

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

CARADOC TOWNSEND MUTUAL INSURANCE COMPANY

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

COSTS DECISION

Counsel Appearing:

Kevin D. H. Mitchell: Counsel for the Applicant, Caradoc Townsend Mutual Insurance Company (hereinafter called Caradoc)

Tim Crljenica: Counsel for the Respondent, Economical Mutual Insurance Company (hereinafter called Economical)

Issue:

The issue before me is what costs, if any, should be awarded to either the Applicant or the Respondent with respect to a loss transfer Arbitration in which I rendered a decision on September 9, 2021, and the effect, if any, in terms of that award of costs of an offer to settle made by the Respondent on June 2, 2021.

Factual Background:

On June 15, 2018, there was an incident that took place between a motorcycle insured by Caradoc and a BMW personal automobile insured by Economical. Various monies were paid by Caradoc to an individual who was injured in that accident. As a motorcycle was involved, Section 275 of the *Insurance Act* providing the right to loss transfer was applicable. However, Caradoc and Economical could not agree as between them with respect to the applicability of the Fault Chart and/or liability for this accident as between the motorcycle and the BMW.

As a result, the parties chose to proceed to an Arbitration. I was selected, on consent, to be the Arbitrator and the matter proceeded to a hearing with viva voce evidence on June 23, 2021. Three witnesses were called at that time. Subsequent to the hearing, counsel provided written submissions and Books of Authorities. There was then a half day of oral submissions that took place on July 20, 2021.

I rendered my decision in this matter on September 8, 2021 concluding that fault for this accident was to be allocated on a 50/50 basis as between Caradoc and Economical based on the ordinary rules of law per Rule 5 of the Fault Chart.

Throughout the course of the hearing, Caradoc and Economical both maintained a 100%/0% position at the Arbitration. Caradoc maintained that its insured had no liability (the motorcycle) while Economical also maintained that its insured had no liability. Each party urged on me to conclude that the other party was 100% responsible for the accident.

As a result of my decision Economical, having been found to be 50% responsible for the accident, was required to reimburse Caradoc for 50% of the payments it had made to its insured pursuant to the Statutory Accident Benefits Schedule. Caradoc had maintained throughout the Arbitration that it was seeking 100% reimbursement.

The parties filed an Arbitration Agreement and the relevant provisions of that Agreement are set out below:

4. ARBITRATOR'S ACCOUNT:

The parties agree that the arbitrator's account shall be paid by the unsuccessful party to the arbitration. If success is divided, it shall be ordered paid in keeping with that division. Her accounts, interim or otherwise, shall be paid by the parties equally until the arbitration is concluded and the outcome determined, including any appeals, and then adjusted in accordance with the final result.

5. ACCOUNT OF COURT REPORTER:

The account of a court reporter, which is utilized during the course of the arbitration hearing, is to be considered a disbursement and shall be ordered paid by the unsuccessful party to the arbitration. If success is divided, it shall be ordered paid in keeping with that division. If any appeal(s) is taken, it will be satisfied in the same manner as the account of the arbitrator and adjusted in accordance with the final result.

6. LEGAL COSTS:

The parties agree that the costs of the arbitration shall be ordered paid by the unsuccessful party to the arbitration. However, costs shall not be quantified in the original award. The scale and quantum of costs shall be determined by the arbitrator in a subsequent award, in accordance with the *Arbitration Act, 1991*, in the event there is any dispute between the parties. For the purpose of determining the scale and quantum of costs, the arbitrator shall take into account the conduct of the arbitration proceedings and any conduct, which has led to unnecessary costs or delay. The arbitrator shall also take into account any formal offer of settlement made by any party, in accordance with s. 54 of the *Arbitration Act, 1991*. Any such formal offer of settlement shall not be disclosed to the arbitrator until the decision has been reached on the pertinent issues other than costs.

It is relevant to note that no appeal has been taken from my decision in terms of the 50/50 split.

Subsequent to the rendering of my decision, the parties requested a costs hearing on the basis that there was an offer to settle which Economical argues entitles them to costs on either a partial or substantial indemnity scale from the date of the offer through to the conclusion of the Arbitration. Caradoc disputes that assertion.

With respect to the offers to settle, Economical made the first offer to settle on May 8, 2020. It offered to accept 25% fault for the accident with 75% being allocated as against Caradoc. This offer was not accepted by Caradoc.

Caradoc's counsel verbally offered to settle the case on May 17, 2021. This offer was for a 75/25 liability split in favour of Caradoc. Economical's counsel rejected that offer via email dated May 18, 2021.

There were no further formal settlement discussions until an offer was made by Economical by way of letter dated June 2, 2021. By the time this offer was made, the hearing had been scheduled to proceed on June 23, 2021.

There are 2 parts to the offer made by Economical. They are reproduced below:

1. Prior to 5:00 p.m. on Friday June 4, 2021, Economical will agree to:
 - a. a division of 50 percent fault being attributed to each of Economical and Caradoc;
 - b. each insurer will pay 50 percent of the arbitrator's fees; and
 - c. each insurer will bear its own costs and disbursements incurred up to the time of acceptance of the offer.

2. After 5:00 p.m. on Friday June 4, 2021 and up until five minutes after the commencement of arbitration, Economical will agree to:
 - a. a division of 50 percent fault being attributed to each of Economical and Caradoc;
 - b. each insurer will pay 50 percent of the arbitrator's fees;
 - c. no costs incurred prior to June 4, 2021 will be payable between the insurers; and
 - d. Caradoc will pay to Economical the costs and disbursements incurred by Economical after June 4, 2021 on a substantial indemnity basis.

In addition, the letter indicates, and I quote:

“Economical will rely upon the above settlement offer in seeking elevated costs against Caradoc if the arbitrator apportions 50 percent fault or less to Economical in her award, and Economical reserves the right to seek all costs it has incurred up to the time of the arbitration award”.

This offer was not accepted by Caradoc. Caradoc, however, made a counter proposal by email dated June 4, 2021 proposing that Economical accept 74% liability with Caradoc accepting 26% liability. The past and future accounts of the Arbitrator were to be split on that basis. In addition, Economical was to pay Caradoc 74% of their partial indemnity cost to the date of the acceptance of the offer.

This offer was not accepted by Economical and the case proceeded forward through to decision as outlined above.

Economical claims that a proper result in terms of costs is that for the time period leading up to their offer of June 2, 2021 that no costs be awarded. Economical submits that neither party was

successful as each maintained a position of either 100% or 0% at the Arbitration, and, therefore, neither party should be entitled to costs as neither party was successful in their position.

Economical then submits that from the date of its offer of June 2, 2021 up to the decision of September 9, 2021 that it should be awarded its costs either on a partial or substantial indemnity scale. Economical also claims that it is entitled to its disbursements which would include interpretation costs, the 50% paid towards the Arbitrator's account, as well as a Summons. Based on substantial indemnity, Economical provides a Bill of Costs including disbursements in the amount of \$20,985.80 (fees \$11,551.48, HST \$1,501.69, and disbursements \$7,932.63).

Economical proposes that an appropriate partial indemnity would be 75% of this amount and substantial indemnity would be 85% of that amount.

Economical also claims its costs of these proceedings (the costs hearing) in the amount of \$1,500.00 in legal fees plus HST of \$195.00.

Caradoc provides a variety of scenarios with respect to costs. Caradoc claims that it was successful in the Arbitration. It won 50% reimbursement of loss transfer and, accordingly, Caradoc should be paid its costs on a partial indemnity scale throughout. Caradoc submits that I should not consider the offer for reasons which include:

- a) The first offer expired within 48 hours and did not give anyone enough time to secure instructions;
- b) The second offer which was open until the hearing commenced was also very closely associated with the hearing date and did not allow a great deal of time and in any event when one looks at the totality of the offer including its provisions with respect to costs, and not just the liability split, Caradoc submits that Economical did not get an award at the hearing that was better than its offer. In this scenario, Caradoc submits that it should get costs based on a partial indemnity anywhere from \$ 24,000.00 to \$27,000.00 inclusive of disbursements of \$2,843.00. The variation in number depends upon which hourly rate I choose to apply.

Alternatively, Caradoc submits that if I do feel the offer to settle should be considered that Caradoc should still get its costs on a partial indemnity scale up to June 2, 2021 and suggests somewhere between \$12,604.00 and \$13,994.00 plus disbursements of \$2,843.14 would reflect reasonable costs and disbursements.

Caradoc then submits that subsequent to the offer of June 2, 2021, at best, Economical should be awarded its partial indemnity costs only up to September 9, 2021.

Caradoc also submits that costs subsequent to September 10, 2021, with respect to these proceedings, should be awarded on a 50/50 basis, based on partial indemnity.

The parties also argue not only over how to allocate their respective legal fees but also with respect to the operation of the Arbitration Agreement and what award should be made for the Arbitrator's account and the account of the court reporter.

Caradoc argues that paragraph 4 of the Arbitration Agreement provides that the Arbitrator's account should be paid in keeping with any division with respect to success. In other words, as I found a 50/50 liability that the Arbitrator's Account should, therefore, be split on a 50/50 basis. Caradoc argues that is irrespective of any offer to settle or any award with respect to legal costs. Caradoc suggests that legal costs are separate and apart from the provision dealing with the Arbitrator's account.

The same is true with respect to the account of the court reporter which sets out similar provisions to that of the Arbitrator's account. Caradoc submits that the court reporter that was utilized during the course of the Arbitration under paragraph 5 of the Arbitration Agreement is to be paid based on the liability split.

Economical argues that costs as used in paragraph 6 of the Arbitration Agreement encompasses the Arbitration account and the account of the court reporter. Economical argues that I have the discretion to order the payment of costs as per the *Arbitration Act's* definition which includes disbursements and the Arbitrator's account and that any order I make with respect to legal fees should also apply to the Arbitrator's account and the account of the court reporter. This is the basis upon which Economical claims it is entitled to have the 50% share of the Arbitrator's account that it paid reimbursed based on the effect of its offer to settle.

Decision and Analysis:

The *Arbitration Act* 1991 sets out extensive discretionary authority to an arbitrator with respect to awarding costs.

Section 54 gives me the authority to award the costs of an Arbitration. Section 54(2) describes the costs of an Arbitration as consisting of:

"the parties' legal expenses, the fees and expenses of the Arbitral Tribunal and any other expenses related to the Arbitration."

The cost consequences of the failure to accept an offer to settle is also covered under Section 54(5) which is set out below:

"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."

I pause to note that the right of the Arbitral Tribunal to take an offer to settle into account is discretionary and not mandatory.

In addition, many Arbitrators, including myself, have in the past considered the provisions of Rule 57 of the Rules of Civil *Procedure* when making decisions with respect to costs. Rule 57 sets out that when the court is exercising its discretion to award costs, some of the considerations in making that award include the following:

- The apportionment of liability;
- The complexity of the proceedings;
- The importance of the issue;
- The conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding;
- Whether any step in the proceeding was improper, vexatious or unnecessary; and,
- A party's denial or refusal to admit anything that should have been admitted.

In this case, in considering costs, I am also bound to review the terms of the Arbitration Agreement between the parties, specifically paragraphs 4, 5 and 6 of the Arbitration Agreement.

In completing my analysis of this case I also reviewed case law provided by the parties including *Wawanesa Mutual Insurance Company v. Markel Insurance Company of Canada*, a decision of Arbitrator Bialkowski from March of 2012, *Security National Insurance Company v. Wawanesa Mutual Insurance Company*, a decision of Arbitrator Vance Cooper, May 21, 2013 and *Halton Standard Condominium Corporation No. 550 v. Del Ridge (Appleby)*, 2020 ONSC 1936.

With respect to the case law, this was primarily submitted by counsel to assist in determining what an appropriate percentage would be for a substantial indemnity award of costs versus a partial indemnity award of costs.

Here, there are three discrete periods in which costs are being claimed and I will deal with each of them separately. However, at the outset, my decision is that I must take into consideration the offer to settle made by Economical and that it does, in my view, change the way that costs might otherwise have been ordered. Accordingly, I have divided my cost analysis into the three discrete periods separating out the time before the offer to settle, after the offer to settle, and then subsequent to my decision with respect to the main issue.

Time Period 1: Costs of the Arbitration to the Date of Economical's Offer on June 2, 2021

Both Caradoc and Economical claim that they are entitled to costs for this time period. Various scenarios with respect to a costs award include Caradoc's position that they are entitled to costs on a 100% basis claiming success in the Arbitration, a 50/50 split pursuant to the division of

liability, or no costs at all on the grounds that neither party was successful in the position that they put forward.

Having carefully reviewed counsel's submissions and the relevant statutory authority, I conclude that for this time period neither party should be awarded costs.

Each party to this loss transfer matter took the position at the hearing that there was no liability as against their insured. Caradoc maintained throughout that I should find Economical 100% responsible for the incident on June 15, 2018 and Economical took the same position. In fact, I had to ask counsel if they agreed that I had the authority and jurisdiction to find a liability scenario that did not meet with their submissions. I specifically asked them during the hearing whether either of them disputed that irrespective of their arguments that I could allocate a 50/50 split or some other split. Both counsel agreed that I had that jurisdiction but maintained their position that there was no liability on their clients.

The Arbitration before me was not about quantum of loss transfer or indemnification with respect to loss transfer: this was purely an arbitration in which the only issue was liability.

While Caradoc was successful to the extent that there was a 50% award of indemnification, they were completely unsuccessful in their position that Economical should pay 100% of the loss transfer. Caradoc's entire evidence and submissions were premised on Economical having complete liability. The same is true with respect to Economical's position.

Accordingly, I find that neither party was successful in this Arbitration and accordingly each party must bear their own costs up to June 2, 2021 when the offer to settle was made by Economical.

Costs from June 2, 2021 to September 9, 2021

The offer to settle of Economical was in two parts. The first part of the offer, in my view, is not relevant as it expired at 5:00 p.m. on June 4, 2021. That offer presented a 50% liability split, that each insurer would pay 50% of the Arbitration fees and each insurer would bear its own costs. That offer was not accepted and it expired.

The relevant offer, in my view, is the second offer that remained open from June 4, 2021 until five minutes after the Arbitration commenced with viva voce evidence on June 23, 2021. The only difference between this offer and the previous offer is with respect to costs. This offer provides that no costs would be payable as between the two insurers prior to June 4, 2021 but after June 4, 2021, Caradoc would pay Economical its costs and disbursements on a substantial indemnity basis.

There is no requirement, in my view, when exercising discretion under the *Arbitration Act* that the offer to settle made must be more favourable than the result secured by the individual who made the offer. Obviously that is a key determination. However, the reasonableness of the offer

and how close it resembles any award made is more significant. What I have looked at is whether the offer made on June 4, 2021 and open until after the commencement of the Arbitration was one that should have reasonably been considered by Caradoc and/or efforts made to negotiate that offer particularly with respect to the division of liability. Economical submits and I agree that it made an offer which matched the result of the Arbitration and, accordingly, it should be taken into consideration even if Economical did not "beat" its offer. An offer to settle is an incentive to settlement and should be applied, in my view, in cases such as this.

Had Caradoc accepted either of the offers set out in the June 4, 2021 letter at least in terms of the liability split, I doubt this Arbitration would have proceeded although there may have been a brief hearing with respect to costs and significant legal and Arbitration expenses would have not been incurred.

I also take into consideration Caradoc's negotiations in terms of settlement. The only offers made by Caradoc were either a 75% liability split in favour of Caradoc or a 74% liability split in favour of Caradoc. Caradoc complains that Economical's offers were made very close to the hearing and that that should be taken into consideration. I note that Caradoc's offers were also made close to the hearing date.

I therefore conclude that in accordance with Section 54 of the *Arbitration Act* that the circumstances of this case make it appropriate for me to consider the offer to settle made by Economical when awarding costs both with respect to who gets costs and the quantum of those costs.

Taking into consideration the offer to settle I therefore award costs to Economical on a partial indemnity scale from the date of its offer of June 2, 2021 up to the date of my decision on September 8, 2021. I do not find in the circumstances of this case that the offer to settle warrants an award of costs to Economical on a substantial indemnity scale.

Having reviewed the case law, I find a reasonable percentage for partial indemnity taking into consideration all the factors is 65% of the legal fees incurred and claimed by Economical.

I have reviewed Economical's Bill of Costs. For the time period from the date of the offer up until the date of the decision, Economical claims \$11,551.48 in fees and HST of \$1,501.69. Caradoc did not raise any specific issue with respect to the quantum of Economical's bill. However, I did review each time entry and I could find no duplication, no unnecessary time having been spent nor any matters docketed which would not properly be included in a Bill of Costs. I found the number of hours put in by counsel for Economical also to be reasonable.

Therefore in terms of fees, I assess Economical's fee entitlement at 65% inclusive of HST to be \$8,484.56.

With respect to the disbursements, I have allowed interpretation services at \$421.49 and the Summons fee for Mr. M at \$123.76. This totals \$545.25 of which 65% is \$354.41. The total cost award for this time period is therefore \$8,838.97.

Disbursements: Arbitrator's Account and Account of Court Reporter

Each party has to date paid 50% of the Arbitrator's account which included the cost of the court reporter for the one-day hearing.

Economical claims that if it is awarded costs subsequent to its offer to settle that those costs should include repayment of the Arbitrator's account and the account of the court reporter. Caradoc takes the position that both those accounts should be paid based on the division of liability in accordance with paragraphs 4 and 5 of the Arbitration Agreement.

Economical points to the definition of costs under the *Arbitration Act* which includes "the fees and expenses of the Arbitral Tribunal and any other expenses related to the Arbitration." While I agree with Economical that the *Arbitration Act* clearly defines arbitration costs in those terms, the parties have chosen, based on their Arbitration Agreement, to set up a different agreement with respect to how Arbitration costs are to be dealt with.

Paragraph 4 of the Arbitration Agreement sets out a separate heading for Arbitrator's account and a separate direction to the arbitrator as to how that account is to be dealt with. The agreement clearly indicates that if success is divided then the Arbitrator's account "shall be ordered paid in keeping with that division." The direction seems clear to me and that I have not been given any discretion to order otherwise. There is no section under paragraph 4 of the Arbitration Agreement suggesting that it is subject to paragraph 6 which deals with legal costs. I see legal costs as part of the costs of an Arbitration as set out under the *Arbitration Act* but not only the costs of the Arbitration. In my view, the parties chose, through their Arbitration Agreement, to separate out the costs of the Arbitration and how they would be dealt with.

I therefore find that I am bound by the Arbitration Agreement and it does not allow me to exercise any discretion with respect to the payment of the Arbitrator's account. Accordingly, as "success was divided on a 50/50 basis", the Arbitrator's account shall be paid in keeping with that division and accordingly Caradoc is not liable to reimburse Economical for its payment of the Arbitration account.

The same is true with respect to the account of the court reporter. Section 5 of the Arbitration Agreement also indicated that if success was divided, the Arbitrator had no discretion and that the cost of the court reporter was to be paid in keeping with that division.

The only discretion awarded to the Arbitrator in this agreement is with respect to legal costs where the Arbitrator is given the discretion to take into account things such as the conduct of the Arbitration proceedings, conducts that have led to unnecessary costs or delay and any offer

made in accordance with the *Arbitration Act*: Section 54. That has already been done and I do not see that paragraph as extending to alter the clear provisions of paragraphs 4 and 5 in terms of the Arbitrator's account and the account of the court reporter.

Costs of this Proceeding

Economical has, in my view, been largely if not wholly successful in this costs proceeding. Accordingly, I agree that they are entitled to costs of this proceeding on a partial indemnity scale payable by Caradoc. Economical proposed costs of \$1,500.00 plus HST of \$195.00. I find that that is reasonable and I therefore order that Caradoc pay Economical \$1,500.00 in legal costs together with HST of \$195.00. Caradoc is also to pay the Arbitration account for this proceeding.

Order

With respect to costs, my order is as follows:

1. No costs are awarded with respect to legal costs of the parties up to June 2, 2021.
2. Caradoc is to pay Economical its costs on a partial indemnity scale (65%) for the time period of June 2, 2021 to September 8, 2021 in the amount of \$8,838.97 (this is inclusive of disbursements and HST); and,
3. Caradoc will pay Economical the sum of \$1,695.00 (this is inclusive of HST) with respect to the costs proceedings.
4. The Arbitration account and court reporter's account is to be paid 50/50 up to September 8, 2021. The Arbitrator's account of the costs hearing is to be paid by Caradoc.

DATED THIS 26th day of January, 2022 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP