

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8,
s.268 AND REGULATION 283/95 THEREUNDER**

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
& THE GUARANTEE COMPANY OF NORTH AMERICA

Respondents

- AND -

ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondents

DECISION WITH RESPECT TO COSTS

COUNSEL

Nathalie Rosenthal/Nathan Fabiano – Zarek, Taylor, Grossman, Hanrahan LLP
Counsel for the Applicant, Royal & Sun Alliance Insurance Company
(hereinafter referred to as “RSA”)

Mark Donaldson – Dutton, Brock LLP
Counsel for the Respondent, State Farm Mutual Automobile Insurance Company
(hereinafter referred to as “State Farm”)

ISSUE - COSTS

[1] In the context of two priority disputes pursuant to s. 268 of the *Insurance Act*, R.S.O. 1990, c. 1.8, arising out of the same motor vehicle accident and with RSA ultimately having accepted priority, the issue before me is to determine the costs, if any, to which the successful insurer, State Farm, is entitled in the face of significant delay and a suggested breach of the requirement to complete the priority dispute arbitration within two years as set out in section 8(2)(5) of O. Reg. 38/10.

PROCEEDINGS

[2] The matter proceeded by way of written submissions, document briefs and books of authorities.

FACTS

[3] The claimants, Mohammed Arif Bahman ("Bahman") and Andrew Salvador Chavez ("Chavez"), were occupants of a 2001 Honda owned by Bahman. It is unclear which of Bahman or Chavez was driving, as both were ejected from the vehicle as the result of a high speed single car accident that occurred on October 9, 2013.

[4] According to the police accident report, the Bahman vehicle was insured by the Applicant, Royal & Sun Alliance Insurance Company of Canada ("RSA").

[5] Both Bahman and Chavez submitted their respective Applications for Accident Benefits to RSA.

[6] RSA notified both claimants and State Farm of the inter-company priority dispute.

[7] With respect to the claimant, Bahman, it was alleged that he had regular use of a State Farm insured vehicle and that he was a dependent of his father as insured by The Guarantee Company of North America ("Guarantee").

[8] With respect to the claimant, Chavez, RSA took the position that he was a dependent of his parents as insured by State Farm and also that he had regular use of his employer's vehicles.

[9] RSA, State Farm and Guarantee consented to the appointment of Arbitrator Bialkowski and the initial pre-hearing took place March 5, 2015. In addition to the above-noted potential issues, RSA advised that they did not insure the Bahman vehicle, but rather the coverage noted on the police accident report was the result of a fraudulent pink slip having been purchased.

[10] Although the Bahman claim remained quite well contained in the time leading up to the initial pre-hearing, nearly \$150,000.00 had already been expended with respect to Mr. Chavez.

[11] At the initial pre-hearing, it was noted that RSA had sold a policy with respect to one specified vehicle to an individual named Chertin. Mr. Chertin then began to sell pink slips, sometimes with RSA's policy number and sometimes with other companies and numbers to various individuals. Bahman had purchased a pink slip from Mr. Chertin and by some means, Bahman's vehicle became registered in Chertin's name. Bahman was making regular payments to Mr. Chertin for his insurance "coverage". Mr. Chertin was subsequently convicted of various related charges.

[12] Production related to various available coverage and the potential dependency scenarios regarding both claimants were duly exchanged. Arrangements were made to conduct Examinations Under Oath of Bahman and his father on June 3, 2015. Given the evidence assembled with respect to Bahman's potential connection to any State Farm policy, it was agreed that State Farm would not attend at the June 3, 2015 examinations.

[13] State Farm did send a Notice to Applicant of Dispute Between Insurers form to the Motor Vehicle Accident Claims Fund ("the Fund") pursuant to s.10 of *Ontario Regulation 283/95*. That Notice was sent out on or about June 1, 2015.

[14] The Fund requested various productions which were duly sent. However, they declined to appoint counsel or participate in further pre-hearings. The October 9, 2015 pre-hearing was adjourned on consent.

[15] Following the pre-hearing of January 26, 2016, proof of service of State Farm's Notice of Dispute to the Fund and a draft Order were provided to Arbitrator Bialkowski. Arbitrator Bialkowski then signed an Order in each proceeding requiring the Fund to assign counsel, that their counsel should participate in the upcoming pre-hearing on March 24, 2016 and in the event that the Fund continued to refuse to participate in these arbitrations, then they would be considered as having permitted the arbitrations to proceed undefended.

[16] Shortly before the March 24, 2016 pre-hearing, the Fund appointed John Friendly as counsel. Mr. Friendly questioned the Arbitrator's jurisdiction to issue the March 10, 2016 Orders, as well as State Farm bringing the Fund into the priority dispute under s.10 of *Ontario Regulation 283/95*. Additional documentation was duly sent out to Mr. Friendly in support of the positions of RSA and State Farm. As it was noted that the first arbitration had been initiated in August 2014, an arbitration hearing was scheduled for July 22, 2016.

[17] The pre-hearings next resumed on May 25, 2016. The issues in dispute were discussed and the delivery of the arbitration documents was timetabled.

[18] By e-mail dated June 3, 2016, the Fund advanced an additional request for production.

[19] On or about July 7, 2016, the Respondent, Guarantee, was released from the arbitration. Counsel for RSA and Guarantee agreed upon the latter's claim for costs.

[20] The arbitration proceeded to a hearing before Arbitrator Bialkowski on July 22, 2016 with respect to the various preliminary issues raised by the Fund.

[21] By the time of the arbitration hearing, it was apparent that RSA did not challenge State Farm's position as to dependency or regular use, but as State Farm had brought the Fund into the dispute by means of their Notice under s.10 of *Ontario Regulation 283/95*, State Farm attended and participated at the hearing. However, having reviewed all of the documentation prepared, including RSA's Factum, Document Brief and Book of Authorities, in the interest of containing costs, State Farm did not prepare written materials for the arbitration, but rather relied upon those prepared by RSA. Although it was anticipated that the hearing would be conducted in half a day or less, counsel for the Fund advanced lengthy argument, including items which were not laid out or summarized in his Factum.

[22] Arbitrator Bialkowski released his Decision with respect to the preliminary issues on August 11, 2016.

[23] Although Arbitrator Bialkowski concluded that he had the jurisdiction to order the Fund to participate in these private arbitrations, the Arbitrator went on to note that the Notice provided to the Fund by State Farm pursuant to s.10 of *Ontario Regulation 283/95* was of no effect in terms of the dispute launched by RSA.

[24] In an e-mail exchange on August 15, 2016, counsel for the Fund set out his client's position as to costs. In her response as directed to State Farm's counsel, RSA's solicitor confirmed that her client had already agreed to pay State Farm's costs.

[25] Some 17 months later, Mr. Donaldson sent correspondence dated January 17, 2018 to counsel for RSA, apologizing for the delay in resolving costs. A specific quantum of costs sought was not provided by Mr. Donaldson.

[26] On January 19, 2018, Mr. Donaldson sent correspondence to counsel for RSA requesting that the files be re-opened so that the issue of State Farm's costs could be resolved.

[27] On January 23, 2018, counsel for RSA advised Mr. Donaldson that the files were being re-opened and that she was in the process of reviewing the files.

[28] As there were no further requests or costs proposals by Mr. Donaldson, counsel for RSA closed their file in August 2018, over seven (7) months after Mr. Donaldson was advised by RSA that the files were being re-opened.

[29] On July 6 2020, Mr. Donaldson contacted Arbitrator Bialkowski on the issue of costs, which initiated this application.

[30] Solicitor and client accounts with respect to each claimant have been provided. The Bahman solicitor/client accounts span the period of October 2014 to January 2018. Those solicitor/client accounts, which include disbursements and applicable taxes, total \$19,409.16. The Chavez solicitor/client accounts span the period of December 2014 to January 2018 and total \$18,348.66, including disbursements and taxes. Altogether, there is \$37,757.82 in solicitor/client costs, with State Farm seeking partial indemnity costs.

ANALYSIS AND FINDING

[31] Section 54(1) and (2) of the *Arbitration Act* sets out the general principle with regard to an award of costs in an arbitration:

Costs

Power to award costs

54 (1) An arbitral tribunal may award the costs of an arbitration. 1991, c. 17, s. 54 (1).

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.

1991, c. 17, s. 54 (2).

[32] The arbitrator may consider the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure* when exercising his or her discretion to award costs under the *Arbitration Act*. In addition to the result in the proceeding and any offer to settle or to contribute made in writing, they are:

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

- (c) the complexity of the proceeding;
 - (d) the importance of the issues;
 - (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; [Emphasis Added]**
 - (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
 - (g) a party's denial of or refusal to admit anything that should have been admitted;
 - (h) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
 - (i) any other matter relevant to the question of costs.
- [emphasis mine]

[33] In support of its claim for costs, State Farm has provided solicitor and client accounts totalling \$37,757.82, but quite appropriately is only seeking recovery of costs on a partial indemnity basis.

[34] RSA has submitted that State Farm ought to be barred from seeking costs by reason of a breach of s. 8(2)(5) of O. Reg. 38/10 which requires an arbitration be completed within two years after the commencement of the arbitration or alternatively, that the claim for costs be drastically reduced by reason of the significant unjustified delay.

[35] I will deal firstly with the alleged breach of s. 8(2)(5) of O. Reg. 38/10. I am of the view that the section does not require that the costs issue be resolved within two years of the commencement of the arbitration, but the hearing itself be completed within that time frame unless the parties consent otherwise. In this case, RSA confirmed that it stood in priority to State Farm well within two years of the commencement of the arbitration. I find that there has not been a breach of s. 8(2)(5) of O. Reg. 38/10.

[36] What is clear from the wording of s. 8(2)(5), is the intent of the legislature that priority disputes be completed in a timely fashion unless consented to by the parties. On the basis of

the evidence before me, I am satisfied that there has been unjustified delay in advancing the costs claim, thereby unnecessarily lengthening the duration of the proceeding. I am satisfied that this is a factor as set out in Rule 57.01(1)(e) of the *Rules of Civil Procedure* that ought to be considered on the facts of this case, although the primary factor is the success of State Farm in the priority dispute. On the particular facts of this case and with the discretion provided to me pursuant to the *Arbitration Act*, I hereby find that State Farm ought to be entitled to partial indemnity costs at lower than traditional rates, that there be no Order as to costs of the costs dispute and that the Arbitrator's account be shared equally by the parties. I find that State Farm ought to recover partial indemnity costs of \$17,500, inclusive of HST. I will reconsider these findings should they be impacted by an offer to settle.

ORDER

[37] I hereby order that:

1. RSA pay to State Farm partial indemnity costs of \$17,500, inclusive of HST;
2. Each party bear their own costs with respect to the costs dispute;
3. The Arbitrator's account be paid equally by the parties.

DATED at TORONTO this 17th)

day of March, 2021.)

 KENNETH J. BIALKOWSKI
 Arbitrator