IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, 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:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

and

AXA INSURANCE

Respondent

COSTS DECISION

Introduction

This decision deals with the entitlement to and quantum of costs arising out of the arbitration proceedings.

The arbitration involved a priority dispute pursuant to Regulation 283/95 between Wawanesa and AXA. The arbitration was commenced by Wawanesa by way of a Notice of Application issued October 8, 2010. Shortly thereafter the parties agreed to appoint me as arbitrator for the dispute.

On November 18, 2010 I received materials and heard submissions on a motion brought by Wawanesa for an order to determine, on an interim basis, which of the insurers was responsible for the payment of SABS to the claimant, Preadeep

Rampersaud. At the time the motion was argued, the claimant had not commenced any FSCO proceedings in connection with his claim, but he had advanced, through counsel, requests to both insurers for the payment of SABS. Neither insurer paid SABS.

I released a decision on the interim motion on May 31, 2011. I concluded that AXA had the responsibility of handling the claimant's SABS claim pending, if necessary, further proceedings for a final arbitration award.

My decision was initially appealed by AXA. AXA also took steps to involve in priority dispute arbitration Mercury Insurance Company of Florida ("Mercury"). One of the central issues in the priority dispute between Wawanesa and AXA was the status of Mercury – specifically whether Mercury was an "insurer" for the purposes of Ontario's automobile legislation with the obligation to pay SABS to the claimant. In my decision on the motion I held that Mercury was not an "insurer" governed by the terms of Ontario's automobile legislation. Therefore, it did not have an obligation to pay SABS to the claimant.

The appeal of my decision on the interim motion, and the efforts to involve Mercury in priority dispute arbitration were later abandoned by AXA. During this time however, AXA adjusted the claimant's SABS claim. It was eventually settled with a total periodic, and settlement payout by AXA of approximately $60,000.00 in late 2012, or early 2013.

On August 28, 2013 the arbitration hearing involving Wawanesa and AXA proceeded for the purposes of a final priority determination. On March 26, 2015 I released my Arbitration Award. In summary, the Award confirmed the determination I

made in my interim decision that as between Wawanesa and AXA, AXA was the priority insurer responsible for the payment of SABS to the claimant. As far as I am aware, no appeal was taken from that decision.

With respect to the issue of costs, in my interim decision I made the following comments:

> For the reasons I have outlined concerning my view that both AXA and Wawanesa had an obligation to respond to Mr. Rampersaud's SABS claim and then follow the rules set out in 283/95 to have the priority issue determined I am inclined to award no costs of the motion. I will formally reserve my decision however until counsel have had an opportunity to make submissions on costs should they wish to do so.[1]

Counsel deferred submissions with respect to costs incurred up to and including the interim motion, when it became clear that the matter was going to proceed to a full arbitration hearing and the issue of costs for the entire proceeding would have to be dealt with following the issuance of my Arbitration Award.

In my Arbitration Award I invited submissions from the parties before making any order regarding costs from the inception of the arbitration to its conclusion. Wawanesa provided Written Costs Submissions, a Costs Brief, a Book of Authorities, all dated August 21, 2015, and Reply Costs Submissions dated September 11, 2015. AXA provided Reply Cost Submissions dated September 11, 2015.

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[1] Reasons for Decision on Interim Motion, May 31, 2011, page 18.

Analysis

My authority to award costs as arbitrator derives from section 54 of the *Arbitration Act*. It makes the awarding of costs discretionary. It states in part, "*An arbitral tribunal **may** award costs of an arbitration.*"[2]

The costs which may be awarded consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.[3]

Regard must be had however, to subsection 9 of Regulation 283/95, and the Arbitration Agreement entered into by the parties. Subsection 9 states, in part, as follows:

> 9 (1) Unless otherwise ordered by the arbitrator or agreed to by all parties before the commencement of the arbitration, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful parties to the arbitration.
>
> (2) The costs referred to in subsection (1) shall be assessed in accordance with section 56 of the *Arbitration Act, 1991*.

Paragraph 6 of the Arbitration Agreement reads as follows:

> 6. LEGAL COSTS
>
> The parties agree that the costs of the arbitration shall be in the discretion of the arbitrator. The amount or scale of such costs shall be determined in accordance with the Arbitration Act and determined by the arbitrator in the event that there is any dispute between the parties. For the purpose of determining entitlement to costs, the arbitrator shall take into account the conduct of the arbitration proceedings and any conduct, which

[2] Section 54 (1) (Arbitrator's emphasis).
[3] Section 54 (2).

> has led to unnecessary costs or delay. With respect to determining costs, the arbitrator may take into account any formal offer of settlement made by any party. 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.

Subsection 9 of Regulation 283/95 acknowledges the discretion of an arbitrator to award costs, but it uses mandatory language in stating that the unsuccessful party in an arbitration should be responsible for the costs unless the arbitrator orders otherwise. The parties' Arbitration Agreement stipulates that I should take into account the conduct of the arbitration proceedings and specifically any conduct which has caused unnecessary costs or delay. It also references offers to settle. No offers to settle were drawn to my attention in this case so I do not have to deal with any costs impact consequent upon such offers.

The Arbitration Agreement does reference considering how the arbitration was conducted, a matter which is found in Rule 57.01 of the Rules of Civil Procedure. There is much authority for the proposition that costs in arbitration proceedings are appropriately determined by reference to factors itemized in the aforementioned cost rule.[4]

The Ontario Court of Appeal recently gave special emphasis to factor 57.01 (0.b). This factor places the focus on what an unsuccessful party could reasonably expect to pay as the foundation for determining a fair figure for costs.[5]

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[4] See, for example, *Security National Insurance Company v. Wawnesa Mutual Insurance Company*, [2014] O.J. No. 609 ("*Security v. Wawanesa*").
[5] This is emphasized by Morgan J. in *Security v. Wawanesa.*

In referencing its own comments in *Boucher v. Public Accountants Council for the Province of Ontario*[6], in *Ontario v. Rothmans Inc.*[7] the Court of Appeal stated:

> ...hourly rates and the notion of indemnification, while clearly important are not the *only* relevant considerations...the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, *rather than an amount fixed by the actual costs incurred by the successful litigant* (emphasis added by the Court).

With these statutory and common law principles in mind, I will now address the positions of the parties.

Wawanesa submits that as the successful party in the arbitration it is entitled to costs from AXA. Wawanesa argues that although it was held by me that neither insurer properly discharged its obligation to adjust the claimant's SABS claim in accordance with Regulation 283/95, Wawanesa was nevertheless proactive in attempting to resolve the priority issue which efforts inured, at least in part, to the benefit of the claimant.

In support of its proactive approach argument Wawanesa emphasizes the following: It was Wawanesa which initiated the arbitration. This required the issuance of an Application when a timely response to an arbitration demand was not provided by AXA. It was Wawanesa which initiated the motion seeking as timely a determination of priority on an interim basis as could be obtained from the arbitrator. Although this was done primarily in the interest of avoiding sanction from FSCO in the event of proceedings being taken there by the claimant with neither insurer having responded to

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[6] (2004), 71 O.R. (3d) 291 (C.A.) ("*Boucher v. Public Accountants*").
[7] [2013] O.J. no. 2367 (C.A.) ("*Ontario v. Rothmans*").

his claim, it had the effect of requiring one of the insurers to deal with the claimant's SABS claim which was something that had not been happening to that point. It was Wawanesa who encouraged an end to the proceedings following the issuance of my decision on the motion given that I indicated in the decision that I felt a determination of the matter on an interim basis involved a consideration of essentially the same facts and law as would have to be considered for the purposes of a final Arbitration Award.

On the other hand, Wawanesa submits, AXA deflected to Wawanesa the claimant's SABS application when it was received by AXA. AXA delayed in consenting to arbitration to have the priority issue determined. AXA appealed the decision from the motion then abandoned the appeal at a much later date. AXA indicated an intention to involve Mercury in further arbitration proceedings after the decision on the motion, and then abandoned that course of action as well. AXA then unnecessarily pursued the arbitration through an arbitration hearing making substantially the same arguments it made unsuccessfully on the hearing of the motion.

Wawanesa emphasizes Rule 57.01 (0.a) – the principle of indemnity, and Rule 57.01 (e) – conduct of a party that tended to lengthen unnecessarily the duration of the proceeding, in seeking an order for the payment of partial indemnity costs up to May 31, 2011, the date of my decision on the interim motion, and substantial indemnity costs after that through the conclusion of the arbitration.

AXA's responding submissions were brief, but to the point. AXA submits that in light of my finding that neither insurer complied with Regulation 283/95 in its handling of

the claimant's SABS claim, the proper disposition is that neither insurer should be entitled to any costs in connection with the arbitration proceedings.

I must say, AXA's position aptly summarizes the inclination I expressed in my decision on the motion for interim relief. In my opinion, it is a significant factor to consider when deciding entitlement to, and quantum of costs that neither of the insurers complied with their liability under section 268 of the Insurance Act to pay SABS to the claimant despite both having been properly presented with a valid SABS claim, until the issue was dealt with by me on a motion.

The fact that it was Wawanesa which initiated the proceedings, and the motion, in my view does little to excuse the fact that apart from deflecting the claim, Wawanesa did essentially the same thing AXA did when presented with a proper SABS claim by its named insured under a policy issued to that named insured. Rather than dealing with its named insured's claim, and commencing benefits, it paid no benefits and instead took up the fight with AXA arguing that AXA should have paid.

If AXA's handling of the matter had delayed the proper payment of benefits to the claimant, Wawanesa's actions simply compounded the delay.

This is exactly the behaviour Wawanesa impugns in its costs argument in seeking to justify a demand for not just partial indemnity costs, but solicitor client costs against AXA.

Part of the decision on costs is, in my opinion, straightforward. Wawanesa was equally non-compliant with Regulation 283/95 as AXA. It left its named insured who had properly presented to it a SABS claim, without benefits, while carrying on a dispute with

AXA. In my view it would be inappropriate to award costs in favour of Wawanesa on a substantial indemnity scale for any part of the arbitration process.

The more difficult question is whether costs should be denied entirely as result of this behaviour, or whether some type of arbitral process would have been necessary in these circumstances in any event, and Wawanesa, as the successful party, should be entitled to some costs.

It should not go unmentioned in the analysis that Wawanesa is actually fortunate that AXA did not properly follow the 283/95 pay and dispute procedure. Had AXA simply started adjusting the claimant's SABS claim, and served a timely priority dispute notice on Wawanesa, Wawanesa would have been obliged to accept the claim as the higher priority section 268 insurer. The fact that AXA did not do this is a windfall to Wawanesa.[8]

After much deliberation, I have concluded that Wawanesa is entitled to some costs from AXA on a partial indemnity scale for proceedings that would have been necessary had Wawanesa complied with Regulation 283/95.

Had Wawanesa complied with Regulation 283/95 by accepting the claimant's SABS claim, and then commencing section 3 priority dispute proceedings against AXA, it probably would have been necessary to arbitrate at least some of the same issues that were arbitrated in this proceeding in any event. The record gives no indication that if Wawanesa had begun adjusting the claimant's SABS claim, then issued a 283/95 priority dispute notice against AXA instead of commencing arbitration and bringing an

[8] See subsection 268 (2) 1. i, and iii.

interim motion for a priority determination that AXA would have responded differently, or accepted priority.

In fact, based on what occurred in this case it seems to me that if Wawanesa had started adjusting its named insured's SABS claim, this would have made it even less likely that AXA would have accepted priority for the claim without being ordered to do by an arbitrator.

Had it properly followed the Regulation Wawanesa would have argued, just as it did in these proceedings, that since AXA received the claimant's SABS application before Wawanesa, AXA should have adjusted the claim, and served a priority dispute notice on Wawanesa within 90 days of having received the claimant's SABS application. By failing to do so, absent relief under subsection 3 (2), Wawanesa would have argued, as it did here, that AXA had forfeited its right to have the obligation to pay the claimant's SABS claim transferred to Wawanesa.

Another of the issues raised in these proceedings that proper pay and dispute proceedings would have raised is the status of Mercury, and whether it was the "first insurer" to receive the claimant's SABS application. The issues of whether Mercury was an "insurer" under the Ontario legislation, and whether AXA was a subsequent insurer not bound by the 90 time limit to issue a priority dispute notice would undoubtedly have been argued just as they were in these proceedings.

The point of the foregoing is that in my view, had Wawanesa followed the proper procedure when it received the claimant's SABS application, it is very likely that an arbitration proceeding would have been necessary to resolve the priority issue in any

event. Therefore, Wawanesa should not be disentitled to some costs in relation to one proceeding in which it was successful since its error in not "paying and disputing" did not create the need for an unnecessary arbitration.

I do not think however, that had the proper procedure been followed there would have been a need for a motion for an interim priority determination. The only reason this was necessary is that neither insurer was paying benefits to the claimant, and Wawanesa was concerned that should the claimant pursue proceedings at FSCO it could be sanctioned for not complying with Regulation 283/95.

If Wawanesa had adjusted its named insured's SABS claim and commenced priority dispute proceedings against AXA this concern would have been alleviated, and although a hearing on the merits may ultimately have been necessary, only one such hearing would have been necessary.

Wawanesa's answer to this is that AXA should have accepted the result on the motion for an interim priority determination, and not pressed the matter to a second hearing. In support of this argument Wawanesa cites a comment I made in my decision on the motion that the issues and law to be considered to decide interim priority on the motion were essentially the same as what I would have to consider to make a final decision on the priority issue.

I will not say that this argument is without merit. It was AXA which required the arbitration proceedings to continue to a second, full hearing which was not very much different from the motion. On the other hand however, I think both parties, and I will say me, as arbitrator, were in unfamiliar territory being involved in a section 283/95

arbitration which had been commenced without a priority dispute notice,[9] and an immediate motion for interim relief on priority – the very issue to be determined in the arbitration.

Considering this, I am not prepared to be overly critical of AXA for pursuing the matter to a final hearing. In my decision on the motion I clearly left it open to the parties to introduce further evidence and submissions on the issues. Although I was contemplating that such evidence and submissions might be focused on Regulation 283/95 subsection 3 (2), and (3) issues, I did not foreclose the introduction of further evidence and submissions on the other issues which had been directly addressed on the motion for the very reason that the decision was an interim decision, not a final decision.

As I have noted, during the intervening period between my decision on the motion and the final arbitration hearing, even though AXA appealed, and later abandoned the appeal of the motion decision, AXA nevertheless commenced adjusting the claimant's SABS claim. The claimant was in no way prejudiced by AXA continuing these proceedings to a final determination, as his claim had been long settled by AXA by the time the final arbitration hearing was conducted.

In its costs submissions Wawanesa makes a great deal of the time which passed between the delivery of my decision on the motion, and the point at which the final arbitration hearing was conducted. Wawanesa is critical of AXA for its conduct during this time for changing its mind about appealing my motion decision, changing its mind

[9] The effect of which on the validity of the arbitration was not argued on the motion, but was argued on the arbitration hearing and dealt with by me in my Arbitration Award.

about attempting to involve Mercury in the proceedings, and failing to respond in a timely way to requests for production of documents concerning AXA's payments made in respect of the claimant's SABS claim.

This concern might be valid, particularly on the issue of interest, if Wawanesa had been paying its own named insured SABS during this time solely because of Regulation 283/95 requirements, and it was anxious to have the obligation to pay transferred to AXA through the arbitration process. This however, was not the case. Wawanesa never paid anything to its own named insured. It did not pay as it should have done when presented with a valid SABS claim, nor, fortuitously because of AXA's own mishandling of the matter, did Wawanesa have to pay following the result of the motion.

I will note as well that from my review of the dockets provided in the Amounts Claimed for Fees and Disbursements submitted by Wawanesa that subsequent to my decision on the motion Wawanesa spent considerable time itself investigating Mercury's status and seeking to involve Mercury in the arbitration proceedings.

Therefore, I do not find it relevant to embark upon an analysis of AXA's conduct between the time of my decision on the motion, and the final arbitration hearing insofar as the issue of costs is concerned. I do not see the passage of time between my decision on the interim motion and the final arbitration hearing as giving rise to any prejudice to Wawanesa, nor do I see it as a factor which should have any impact on the costs which Wawanesa may be found entitled to recover from AXA.

Turning now to an analysis of the monetary amounts presented in Wawanesa's claim for costs, the form of the presentation sets out the docket entries for counsel, law students, and law clerks in the firm retained by Wawanesa to represent it in these proceedings. Lead counsel in the matter was Kevin Mitchell. Mr. Mitchell is a very experienced insurance litigator in the area of priority disputes and loss transfer. He is a competent, thorough counsel who has conducted several arbitrations before me, always with vigour and integrity.

According to the docket entries, the total time spent by Mr. Mitchell as presented in the Amounts Claimed for Fees and Disbursements is approximately $22,398. I have no doubt that the record of this time submitted to me is accurate and is a fair representation of Mitchell's efforts in connection with the matter. I have reviewed the docket entries for the two associates, three law students, and four law clerks who were also engaged in this matter. Although I do not have the same familiarity with them as I do with Mr. Mitchell, the fact that they work under his direction is in itself sufficient for me to place reliance on the accuracy of their reporting in terms of their time spent in this matter.

The total fees based on the time spent as presented come to $32,580.00, plus HST of $4,235.40.

Having said this however, as I have indicated in these reasons I am not prepared to award costs to Wawanesa against AXA for all time spent which has been attributed to this matter, and I am certainly not going to award it on a substantial indemnity basis for the reasons previously outlined.

In arriving at what I believe to be a fair and reasonable award of costs I will reduce the total dockets presented on three grounds: first, I adjust them to reflect that what has been presented is a solicitor – client quantum in that it includes time spent in connection with matters as between counsel and its own client, Wawanesa. Some of the docketing was also in connection with matters not directly connected with the arbitration.[10]

A second downward adjustment must, in my opinion, be made for the fact that only one hearing and decision should have been required to deal with this priority dispute. I have explained why I do not think AXA should bear the responsibility for Wawanesa's decision to bypass Regulation 283/95 pay and dispute type proceedings to go straight to arbitration, and bring a motion for an interim decision. This course of action left open the possibility (which became a certainty in this case), that there would have to be a second, full hearing and decision to finalize the matter.

Therefore, I will reduce the recoverable time to remove an amount which reflects the consequences of Wawanesa's failure to follow the pay and dispute Regulation. I have not attempted to make an exact calculation of this amount. It is a deduction in principle, and also based on a general review of the dockets for all time keepers which appear to be related to work in connection with the course of action adopted by Wawanesa.

Finally, I must consider another factor set out in Rule 57.01 of the Rules of Civil Procedure – the concept of proportionality, or as rule 57.01 (1) (a) puts it, "*the amount*

[10] For example, there were several docket entries relating to client discussions, advice, and interactions with claimant's counsel with respect to the claimant's SABS claim which, since it was being handled by AXA, did not have direct relevance to the issues in the arbitration.

claimed and the amount recovered in the proceeding;". This rule really goes hand-in-hand with rule 57.01 (1) (0.b) – the amount of costs an unsuccessful party could reasonably expect pay.

This rule has been applied by other arbitrators in costs decisions. For example, in *Security National Insurance Company v. Wawanesa Mutual Insurance Company*[11] Arbitrator Cooper relied on this principle to make a downward adjustment to partial indemnity costs where the amount of SABS involved in the priority dispute totaled $26,043.30, and the claim for costs advanced by Wawanesa was $19,028.08, or 73% of the total SABS involved in the dispute.

Arbitrator Cooper relied on the proportionality principle, and the holding of Arbitrator Bialkowski in *Wawanesa Mutual Insurance Company v. Markel Insurance Company of Canada*[12] who stated that partial indemnity costs should approximate 60% of full indemnity costs, to reduce Wawanesa's recoverable costs (after some other adjustments) to the 60% level.

I am in agreement with the approach taken by Arbitrators Cooper and Bialkowski. The costs sought in this case total $38,077.59, or approximately 63.5% of the $60,000.00 total SABS paid – not even by Wawanesa, but AXA; so I will make a similar adjustment to the costs claimed by Wawanesa in this case.

I reduce the total claim for fees from $32,580.00 by $5,000.00, to reflect the first factor discussed – solicitor – client and unrelated matters.

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[11] Private Arbitrator Vance Cooper, May 21, 2013 ("*Security v. Wawanesa*").
[12] Private Arbitrator Ken Bialkowski, March 8, 2012 ("*Wawanesa v. Markel*").

I reduce the subtotal of $27,580.00 by $10,000.00, to reflect the second factor discussed – the impact of Wawanesa's failure to follow the Regulation 283/95 procedure.

I reduce the subtotal of $17,580.00, to the sum of $10,000.00, to reflect the third factor discussed – proportionality and partial versus full indemnity compensation.

I would allow Wawanesa to recover against AXA the sum of $10,000.00 for fees, plus HST in the amount of $1,300.00, for a **total fees and HST amount of $11,300.00**.

Wawanesa has advanced a claim for disbursements for items set out on page 13 of the Costs Brief of the Applicant. The total, exclusive of HST, is $1,137.80. In my opinion, some of these items claimed are not assessable under the tariff, and some only partly allowable. Without being mathematically precise, I would reduce the **disbursements** claimed on page 13 to $1,000.00, plus HST in the amount of $130.00, for a **total of $1,130.00.**

Wawanesa has also submitted that it should be fully indemnified by AXA for all of the share of the arbitrator's fees and disbursements it has paid, plus a further amount of $1,500.00 for preparing and submitting costs submissions.

Including the account submitted with these reasons to the parties, I have rendered four accounts for fees and disbursements in this matter. The first account dated May 31, 2011 totaled $6,474.75. It was substantially comprised of work done by me in connection with the motion for an interim determination of priority. I rendered a second account on September 4, 2013 in the amount of $6,373.20. The substance of this account involved work in connection with the final arbitration hearing conducted

August 28, 2013. My third account totaled $12,712.50, and was in reference to work done by me in completing my 36 page Award. The last account I have rendered in this matter is in connection with the preparation of these reasons for my costs award. Although it took me many more hours to complete them than my account reflects ($1,350.00 plus HST of $175.50, total $1,525.50), I reduced that account significantly because it has taken me much longer than I would have liked to provide these reasons to counsel.

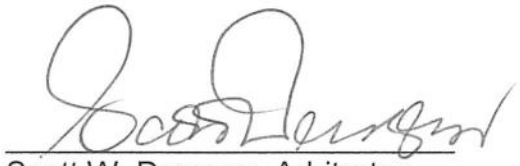
So far the parties have borne equally the total of my accounts. In respect of the first three accounts they have each paid a total of $12,780.22. For the same reasons that I was initially inclined to award no costs of the motion for an interim priority determination – neither insurer complied with the pay and dispute SABS Regulation 283/95, I am of the view that this would be an appropriate case for each insurer to bear its own costs in so far as the arbitrator's fees and disbursements are concerned. I would not make any adjustment in how the parties have satisfied my accounts to date, and I would further state that the parties should satisfy my fourth and final account in equal shares of $762.75 each.

Conclusion

I award costs of these proceedings to Wawanesa, payable by AXA, in the total amount of **$12,430.00**. This amount includes fees, disbursements, and HST on fees and disbursements.

If there further matters which require my involvement as arbitrator I invite counsel to contact my Coordinator, to schedule a telephone conference to discuss same.

Dated at Toronto, May 24, 2016



Scott W. Densem, Arbitrator