Co-op were adverse in interest and in litigation. While in this situation Cumis willingly shared its file with Co-operators, including communication with their counsel. I.C.B.C. alleges that this was a deliberate and conscious decision on the part of Cumis and that once they decided to share any communications or information created by their counsel, Mr. Strigberger, including any opinions, verbal or otherwise, then no privilege could continue to be attached to those documents.

I.C.B.C. takes the position that the onus is on Co-operators to establish that there was privilege and that that privilege was not waived.

I.C.B.C. also submits that it would be prejudicial for them not to obtain those documents as Co-operators had access to the Cumis documentation even though they were not under a joint retainer at the time and therefore they have an unfair advantage in this arbitration.

With respect to the case law Cumis provided a number of cases outlining when and how solicitor-client privilege can be waived. I.C.B.C. noted that solicitor-client privilege applies to communications once a lawyer is retained by the client. This should be distinguished from litigation privilege which can apply to communication of a non-confidential nature between a solicitor and a third party. I.C.B.C. submits that the solicitor-client privilege can be waived by the holder of that privilege. Where the client voluntarily discloses that information so that it is inconsistent with the confidential nature of the relationship then privilege is waived.

I.C.B.C. submits that once Cumis "shared" their file with Co-operators then implicitly they waived the solicitor-client privilege that had existed between Cumis and Mr. Strigberger and therefore the documents that they have been requesting are now producible.

According to Co-operators the issue is not whether privilege was waived during the priority dispute but whether Co-operators has waived privilege by sharing information with itself. Co-operators relies significantly on the evidence of Ms. Jory with respect to the structure of Co-operators and Cumis. Co-operators takes the position that it and Cumis not only share a

common interest but share an identical interest as between adjusters, management and company. Co-operators submits that I.C.B.C.'s argument would only succeed if there was any evidence that Co-operators and Cumis were two separate unrelated distinct entities that operate at arm's length and that that privileged communication took place in those circumstances.

Co-op submits that in the context of this arbitration that Co-operators and Cumis are adversarial vis à vis I.C.B.C. and not adversarial to each other. Co-operators also submits that Ms. Jory's evidence is that was the case even when a priority dispute notice demanding arbitration was sent out. Their position is that that did not result in an adverse in interest position but was rather for the purposes of certain company interests.

Co-operators submits that Ms. Jory's evidence is uncontroverted that there would never have been a priority dispute pursued as between Co-op and Cumis. Co-op and Cumis have the right to retain one lawyer to represent their common interests. Co-operators and Cumis as sister companies have the right to share privilege amongst themselves as if they were joint clients.

With respect to the issue of prejudice Co-operators submits that I.C.B.C. made unfounded allegations of prejudice without any evidence of how not having access to Mr. Strigberger's file and the Cumis file would in some way prejudice their position.

With respect to the law as to when privilege can be waived Co-operators relies on the case of *C.C. & L. Dedicated Enterprise Fund (Trustee of) v. Fisherman, 2001 CarswellOnt. 514 SCJ (paragraphs 25 to 31)*. Based on this case Co-operators submits that different litigants who are in fact different entities who have a common interest can share privileged information where it is beneficial for them to do so and in those cases a waiver will not be assumed. Co-operators submits that case stands for the proposition that any privileged information shared between parties with a common interest will continue to have the protection of the privilege. Therefore, Co-operators submits that even if one assumes that Co-op and Cumis are separate entities as opposed to sister companies within the umbrella of Co-operators that privilege has still not been waived.

Decision and Analysis:

I am satisfied based on the Affidavit of Ms. Jory that Co-operators and Cumis operate in the manner she described. I am also satisfied and I find that there was never any intention of Co-operators to actually proceed with an arbitration or a dispute as against Cumis. There is no evidence to the contrary. Ms. Jory's Affidavit was never cross-examined on. Her Affidavit is quite clear, and I quote:

“Despite the wording in these letters and as discussed further below, Co-op would never initiate arbitration against Cumis.”

Mr. Strigberger appears to have been retained by Cumis to conduct an EUO. I could not find any evidence that Cumis had retained Mr. Strigberger to act in a priority dispute as against Co-operators. Mr. Strigberger does not appear to have been retained on the evidence before me with respect to any actual dispute until Co-operators retained him to pursue the claim against the I.C.B.C. There is no evidence before me as to whether Mr. Strigberger having not conducted an EUO and Co-operators having withdrawn its position that M.T. was a dependent on Cumis whether Mr. Strigberger provided an oral opinion or a written opinion to Cumis.

I agree with Co-operators that in the circumstances particularly with reference to their corporate structure and with reference to their common position as against the I.C.B.C. and on the issue of dependency that they stand together in this arbitration. I see nothing wrong with Mr. Strigberger acting for both Co-operators and Cumis in this matter. Similarly I find that there is nothing in any of the materials before me that would support I.C.B.C.'s position that Cumis somehow as a result of the lack of a firewall between Cumis and Co-operators implicitly or explicitly waived any solicitor-client privilege as between Cumis and Mr. Strigberger vis à vis Co-operators.

I also agree with Mr. Strigberger that there is no evidence of any prejudice.

While I therefore find that this motion fails with respect to the production of any items from Mr. Strigberger's file and an order advising of any verbal communications between Mr. Strigberger at his firm there are portions of the Cumis file that are producible in my view. Counsel and I did discuss this briefly during the course of the motion and it was my understanding that Mr. Strigberger was agreeable to providing some of the documents from the Cumis file. In the event that I am wrong in that regard I am ordering production of the following:

1. A complete copy of the Cumis' adjusters' notes but excluding any information that would involve communications with Mr. Strigberger or other lawyers at his office;
2. A complete copy of Cumis' communications with M.T. or his counsel, including any notes relating to telephone calls, e-mails or in-person meetings.


I decline to order any other of the documents that have been requested.

Costs:

Both parties sought their costs. Indeed in earlier communications Mr. Strigberger had sought costs thrown away with respect to the motion to have him removed from the record which did not proceed in May. Any submissions with respect to costs thrown away for that motion can be dealt with at a later time. However, with respect to this motion in all the circumstances that I have outlined and considering that overall the success lay with Co-operators I am awarding the costs of the motion to Co-operators. I am also ordering that the costs of the Arbitrator relating

to the motion for productions only be paid by I.C.B.C. If counsel cannot agree on the amount of those costs we can discuss it at the next pre-hearing. Alternatively those costs can be included in any cost hearings that may be necessitated when the full arbitration has been completed.

DATED THIS 1st day of August, 2019 at Toronto.


Arbitrator Philippa G. Samworth
DUTTON BROCK LLP